

# Justifying Intellectual Property Protection: Why the Interests of Content-Creators Usually Wins Over Everyone Else's

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## ABSTRACT

I attempt to show that the law should, as a matter of political morality, provide limited protection of intellectual property interests. To this end, I argue that the issue of whether the law ought to coercively restrict liberty depends on an assessment of all the relevant competing interests. Further, I argue that the interests of content-creators in controlling the disposition of the content they create outweighs the interests of other persons in using that content in most, but not all, cases. I conclude that, in these cases, morality protects the interests of content-creators, but not the interests of other persons and hence would justify limited legal protection of the former interests.

## INTRODUCTION

Whether or not intellectual property rights ought, as a matter of political morality, to be protected by the law surely depends on what kinds of interests the various parties have in intellectual content. Although theorists disagree on the limits of morally legitimate lawmaking authority, this much seems obvious: the coercive power of the law should be employed only to protect interests that rise to a certain level of moral importance; indeed, it would be wrong for the law to coercively restrict behaviors in which no one has any morally significant interests (i.e., interests that are important enough from the standpoint of morality that they receive some protection from moral principles) whatsoever.

In this essay, I argue that the interests that content-creators have in the content they create (or discover) outweigh the interests of other persons in all cases not involving content that is necessary for human beings to survive, thrive or flourish in certain important ways. While this might not imply the existence of moral rights to intellectual property, it surely provides a strong reason for affording some stringent legal protection to the interests of content-creators in the contents of their creations. And one eminently sensible way of protecting their interests is for the law to allow them limited control over the disposition of their creations.

Nevertheless, this should not be taken to imply any sort of endorsement of copyright law as it is currently formulated in the U.S. or in any other nation. For what it is worth, I think it quite reasonable

to believe that various elements of these laws are morally problematic and hence should be rethought and reformulated. For example, though I cannot argue the point here, I think it fair to say that the existing length of copyright protection in the U.S. lacks an adequate justifying rationale. My point in this essay is not to offer a sympathetic analysis of any body of existing copyright law, but is rather to show that the interests of content-creators deserve some reasonably stringent legal protection. How much protection, however, is not something I will address here.

## LEARNING FROM LOCKE

### **The Lockean Approach to Justifying Property Rights in Material Objects**

It is instructive to begin with a brief look at the classical Lockean argument for original acquisition of property (i.e., conversion of an object that no one owns into an object that someone owns). Locke realized that the existence of a moral right to property depends critically on the idea that persons can acquire a property right in objects to which no one else has a prior moral claim or entitlement (i.e., objects which are not the property of anyone else). Here it is helpful to note that the idea that one can acquire a property right in something that *is* antecedently owned by someone else is comparatively unproblematic: if I own X and am hence morally entitled to dispose of it as I see fit, then it seems clear that I may transfer my property right in X to you by giving X to you, selling X to you, or otherwise abandoning my claim in X. Although it might not be entirely clear exactly why it is that I can do this, there are no obvious problems, from the standpoint of ordinary intuition, with the idea that one person can transfer a property right to another person.

Original acquisition of property, however, is another story because our appropriating something that does not belong to us bears some resemblance to theft. While theft is, strictly speaking, the intentional appropriation of *someone else's* property without permission or legitimate authorization, the idea that one can take some object out of the commons – an object that does not belong to anyone – and make it one's own without the consent of any other person requires some justification. If, as Locke expressed the concern, God gave the world to all humanity in common, there is a puzzle about how it is that any one person can acquire an exclusive property right in some worldly object.

Locke's solution is, of course, justifiably famous and remains the foundation for much classically liberal theorizing about property rights. According to Locke:

Though the earth and all inferior creatures be common to all men, yet every man has a property in 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 it in, he hath mixed his labor with, and joined to it something that is his own and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labor something annexed to it that excludes the common right of other men (Locke 1690, Chapter V).

There are at least two different constructions of this argument grounded in Locke's claim that we have a moral property right in our bodies and hence in our labor. On one interpretation, we acquire a property right in antecedently unowned objects in which we labor because we literally *mix* our labor and hence our property into those objects; since our property is inextricably mixed into such objects, we attain a moral right to them that is parasitic on our moral right to our labor. On the other interpretation, we acquire a property right in antecedently unowned objects that we improve by our labor because our labor creates value that did not exist in the world; since we created that new value with our labor and hence with our property, it follows that we have a right to the objects we improve with our labor provided that no one else has an antecedent claim to them.

Either way, the problems with the Lockean argument are as well known as the argument itself. First, it is simply not clear that it makes sense to think of our relationships to our bodies as a property relation.

While we naturally use the term “my” to refer to our bodies, we do not intend this pronoun in the same way that we use it in talking about other objects. I am not my house, but I am, in part, my body. To characterize the relationship between me and my body as one of ownership seems misleading at best and confused at worst.<sup>1</sup>

Second, and more importantly, it simply doesn’t follow from Locke’s premises that we have a property right in those unowned objects we improve with our labor. It might very well be that we forfeit the expenditure of our labor or the value we create when we labor on some object that does not belong to us. If I swim out to the middle of the Atlantic Ocean and somehow fence off a portion and improve it by cleaning it of all pollution, most people will agree that I do not thereby acquire a property right in that portion of the ocean. The claim that I own my labor, even if true, does not imply that I own whatever material entities I mix it with or use it to improve.<sup>2</sup>

Not surprisingly, the consensus among property theorists is that the argument as Locke specifically formulates it is unsuccessful in justifying property rights – though many theorists, including myself, believe that Locke is on the right track and continue to tinker with the Lockean argument to produce a viable justification for property rights.

## Applying the Lockean Approach to Intellectual Objects

It is important to note that both interpretations of Locke’s argument for original acquisition of material property depend critically on the assumption that we causally interact with pre-existing material objects. To “mix” one’s labor with some pre-existing object is, at the very least, to causally interact with that object. I can put my labor into a piece of wood only because I can causally interact with the wood in the following sense: my labor changes the form taken by the piece of wood. Likewise, we can improve some material object only by changing it in a way that is more easily appropriated for the satisfaction of human wants or needs. It should be clear that we can *change* a material object only by causally interacting with it.

Even if Locke’s argument were successful in justifying original acquisition of material property, it doesn’t have any direct or obvious application to intellectual property because this assumption does not apply to intellectual content. If it makes sense to think of intellectual content as constituting objects that exist independently of us, they are *abstract* objects with radically different properties than material or mental objects (i.e., ideas, thought, perceptions, etc.). In contrast to material objects, abstract objects, if such there be, lack extension, solidity, and spatio-temporal location; it should be clear, for example, that the object denoted by the symbol “2” is an entity of a very special kind: it is intangible and neither here nor there. In contrast to mental objects, abstract objects exist without being present to anyone’s consciousness; it seems reasonable to think that the number denoted by “2” and the proposition expressed by “ $2 + 2 = 4$ ” exist in a world where there are no minds to think about those objects.

Of course, there are some difficult issues regarding the nature of certain artistic content.<sup>3</sup> It seems clear, for example, that a sculptor mixes his labor (and hence causally interacts) with pre-existing

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I am indebted to a number of people for their very helpful comments on an earlier draft of this paper: Herman Tavani, Richard Spinello, Steve Layman, Philip Goggans, and Patrick McDonald. Their comments significantly improved this paper.

<sup>1</sup> Indeed, Locke’s position is in tension with the Christian doctrine he frequently seems to presuppose. On one common view, we are holding our bodies in trust for God, who is the sole owner of those bodies. I find it somewhat odd to think of human beings as being divine *property*, but this seems a plausible view to many Christians.

<sup>2</sup> As Robert Nozick puts the point: “But why isn’t mixing what I own with what I don’t own a way of losing what I own rather than a way of gaining what I don’t? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?” (Nozick 1974, 174-5).

<sup>3</sup> I am indebted to Steve Layman for pointing this out to me.

materials when she creates a sculpture; sculptures are, after all, physical objects. Here it is helpful to note that the sculptor has potentially two interests here. One is in the physical object that is the sculpture but this is not the relevant interest from the standpoint of intellectual property debates; there is no issue, after all, about whether the sculptor can exclude people from appropriating the physical object that is that particular sculpture. The relevant interest is the sculptor's interest in the "content" of that sculpture; her interest is in protecting the content of that sculpture so that it cannot be reproduced in some other material object.<sup>4</sup> Although the ontological nature of this content is not entirely clear, I am inclined to think that it is an abstract object – perhaps something like the "form" (though not necessarily Platonic form) that the sculpture has.

However, if the ontological character of sculptural content is not entirely clear, it should be clear that much intellectual content has the form of an abstract object. A set of propositions, such as is expressed by a novel, constitutes an abstract object that contains as its members abstract objects since both sets and propositions are abstract objects if anything is an abstract object. Likewise, a string of linguistic symbols (as opposed to their representations on a page) is an abstract object containing abstract objects as members if, again, anything is an abstract object. Accordingly, novels, plays, and other forms of intellectual content that are linguistic in character are abstract objects.

What this means, it seems, is that we cannot causally interact with such objects – assuming they exist in a genuine way and are not merely theoretical posits. I can think about the abstract object denoted by "2" but I cannot causally interact with that object in any way. I can express some idea about "2" by means of the appropriate linguistic representation and communicate that idea to you, but I do not seem to have any direct causal access to that object; I cannot perceive "2" by any of the five senses; nor is it plausible to think that I have a sixth sense made for "perceiving" abstract objects. An abstract object might be important enough to warrant the expenditure of a great deal of human energy, but that energy will not be appropriately spent trying to causally interact with it. Reasoning about an abstract object is the way in which we come to understand it and does not involve causal interaction with such objects.<sup>5</sup>

It is not clear what Locke thought, if anything, about intellectual property, but the foregoing analysis suggests that neither version of the classical Lockean argument can be directly deployed to justify property rights in, at the very least, intellectual objects that are linguistic in character, such as novel, poems, etc. If I cannot causally interact with abstract objects, then I can neither mix my labor with an abstract object nor use my labor to create new value by improving some existing abstract intellectual object. The Lockean argument – as he formulated it – would have to be modified in some significant way to apply to these intellectual objects. Further, if all intellectual content is abstract in character, as seems eminently reasonable to me, the Lockean argument would have to be modified to apply to any intellectual content whatsoever. As Locke formulates the argument, it has no bearing on the issues of intellectual property that currently divide us.

## **The Deeper Insight in the Lockean Arguments**

Despite these problems, however, I think that the Lockean argument points in the direction of a more promising approach to justifying legal protection of both material and intellectual property. While it is undoubtedly true that the mere fact that I expend my labor in some unowned object does not imply that I have a property right to that object, the fact that I labored on the object is of obvious moral significance in deciding whether I have any moral claim to the object. After all, it seems clear that I have a morally significant interest in my body and its activities. If this interest is not sufficient to immediately confer some sort of right in me to things on which I labor, it is a consideration that surely weighs in favor of my having a property right (or some strength) in those things. It might not entail

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<sup>4</sup> At this point, no claim is being made about the legitimacy of this interest.

<sup>5</sup> This is a standard view of abstract objects. See Rosen 2001.

such a right and might be outweighed by other considerations, but it is surely one consideration that must figure into determining whether I have such a right.

Similarly, it seems reasonable to think that the interests of other people in such objects will also figure into determining whether one has something resembling a property right in some object. One of the most plausible reasons for thinking that I cannot acquire a property right in some portion of the Atlantic Ocean by laboring on it is the importance of other persons' interests in the ocean. My acquiring a property right in some significant portion of the ocean can cause tremendous damage to the interests of others. If I also had a right to the airspace above it, for example, this could make it much harder to ship necessities from one part of the world to the other.

This is not to deny that the fact that I expended labor on that portion of the ocean is a consideration that operates in favor of my having some sort of claim to that portion of the ocean (or perhaps instead to some compensation). It seems reasonable to think that I fail to acquire a property right in that portion of the ocean, not because the fact that I labored on it counts for nothing, but rather because the interest I have in the labor I spent on that portion is greatly outweighed by the interest that other people have in that portion of the ocean.

If the two interpretations of the Lockean justification of material property rights fail to show that the expenditure of labor is sufficient to create property rights in intellectual or material objects, they are suggestive of a plausible approach for determining whether someone should be afforded a limited legal right to exclude others from appropriation of an object. To determine whether the law should allow someone to exclude others from appropriating some material or intellectual object, we must weigh all the competing interests. If my interests in X outweigh the interests of all other parties, then that fact is a pretty good reason (though not necessarily a conclusive one) to think that my interests in X are justifiably protected by the law.

Of course, I do not pretend to have some sort of algorithm for assessing the various interests.<sup>6</sup> Weighing competing interests is a messy, imprecise business that relies much more heavily on gut level reactions and feels than other ethical arguments – though it is fair to say that all ethical theorizing – applied, general, and meta-ethical – is, at the end of the day, grounded in such gut-level intuitions. The imprecise character of such reasoning surely diminishes the level of confidence we can have in any conclusions it supports.

Even so, there are easy cases. One reason that most people agree that it would be wrong for me to shoot someone in the back as he flees with my stolen property is that our interests in life are much more weighty than our interests in property; in just about every case, a thief's interest in his life is much more important than my interest in the property he steals from me.<sup>7</sup> Life, after all, is sacred and property is not. For this reason (or something like it), most people (and the criminal law in every Western nation) agree that property may not be defended with deadly force.

I think there are some fairly easy assessments in the case of intellectual objects. As I will argue below, content-creators have a stronger interest in the time and effort they expend in creating content not needed to survive or thrive than the interests that other persons have in that content. Since I lack an algorithm for assessing these interests, my argument will rely on certain gut-level intuitive reactions to certain cases. But although I do not have an argument for thinking that my reactions to these cases are

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<sup>6</sup> For a very plausible (non-algorithmic) device for balancing competing claims, see Moore (2001), Chapter 5 and 7. Moore argues for something he calls the Weak Pareto Proviso: If the acquisition of an intangible object makes no one else worse off in terms of her level of well-being (including opportunity costs) compared to how she was immediately before the acquisition, then the taking is permitted. As is readily evident, the Weak Pareto Proviso attempts to balance all the competing interests.

<sup>7</sup> In a case where the thief steals something from me that is necessary for my survival, the calculus seems different to me.

the correct ones, I think most readers will share my reactions to these cases and are hence committed to the conclusions I defend in this paper.

## ASSESSING THE INTERESTS OF CONTENT-CREATORS AND OTHER PARTIES

### **Content-Creators: The Value of Time and Labor**

This much should be clear at the outset: content-creators have a *prudential* interest (i.e., an interest from the standpoint of objective or perceived self-interest) in controlling use and dissemination of their creations. To devote time and energy to creating intellectual content, time and energy must be diverted from other activities. This means that any particular deployment of time and energy involves costs that are significant from the standpoint of prudential rationality (i.e., those standards governing rational self-regarding or self-interested behavior), including opportunity costs involved when one foregoes other opportunities to devote resources to a particular activity.

It also seems clear that we have a strong prudential interest in not wasting or squandering time and energy. Even if I do not feel like working, my time could be spent doing something that has value to me. Though we tend (incorrectly, on my view) to think of play and rest as counterproductive, I think it is clear that sometimes time invested in rest and recreation is well spent. As paradoxical as this may sound, I would rather not waste time that can be spent watching or playing basketball when I have that time available for those purposes.

It is important not to underestimate the significance of this prudential interest. My time and energy matter a great deal to me because I know that I have a limited supply of both. Like everyone else, I am a finite being with an all-too-limited life span. Every moment I devote to a particular task spends one of a limited supply of moments I have in life to do all the things that make life worth living. Squandering these moments is nothing less important than squandering precious bits of my life.

The importance of this prudential interest seems to grow with time; the older I get, the more precious my time and energy seem to me. There are three reasons for this – one biological and the others psychological. First, and most obviously, our supply of time and energy is diminished over time as we get nearer to the end of our lives. Second, we tend to become more sensitive to the fact of our own mortality as we grow older. It is well known that older people have a far more acute sense of their own mortality than younger people and that this sense becomes more acute over time. Third, a person's experience of time tends to change as she grows older: the passage of a year is experienced as much quicker by an older person than by a younger person.

As a general matter, these elements lead people to assign more value to expenditures of time and energy as they grow older because all draw attention to the unhappy fact that one's supply of moments is limited; sooner or later, we all die. It seems clear, then, that, as a purely *descriptive* empirical matter, people generally regard their time and their energy as prudentially valuable.

It is true, of course, that the mere fact that people generally have a prudential interest in something tells us little about whether they have a morally protected interest in it. By itself, the claim that X wants something does not imply that X has a morally protected interest in it. People commonly want things, like prestige and power over others, to which morality affords no significant protection.

But the point here is not just the descriptive point that people generally value their time and energy: it should also be clear that, as a normative matter of practical rationality, people *should* regard their time and energy as prudentially valuable. Someone who cares nothing about how she spends her time and energy is fairly characterized as doing a disservice to herself - if not to the community in general.

Indeed, I would be tempted to regard such an attitude as signaling some fairly serious psychological disease. Other things being equal, it is reasonable to hypothesize that someone who cares nothing about how her time and energy are spent is severely depressed, and possibly suicidal. It is clearly

irrational from the standpoint of prudential interest to care so little about what is, in essence, the central resource for pursuing the goods that make life worth living. Someone who does not value her time and energy at all is, it is reasonable to hypothesize, probably in need of medical or psychological treatment. From the standpoint of prudential rationality, we *should* care about how our time and energy is spent.

Of course, morality and prudence sometimes depart. It might be that not everything that is reasonably in my interest is of moral value or receives moral protection. Perhaps it is rational from the narrow standpoint of self-interest to prefer having power over other people to not having power over other people. I am not entirely sure about even this, but it seems clear to me that such an interest has no value from the standpoint of morality and hence does not receive any moral protection – at least none specific to this particular interest.

But the idea that morality assigns no value to what is absolutely necessary to pursue any of the things that human beings ought, as a moral matter to have, seems paradoxical. We cannot pursue anything of moral value without having time and energy. If we have any interests at all that receive significant moral protection (as is true if we have any moral standing at all and especially true if we have the special status of “moral personhood”) because they are morally valuable, then the limited supply of time and energy available to each of us must be valuable from the standpoint of morality because these are the resources that must be spent to pursue any other interests at all. Having time and energy is a precondition for achieving any other interests – and this makes our time and energy very important.

At the very least, this means that, as a moral matter, we should care enough about the expenditure of our time and energy not to waste them. I think it also means that we should care enough about the time and energy of other people not to waste them. A person’s time and energy are precious not only from a purely prudential point of view, but also from a morally normative point of view. We should care about our and other people’s time and energy because they are so central to ensuring that human beings flourish in all the ways that human beings should flourish. This distinguishes our interests in such matters from interests that are more trivial from a moral point of view – such as our interests in even more affluent standards of living that allow us, say, to buy bigger and more expensive cars.

A stronger argument is available with respect to the moral significance of our interests in our expenditures of time (as opposed to energy or labor). It is reasonable to think that we do, and should value, *our* time (as opposed to time itself) as an end-in-itself – and not merely as a means. While it might be true that energy is only instrumentally valuable (i.e., valuable as a means) because it enables us to achieve other ends by doing things, time is both instrumentally and intrinsically valuable.<sup>8</sup> Our time is, of course, of considerable instrumental value because having some time is a necessary condition to being able to achieve *any* end; we can be and do nothing if we do not have an available supply of time. But if continued sentient life is, as seems reasonable, of considerable intrinsic value (i.e., valuable as an end-in-itself), then it follows that having a supply of time is also of considerable intrinsic value to a sentient being: someone who has no available time is no longer alive and hence no longer sentient. To have time to do X (for beings like us) is to be conscious for that period and have the ability to devote some of that consciousness towards performing X.

Again, there are two points here – one descriptive and one normative. The descriptive point is that people generally regard the moments of their lives as ends-in-themselves and hence as valuable for their own sakes. The normative point is that we *ought to* regard the moments of our lives as ends-in-themselves and hence as valuable for their own sakes. If practical rationality requires that we regard our continuing lives as intrinsically valuable, then it would seem to require that we regard the moments of our lives as intrinsically valuable – since, again, a continuing sentient life consists of the moments that a being remains sentient.

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<sup>8</sup> For a discussion of the significance of the distinction between intrinsic and instrumental value in ethical theorizing, see Himma 2004a, b, and c.

Moreover, it seems clear from the standpoint of ordinary moral intuitions that people should also regard *other people's* time as intrinsically valuable as ends-in-themselves – precisely because every other person's time is, and should be, so intrinsically valuable to her. If, as seems reasonable, we should value the *lives* of others as intrinsically valuable, then it seems to follow that we should value the moments that constitute those lives as intrinsically valuable.

This suggests that our prudential interests in time are afforded significant protection by morality. While the claim that some resource *r* is, or ought to be, regarded as *instrumentally* valuable does not imply that morality protects persons' interest in *r*,<sup>9</sup> the claim that *r* is – and *ought to be* – regarded as *intrinsically valuable* does seem to imply that morality protects the interest in *r*. As a matter of substantive moral theory, what is, and ought to be, regarded as intrinsically valuable to beings like us with the special moral status of personhood is deserving of moral respect because these values constitute our ultimate ends; and it is very difficult to make sense of the idea that we deserve respect *qua* persons if what we ought to regard as our ultimate ends do not deserve respect from others.

One plausible way of respecting this intrinsically valuable resource is to respect the interest of content-creators in controlling the use and dissemination of what they have expended their time to create. To respect another person's time requires refraining from doing something that would ultimately convert a worthwhile expenditure of time into a waste of a valuable resource. And it should be clear that legal protection of the interest in controlling the use and dissemination of one's creation is a value-preserving form of respect. Paying you, for example, a negotiated price for limited use of your creation, and respecting those limits, clearly preserves the value of your expenditure of time.<sup>10</sup> Allowing a content-creator limited legal authority to exclude others from using or disseminating the content she creates might not be the only way to respect this interest, but it is clearly one way to do so.

These meta-ethical considerations regarding the sense in which moral protection is grounded in attributions of intrinsic value suggest, then, that we have a morally protected interest in the time and energy we spend on creating intellectual content. While our interest in the energy spent might be only instrumentally valuable, it is sufficiently central to our flourishing that it is reasonable to think it receives some protection from morality. Moreover, our interest in the time we spend is intrinsically valuable and hence deserving of respect. And one way of protecting these interests is to allow an author some control over the content she makes available to the world – though, of course, this might not be the only way.

## **Content-Creation and Considerations of Justice**

Normative principles of justice also suggest that the interest in controlling the disposition of one's creations is afforded some moral protection. In this connection, it is crucial to realize that intellectual objects are not naturally occurring in a form that can readily be appropriated by any person. While it might be true that all possible intellectual objects exist in logical space (whatever that is), not every intellectual object is immediately available for appropriation. Intellectual objects are made available through the creative work of content-creators who discover or invent that content and thereby render it in a form that can be consumed by others. If, for example, Charles Dickens does not write *A Tale of Two Cities*, it will never be available for consumption.

This has an important implication for one very common criticism of intellectual property rights. It is commonly argued that legal protection of intellectual property rights is illegitimate because such protection has the effect of “depleting the information commons.”<sup>11</sup> The idea is that intellectual

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<sup>9</sup> This is not to deny that morality protects much that we value instrumentally; it is only to assert that the fact that we value something instrumentally is not sufficient to imply that morality protects it.

<sup>10</sup> One could argue, of course, that authors who do not wish to give away their creations should refrain from expending time in creating content, but one needs an argument in support of this counterintuitive claim that goes beyond pointing out that other people want those creations. As I will argue below, the mere fact that someone wants something does not entail that she has a morally protected interest in it.

<sup>11</sup> For an outstanding discussion of this view, see Tavani 2004. See Himma 2005 for a criticism of this view.

property laws, then, deprive people of something to which all have legitimate claims – namely, the objects in the information commons.

But there is no intellectual commons that is stocked independently of the efforts of people who create (or discover) content. Unlike the material world, there is no stock of ready-made objects with which people mix their labor to produce something valuable. Whereas a house is constructed out of naturally occurring materials (or materials that ultimately owe their existence to naturally occurring materials) with which we can causally interact, content must be, so to speak, conjured up by someone out of nothing. While all possible content might, as noted above, exist in logical space as abstract objects, human beings do not produce content by causally interacting with abstract objects; as far as I can tell, it is metaphysically impossible for us to causally interact with abstract objects – though we can surely think about them just as we think about material objects.

This is important for the following reason. If there were an intellectual commons consisting of intellectual objects to which human being have such causal access that producing content is akin to picking an apple, then that fact would be a pretty good reason (though one that is far short of being conclusive) for thinking that intellectual property protection is illegitimate. But that is simply not the case: *A Tale of Two Cities*, a poem, a song, or a proof of Fermat's Last Theorem cannot be picked from some commons the way an apple is picked from a material commons. For all practical purposes, people invent such content, and no one has access to a particular piece of content unless someone, perhaps the user, invents it; if Dickens does not write *A Tale of Two Cities*, it will never be written. The argument that intellectual property protection is problematic because it depletes the information commons rests on a fundamental misconception about our access to content.

The fact that intellectual content is not available unless invented by someone is important for another reason: it implies that the efforts of content-creators introduce *value* into the world when they make available previously inaccessible intellectual content. When Dickens completes *A Tale of Two Cities* and makes it available to others, he has thereby produced something of value and introduced new value into the world. Content-creators create value that did not exist in the world by investing their own valuable resources (time, energy, and labor) into producing that value.

Ordinary considerations of justice suggest that what people deserve is determined by the value and disvalue they introduce into the world by their free acts and that people should, other things being equal, get what they deserve and hence have some sort of morally protected interest in what they deserve. Such a view underlies, most conspicuously, most theories of punishment,<sup>12</sup> but it also underlies positive views about how to distribute the material benefits and burdens of a society – which, of course, entail views about the extent to which property rights are legitimate.

This shouldn't be taken to mean that the claim that someone created new value logically implies that they have a moral right to that value that deserves legal protection; as we saw above in discussing the original Lockean arguments, the claim that someone created new value doesn't have such strong implications. And, by itself, this shouldn't be taken to say much of anything about exactly how far those interests range. The analysis above, for example, wouldn't imply that Dickens has a legitimate interest in excluding people from using variations on the title *A Tale of Two Cities*; in particular, it wouldn't imply that Dickens has a legitimate interest in stopping people from using the title *A Tale of Seven Cities*.

But it is to assert that, according to ordinary intuitions about justice, people have some sort of morally legitimate interest, other things being equal, in the value they bring into the world via their intellectual efforts. It might not rise to the level of a right, and it might be defeasible by other considerations; however, our ordinary intuitions seem to imply that they have an interest in the value they bring into the world that receives theoretically significant protection from morality.

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<sup>12</sup> Indeed, even utilitarian theories frequently attempt to justify a principle that punishment is justified only insofar as deserved. What distinguishes pure retributivist views from such views is that the retributivist thinks that considerations of desert are both necessary and sufficient to justify punishment while the utilitarian believes that such considerations are necessary but not sufficient. In addition, it must be the case that punishment maximally promotes community utility.

## Interests of Other Parties in Intellectual Content

The reason there is such a contentious dispute over intellectual property rights is that content-creators are not the only persons with a morally significant interest in intellectual content. Other persons have significant interests in intellectual content that has been created or discovered by others. Because people generally assign significant value to different types of intellectual content, it is quite natural that they might resist theories attempting to justify intellectual property rights that make it more difficult for them to obtain and use such content.

As before, many of these valuations are at least partly prudential in character. I value intellectual content for both instrumental and intrinsic reasons, but all these reasons are largely prudential. This is particularly clear in the case of content I value instrumentally (again, as a means to some other end). I might value the content provided by an education because it enables me to earn a better living and achieve a better quality of material living than I could otherwise achieve. I might value a piece of music because it gives me great pleasure when I listen to it. I might value a film because it entertains me for a couple of hours and fills up the time.

This also seems to be true of some intellectual content we value intrinsically. I value information about the existence and nature of God for its own sake (as well, of course, as for instrumental reasons) but the interests that I am looking to satisfy by my pursuit of such information *as an end* are largely my own. I might want value knowledge as an end-in-itself and hence pursue intellectual content for its value, but my pursuits are still being motivated by my interests and priorities, which presumably reflect some sort of view about my well-being. The value is an end-in-itself, but the motivation for pursuing it is at least partly because I have an interest in it and that content fulfills the interest *and me*.

If the above sounds a little odd, it might help to note that the claim that my interest in some content is prudential does not imply that my interest is selfish or self-centered. The notions of selfishness and self-centeredness seem to connote the violation of some moral obligation to consider the interests of others. I do not mean to suggest either of those things by characterizing these interests as “prudential.” I merely mean to suggest that these interests are motivated by desires that are explicitly self-regarding: I want this content because I find it valuable and hence have an interest in obtaining this content.

The strength of the prudential interest varies from one piece of content to the next. It is reasonable to think that there is some intellectual content that one needs to survive independently (i.e., without direct assistance from others) in a particular cultural context. For example, while it is possible to survive in a society like ours without being able to read or add, one will require considerable assistance from other people in order to feed, clothe, and shelter oneself. In most situations in a society like that of the U.S. with an inadequate safety net, a person will not be able to take care of basic needs by herself without knowing how to read and do simple arithmetic. Obviously, a person will have the strongest prudential interest in such content.

I think it is fair to say that people have the strongest prudential interest in intellectual content having to do with the existence and nature of God. Regardless of whether one believes or does not believe that a personal God exists, it should be clear that the various issues are of tremendous prudential significance. Not surprisingly, people care a great deal about being able to access intellectual content that will help them to reach an informed opinion about whether God exists and, if so, what God requires of us.

Not all intellectual content, however, has such importance from the standpoint of self-interest. Some intellectual content is fairly characterized as needed for individuals to thrive in all the ways that human beings ought to thrive. Artistic and philosophical (of course!) content might very well be necessary for a person to lead a meaningful human life. Without such content, our lives would be very different – and probably wouldn’t be much different from that of some non-human animals. Although theorists

disagree on what sorts of goods are needed to live a genuinely human life (and hence to “thrive”), I would be surprised if anyone denied the claim that some access to certain kinds of content is needed for people to thrive in the appropriate ways.

But the vast majority of the intellectual content desired by people is essential neither to survive nor to thrive. We seek much intellectual content in order to entertain or amuse ourselves. Most of the time I spend watching films, for example, is intended to achieve nothing more noble than to make me laugh or entertain me in some other way. Most of the time I spend listening to music is intended to create a mood (perhaps one that is appropriately intense during a workout) or to produce aesthetic pleasure. The same is true of a fair bit of the time I spend reading; while much of it is intended to enlighten me, much of it is done for amusement.

Again, the claim here is not purely descriptive. It is not just that people tend to care about surviving, knowing about God, thriving, or being entertained; rather, it is that, from the standpoint of prudential rationality, people ought to care about these things (though not to the same degree). Someone who cares nothing about her own survival is, other things being equal, in probably in need of immediate inpatient psychiatric care, as is probably true of someone who does not care at all about whether or not a personal God exists who punishes wrongdoing with everlasting suffering (imagine, for example, someone who says – and means – “I really don’t care whether or not I suffer eternal torment in hell”). Likewise someone who does not care at all about her own amusement or entertainment is, at the very least, mildly depressed.

As before, these prudential interests seem to have some moral significance; but how much significance they have from the standpoint of morality depends on how strong these interests are. It is always a morally relevant fact about some piece of content that somebody wants it, but this does not tell us much about how much protection it might receive from morality. It seems reasonable to think that morality would afford much more protection to a person’s interest in information necessary to survive in a self-sufficient way than to her interest in information necessary to thrive; food, water, shelter, and the truth about God are much more important than art and philosophy. Likewise, it seems reasonable to think that morality would afford more protection to a person’s interest in information necessary to thrive than to a person’s interest in being entertained or amused – though, again, it is always a morally relevant fact that some piece of content would amuse a person.

None of this should be taken, of course, to deny that intellectual content might be protected by morality for some other reason than just that it has prudential value. For example, intellectual content that people need to compete in a society like ours might be protected by something like a principle of equal opportunity. Other things being equal, it is better from the standpoint of morality that all persons have free access to such content because a society that does not make it equally available to all will afford some persons an unfair advantage in the marketplace. Here the motivation is not to protect the interests of persons, but to ensure that the distribution of opportunities is fair to all; although we might have a prudential interest in things being fair, fairness is about something other than prudential interests. There is nothing in the analysis of this paper that should be construed as inconsistent with the fact that prudential considerations might form one part of the explanation as to why some content gets protection from morality, but need not exhaust the explanation.

## **Weighing the Competing Interests**

As is evident from the foregoing discussion, content-creators and other persons have conflicting interests that must be weighed. Content-creators must expend valuable resources in the form of their time, energy, and labor in order to bring new value into the world in the form of intellectual content to which people did not previously have access. Content-creators, as we have seen, have a morally protected interest in their time, energy, and labor, in part, because our supply of those resources is limited. Ordinary considerations of justice suggest that they have some claim to the value they bring

into the world in virtue of the expenditure of such resources. Other things being equal, this suggests that content-creators have a limited morally protected interest in controlling (at least for some reasonable period of time) the disposition and distribution of the value they bring into the world in the form of new intellectual content.

Of course, other things are not always equal. It is quite reasonable to think, as noted above, that third parties have a special interest in intellectual content needed for survival that outweighs whatever interest its author might have in the value she brings into the world – though this should not be taken to mean that the author is owed no compensation. It is also reasonable to think that we owe it to individuals and nations to ensure that they have sufficient information to compete in a global economy; this seems to be required by the principle of equal opportunity.<sup>13</sup>

The distinction between factual intellectual objects and non-factual objects is relevant here. It is not unreasonable to think that third parties have a special interest in important factual information that outweighs such interests on the part of the author. Facts, after all, are not likely to lay undiscovered forever; if one person doesn't discover some fact, someone else probably will – something that is just not true of non-factual intellectual objects like novels and songs. If Dickens doesn't write *A Tale of Two Cities*, then it will never be written; in contrast, if Andrew Wiles doesn't prove Fermat's Last Theorem, someone eventually will, though it might take many additional years.

Two considerations converge here to support the idea that people have some sort of special interest in factual content discovered or created by others. First, it is not unreasonable to think that we have some sort of special interest in knowledge of our world.<sup>14</sup> Second, it is not true that if one content-creator does not produce a particular piece of factual content, then that piece of content is not likely to be produced; factual content, again, is different from non-factual content in that respect. Accordingly, if it is true that people have some special interest in factual information, say, because we have some special interest in knowledge about our world, this would support the altogether plausible claim that, for example, it is wrong to assign property rights in genetic sequences.

Still, it is not clear that the interests of other persons always outweigh the interests of a content-creator in factual content she creates such as to preclude any legal protection of the creator's interest in controlling disposition of that information. At an intuitive level, there is a world of difference between factual information needed for survival and factual information not needed for survival, as well as between factual information that is readily discovered and factual information that requires some special talent and effort to discover. While this should not be taken to imply that factual content should ever be afforded intellectual property protection, it is to assert that the issues are different with respect to non-essential factual content and factual content not easily discovered.

It also seems reasonable to think that the interests of other persons in content needed to thrive sometimes outweigh the interests of the creator of that content, but the issues here are just not very clear because the nature of our interest is just not clear. The fact that we need access to some artistic content to thrive doesn't imply that we need access to *all* artistic content to thrive.

Indeed, the idea that we need access to *all* artistic content to thrive is simply too strong to be plausible. It seems ridiculous, for example, to assert that I need access to the latest 50 Cent tracks in order to thrive. While it might (or might not) be fun to listen to the latest offering from 50 Cent, it is simply implausible to think that any person cannot thrive without free access to it. What this means is that the interests of other persons in thriving will defeat the interests of content-creators in some, but not all, cases of artistic content.

Exactly which cases is a difficult issue that would require a much more detailed analysis than I can pretend to give here, but I would like to hazard the following observation. It seems plausible to me that what is currently in the public domain by way of artistic expression is sufficient to ensure that

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<sup>13</sup> I am indebted to Herman Tavani for this point.

<sup>14</sup> It would be incorrect, however, to think that knowledge is necessarily valuable as an end-in-itself. See Himma 2004b.

people thrive in all the ways they ought to thrive. We do not need immediately to provide free access to new artistic content to ensure that all have an adequate opportunity to thrive in the ways that artistic content enables one to thrive. If this is correct, then the interests of content-creators outweigh the interests of other persons in such content – at least in cases of content that is of comparatively recent vintage.

But with respect to content that is merely *desired*, it is not even a close call. While it is, as I noted above, always a morally relevant fact that some agent *A* wants some thing *p*, the mere fact that *A* wants *p* is not strong enough to give rise to any significant protection of that interest. Other things being equal, if *A* wants *p* and I can satisfy *A*'s desire for *p*, it would be a good thing from the standpoint of morality for me to provide *A* with *p*. But the claim that *A* wants *p*, by itself, does not imply that it would be wrong for me not to provide *A* with *p* if I can do so. Indeed, failure to provide someone with something they want is not even a wrong-making property of an act; while it would be good, other things being equal, to provide *A* with *p*, the claim that *A* wants *p* does not provide any reason whatsoever for thinking not providing *A* with *p* is even *prima facie* wrong. Our desires just cannot do that kind of heavy moral lifting.

In cases where content is merely wanted, then, it seems clear that the interests of the content-creators in limited control over the content they create outweigh the interests of other persons. On the one hand, the content-creator expends precious resources in the form of a limited supply of life and energy in order to bring value into the world. On the other hand, other persons want merely to pass the time or enjoy themselves with such content.

Of course, there might be many people who want the content and just one content-creator whose interests are at stake, but this is not enough to defeat the content-creator's interest. The content-creator interest is significant enough to receive moral protection: insofar as my behavior wastes another person's life or energy, it is morally problematic. In contrast, the fact that someone wants content is not significant enough, by itself, to warrant any moral protection: while it might be good for me to give someone something she wants, my failure to do so is not even presumptively problematic. An interest that receives moral protection, like the content-creator's, cannot be defeated by aggregating interests that do not; the difference between the two interests, from a moral point of view, is *qualitative* and not *quantitative*.

Ironically, most of the content that critics of intellectual property want for free is non-informative content that is merely desired. It is reasonable to think that the vast majority of contemporary music, film, and novels (which are not, strictly speaking, information because they do not purport to express true propositional content<sup>15</sup>) are wanted primarily for entertainment and amusement. Those people who are illegally sharing music files online are violating the law for no better reason than they want to be entertained and to experience the pleasure of listening to the newest music – as though this desire is so much more important than the time and effort of the content-creators.

Here it is worth noting that, at least with respect to artistic content, content-creators create not only a piece of content, *but also the demand for it*. There would be no demand, for example, for *A Tale of Two Cities* had Dickens never written that novel. There can be no demand for a song that has never been written.<sup>16</sup> Although it is true that people want artistic content and might want content from a particular artist, this desire has no particular focus until a content-creator sharpens it by making available a suitable piece of content. Artists satisfy wants that they bring into existence. Yet many people believe that these desires, which they would not have if not for people who create, take

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<sup>15</sup> See Himma 2005 for a detailed defense of this point. See also Floridi 2004.

<sup>16</sup> While I am not prepared to argue the point here, I am inclined to think this interest rises to the level of a right. The interest we have in the ideas, time, energy, and intellectual labor we invest in creating new content (and hence bringing new value into the world) are sufficiently important, it seems to me, to give rise, irrespective of effects on utility, to a right that binds any third parties who lack any greater interest in the products of those expenditures than a *desire* for those products. Of course, the suggestion that content-creators have a right over their products is not to say anything about the content of that right. In particular, it is not to endorse the conception of that right that is incorporated into, or expressed by, copyright law in the US.

precedence over any interests that an artist has to control the distribution of her creations. As far as content that is merely wanted is concerned, this should seem implausible to put it mildly.

## SUMMARY AND CONCLUSIONS

In this essay, I have argued that the issue of whether legal protection of intellectual property is morally legitimate depends on how strong the interests of content-creators in the content they create are relative to the interests of other parties. I have also argued that, in most cases, the interests that content-creators have in the content they create (or discover) outweigh – and hence receive greater moral protection – than the interests of other persons in at least those cases not involving content human beings *need* in order to either survive or thrive. This, of course, does not obviously imply the existence of a moral *right* to intellectual property. But, as far as I can see, it provides a justification for laws that provide some protection of the interests of content-creators in the contents of their creations.

Again, this should not be taken as a justification for copyright law in the U.S., or even for the idea that the proper protection for the interests of content-creators in the form of a legal *right*. I think existing copyright law is deeply flawed in a number of particulars, including the duration of copyright protection and the ease with which copyright can be renewed and perpetually transferred from one entity to another. I am also not sure that the most appropriate means for protecting the interest of content-creators is by affording something fairly characterized as a “right” (though I am not sure what the alternatives might be).

What I am asserting, however, is that there are strong reasons for protecting intellectual property that are not consequentialist in character. The idea is that the primary reason for protecting intellectual property is not that protecting intellectual property maximally conduces to community utility, however defined, or the common good, assuming this is true. Rather, it is that, from the standpoint of morality, the interests of the content-creator are more important than the interests of other persons in most cases and hence are the ones that receive the benefit of some fairly stringent moral protection; indeed, in many instances, the interests of other persons, though prudentially significant, are not significant enough from the standpoint of morality to receive protection.

It is worth reiterating in closing that, though related to and in some sense derived from Locke’s argument, this reasoning does not presuppose a Lockean framework for justifying property. The idea is not that such interests are morally significant because the author has mixed her labor with some sort of intellectual raw material in a way that cannot be extracted and thereby created value. Rather, the idea is that such interests are morally significant because they implicate uncontroversial principles of fairness that are widely accepted among persons in our culture. From the standpoint of fairness, I have some minimal claim to the value I bring into the world through expenditures of my time, energy, and intellectual labor – regardless of how minimal those expenditures might be.<sup>17</sup>

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<sup>17</sup> It is worth noting that such considerations provide stronger support for intellectual property rights than for material property rights in one important respect. One can always plausibly argue that one’s investment of labor in a material object is lost because it is invested in an external material object in which one has no antecedent claim; after all, if I carve a sculpture out of an unowned tree, I am putting my labor into something in which I have no antecedent claim. In contrast, one’s investment of labor in creating content does not involve working on something to which one has no antecedent claim; I do not carve a novel out of some previously existing object that is external to me.

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