On Intellectual Property, Considered According to Natural Law and the Rights of Men

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Natural Law and Natural Rights

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Introduction

On March 17, 2022, news media around the world broke the story that Amazon acquired the famous MGM film studio. Included in this purchase were the rights to countless movies and TV shows, not least of which are those to the Peter Jackson adaptations of J. R. R. Tolkien's *The Hobbit*. With Amazon already creating its own TV series set in Middle Earth using other rights once acquired, speculation on fan sites soon began to flow freely about what precisely Amazon might do with much of its new intellectual property. This very concept of intellectual property , however, is not in itself quite as clear and obvious as it may appear to modern folk who have simply gotten used to it. What precisely does it mean to "own" an idea, a story, or a character? Is the concept coherent? How does owning intellectual property differ from owning tangible goods?

These few questions only begin to scratch the surface of the issues raised by the notion of intellectual property (henceforth "IP"). For anyone especially concerned with the basic principles or the philosophy of law and rights, deeper questions also suggest themselves. Is IP in any way a matter of natural law or purely a construct of human positive law? Is owning IP a right in a moral, a natural, or simply legal sense? Are the many positive laws constructed around IP just and in accordance with reason? Again, the possible lines of inquiry may be almost without limit.

Out of these infinite possibilities, the relationship between intellectual property and property in the more tangible and obvious sense as it has been understood through the classic natural law tradition seems a particularly promising avenue of inquiry. This road we can travel in three stages. First will be to traverse a selection of natural law theorists to dissect their accounts of property rights in general and note the common, essential features. With a general account

of property rights in mind, we shall be able to compare and contrast property in the more ordinary sense with intellectual property to see wherein they differ. Finally, taking both the general account of property rights and the differences applicable to IP into account, it will be possible to proceed to a positive account of what IP rights, duties, and prohibitions may be present or absent in nature, with some brief reflections on what this may entail for existing IP law and possible alternatives.

On the Rights of Property in General

To identify the features of something like a consensus natural law account of property, a few figures stand out as especially useful to the conversation. To put them in their proper order, the first shall be Thomas Aquinas, followed by Francisco Suárez, Samuel von Pufendorf, and John Locke. Analyzing the accounts of each of these theorists will unveil an account of property as primarily a practical division (whether necessitated by sin or finite practicality) of legal rights over the administration of the natural right of common use, a way for each man to stake out a specific share of what he needs for a good and healthy life and what he is personally responsible for using or sharing. The end is the flourishing of every man according to the needs and wants of human nature, and the means is a positive law settlement of ownership of particular to particular parties, for the sake of the common good of all parties.

Thomas Aquinas

Thomas addresses the question of property principally in the *Summa Theologiae*, under the questions on theft and robbery. In the first article he considers whether possessions external things is natural to man, and he answers in the affirmative specifically in terms of a right of use: "[M]an has natural dominion over exterior things, since by his reason and will he can make use

of exterior things for his own advantage as things made for his sake."[1] Such dominion God has granted man by making him the most perfect of all earthly creatures, and the lower are made so that the higher have a right to use them.[2]

However, it might only follow from this that all men have a common right of use, and no one can claim some particular piece as his own apart from the actual act of using it. To this Thomas responds with the argument that the actual care and management of goods is a task most fitting and convenient when split into spheres of responsibility for individual men, this being more conducive to their peaceful and orderly use.[3] The purpose of common use, however, still remains, so that the man who personally administrates some particular property should regard its use as rightfully ordered toward anyone in need.

Thomas does not *per se* affirm a natural *right* to property in this administrative sense. Rather, he claims that the natural law leaves such divisions unspecified and that they are the constructs of human law. The natural law does, however, specify sufficiently that under the conditions of a human law property regime, theft is wrong.[4]

To summarize, then, Thomas' account of property: all men by nature have an equal right to the use of the goods of the earth for their benefit. However, for largely practical reasons, actual common use comes best through some kind of property structure which assigns to each man the goods for which he has his own rights and duties, which does not nullify but serves the

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1. Thomas Aquinas, *New English Translation of St. Thomas Aquinas's Summa Theologiae*, trans. Alfred J. Freddoso (2018), II-II, *66*, 1, co. https://www3.nd.edu/~afreddos/summa-translation/.

2. Ibid.

3. Ibid., II-II, *66*, 2, co.

4. Ibid., II-II, *66*, 2, ad. 1.

purpose of common use. This assignment itself is specified by human law rather than natural law, but where it exists natural law enjoins obedience to it.

Francisco Suárez

In *A Treatise on Law and God the Lawgiver*, Suárez does not treat of property systematically in one specific place, but he does describe most of the important features of a natural law account of property along the way in answering certain other questions. Much of this comes in his discussion of whether human power can ever modify the natural law, which he answers in the negative. As one of his examples throughout the section, he discusses the institution of private property in the stead of the more natural right of common possession.

In this section, Suárez denies that there is any natural law precept which demands a community of property. This is much further than can be proved from reason. Rather, a division of property by human arrangement was always potentially permissible, with common ownership simply being the default until and unless men constructed some other system.[5] Until then, however, all men would have had an equal right to the use of any earthly goods, which indicates that their ordinary needs make the universal destination of goods a basic element lurking underneath the more complex developments which natural law may still permit.

Moreover, Suárez specifies that wherever property is not privately owned, the common natural right persists, but once a property structure is established, nature does require that men respect it and not take to themselves whatever is assigned to another. All of this greatly resembles Thomas' account (who indeed Suárez does cite) but with less emphasis on the purpose

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5. Francisco Suárez, *Selection from Three Works*, ed. Thomas Pink, trans. Gwladys L. Williams, Ammi Brown, and John Waldron, Natural Law and Enlightenment Classics (Liberty Fund, 2015), pg. 315.

of common use. This shift in emphasis seems almost entirely accountable by the subject matter of the chapter, however, so it seems there is little if any reason to consider the two doctrines as having any material disagreement.

Samuel von Pufendorf

Moving one step further toward the present, Samuel von Pufendorf in *The Whole Duty of Man* gave an account of property similar to the two above. He begins by noting man's nature requires that he use external goods, even up to the point of destroying them, but no particular goods were originally the property of any particular men. Rather, due to this common need, as time and labour grew more complex men began to devise "finder's keepers" agreements and similar policies to divide the use and responsibility of property among individual men.[6]

According to Pufendorf, the original method of acquiring property was simply to be the first to seize and claim it, but over time men developed more complex structures and rules, and, more importantly, began to trade, sell, and otherwise transfer ownership. This whole body of property law, however, falls neatly under his account into the category of positive law, not at all demanded by nature but reasonable and fitting with the practical needs of men rooted in nature. He specifies the practical purpose of property as basically twofold: it was made "for the prevention of Quarrels; and for the sake of good Order[7]"[8]

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6. Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature*, ed. Ian Hunter and David Saunders, trans. Andrew Tooke (Liberty Fund, 2003), pg. 128.

7. Clearly Pufendorf was a Presbyterian.

8. Pufendorf, *The Whole Duty of Man According to the Law of Nature*, pg. 129.

Once again, then, we find a natural law account of property which renders private property itself to be a needful development of human law in accordance with what is reasonable from the law of nature but not necessarily prescribed thereby. The main thrust is the practical administration of man's common needs to use property, taking sin and finitude into account.

John Locke

At the end of this brief survey is John Locke, famous for his own idiosyncratic theory of property rights. Locke went further than any of the men above in making property rights "natural," turning them into a pre-political matter. For Locke, a key point is that the right of use up to and including destruction (such as eating an apple) necessarily implies ownership. Since, of course, the right of using earthly goods for sustenance precedes any political order, it must be a matter of natural right.[9]

For Locke the origin of this right is human labour. Men do not naturally have any rights beyond their person, but their labour is derivative of their person, and in appropriating physical resources man mixes his labour with them, thus granting him a right over them as an extension of his right over his person. This naturally provides for basic set of property rights which exist in a state of nature before and apart from human institutions.[10] Unlike the theorists discussed above, Locke does not account for any difference between rights of use and administration or anything similar. Rather, in his system the two are necessarily conjoined.

While this more naturally deep view of property rights is unique to Locke by the time he enters the conversation, it has been influential ever since. It also shares some common features

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9. John Locke, *Two Treatises of Government* (A. Millar et al., 1689), pg. 215.

10. Ibid.

with the other views despite its differences. The idea that a man's labours give him a moral claim to property is at least somewhat analogous to Pufendorf's explanation of property rights beginning from being the first to seize and claim something, and what Pufendorf seems to attribute the efficacy of this seizure in producing a right to human agreement, he seems to portray such agreements as flowing organically from reason and human nature. If nothing else, nearly all natural law property theorists can probably agree that there is an organic fitness that a man should, all else being equal, enjoy a preeminent right of use to the fruits of his labour.

Conclusion on Natural Law and Property Rights

Taking the views of these four figures as a whole, and recalling that each of these figures represents faithfully the views of many other theorists in the same general tradition, some basic features of a natural law account of property recommend themselves as something of a baseline consensus.

First, it is clear that in the current state of things some kind of property rights are practically necessary. Whether they are directly prescribed by nature herself, at least the reality of sin and probably also man's natural limits of finitude demand just to keep everything in balance and order that the rights of use and administration over physical goods in most cases be portioned out between different individuals. Simply because so many resources are scarce or otherwise unmanageable if all men had equal access and governance over them, it is necessary to prevent conflict or even just confusion and disorder that different men have a kind of ownership over different things. Nonetheless, Locke's account having many oft-discussed weaknesses, the weight of the remainder of the tradition seems to suggest that this practical utility is the highest justification which can be asserted confidently for property rights, so that it is not clear they

really do need to transcend human law. They may indeed be simply wise specifications of human law without a definite natural prescription. When they do exist as human law, however, they bind rather strictly and theft is a grievous sin.

Underlying this, the root cause of all property rights which most certainly does belong to nature is human necessity. Man's body requires physical goods absolutely to avoid death, and his soul in certain ways and to a certain extent also requires the use of them for its perfection. The fundamental reality underlying any rightful conception of property starts with this universal destination of goods, that every man is naturally invited to use the goods of the earth to serve the needs God has made within him.

Finally, there is an organic fittingness that unites a man's labour, his needs, and his rights. "If any will not work, neither shall he eat,"[11] and conversely, if a man does work, he naturally ought to be able to eat, with a *prima facie* claim to eat what his own work has acquired for him if at all possible.

The Distinctive Case of Intellectual Property

Having distilled a skeletal natural law account of the grounds of property rights from important representative figures of the tradition, we must now consider the unique case of IP law. Intellectual property is, of course, not at all identical to property in the conventional sense, so much so that to many the very designation "intellectual *property*" seems to be nonsense. What, then, is IP, and wherein does it differ from property of a more material nature?

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11. 2 Thessalonians 3:10, Modern English Version (MEV).

Definition

The World Intellectual Property Organization defines IP as follows:

> Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce...IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.[12]

It is not at all difficult to find ambiguities in the very idea of creations of the mind as identifiable property, even moreso than many complex cases of physical property. For example, if we consider right this moment a hypothetical knight named Arthon who wears tweed and a baseball cap on the rare occasion he goes out to fight a dragon, it is entirely possible that both the author and each reader of this sentence will imagine such a man quite differently, and the actual imaginative exercise used in constructing him is not a single act of the author's mind but, in a certain respect, occurs afresh in the mind of each reader.

This example may be somewhat trivial and perhaps complicated beyond necessity, but it should suffice to suggest that, whatever the case for property rights pertaining both to tangible and intellectual property, there will have to be some categorical differences. Let us then proceed to tease out this suggestion into some specific points of differences, points which directly relate to the basic concept of property rights fleshed out in the last section.

Necessity and Perfection

At the very heart of a natural law account of property is the universal right of use to the world's goods in general. That human nature depends upon certain material goods for its survival and perfection means that nature has likewise granted a certain right to men that they

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12. World Intellectual Property Organization, *What Is Intellectual Property?*, https://www.wipo.int/about-ip/en/, accessed 2022-03-28.

should use such goods. All property arrangements are in some way and to some extent downstream of this fundamental need.

The case with IP is not at all the same. Everything a man needs absolutely for his survival is given in nature. Human creations, particularly those made of invention or artistry, may aid the meeting of his needs or contribute to his perfection, but none are so necessary that a man cannot go without them. Survival, talent, virtue, and every other element of human flourishing is, at least in principle, accessible to an average man without the need of any special inventions of the human mind. This rules out the most important principle underlying ordinary property rights from playing any role in grounding IP rights. Rather than a universal need, the most a man might be able to claim about any particular mental invention is its general utility, which may perhaps be great but certainly lacks in general the ability to ground any natural perfect right.

Practical Administration and Scarcity

Another common feature in the accounts of property rights above was the practical necessity to divide up material property among different parties with rights and duties of use and responsibility. With finite resources,[13] there is simply no possibility of every many having an equal right to its use and administration. If one person eats an apple, no one else can eat that apple. If a man uses a kitchen to bake bread, it is rarely the case that another man can use it simultaneously to cook amphetamines. Similar cases abound: physical property has limits of time and space that inhibit shared use, either entirely or in part. Unless property rights are

13. Finite not only in quantity but in quality, i.e. a resource can be in only one place serving one use at one time.

assigned, confusion and complication are almost inevitable even apart from human sin, and given the Fall conflict and even violence are quite likely.

In this IP differs in the extreme. A creation of the mind is, in an important respect, infinite. Not being confined to any particular matter, IP can potentially be replicated and shared *ad infinitum* without collision or chaos. Computer software can be copied time and again without any impact on the first build, ideas can be shared with any number of people without the mind in which they originated losing them, and engineers can build any number of products from the same schematics without any deterioration of utility. IP is thus infinitely sharable by nature. This means that any unique or distinctive rights the creators of such property may have will need an entirely different justification than the practical needs which undergird rights over tangible goods.

Definition and Enforceability

Suárez, in his explanation of the nature of law, noted that laws require a will to bind on the part of the lawmaker: "for without such a will, [the act] cannot be binding upon them."[14] If a law is only binding where there is indeed a will to bind, then this casts doubt on the validity of laws which simply cannot be enforced with principled consistency.[15] In this case as before the practical differences between tangible property and IP are immense. Even under the most intricate of property laws, rights pertaining to physical goods are usually definable and enforceable. A plot of land can have definite borders, and a man can often quite easily tell if someone has crossed them. A lamb has but one body, and if a neighbour decides to eat it, there

14. Suárez, *Selection from Three Works*, pg. 60, brackets original.

15. At least where the lawmakers realize this to the case.

are potentially many ways to prove it and demand recompense. Moreover, anyone can usually tell if he is violating rights over physical property. While there may not always be a border on a plot of land, in general there is nothing complicated or difficult in identifying clear transgressions, whether on the part of the perpetrator, the victim, or the judge.

Again, the contrast is great with IP. The good order and the evasion of strife which Pufendorf attributed to property rights are not at all intrinsic to laws protecting IP rights. Rather, they often have to engage in extreme and labyrinthine legal definition to make up for the ambiguities inherent in the ordinary actions which men might take with IP, and identifying and enforcing penalties for violations is often much more complicated. For example, it is often difficult, if possible at all, to prove when one man has copied an idea from another if they both publish similar material. Likewise, simultaneous patents for similar inventions have long been a source of contention between geniuses. For a more extreme example, digital piracy is almost impossible to practically handle: it is a perpetual cat-and-mouse game as hackers find ways to acquire digital goods for free, the distributors construct ever more clever schemes to prevent this, and then the hackers come up with something far more clever to circumvent the new techniques. Innumerable methods for bypassing all manner of protections exist for almost all media, and piracy continues to occur in such extreme volume and by so many unidentifiable parties that punishment is usually costly and complicated where it is possible at all.

To add to these considerations, IP law must often be so complex and discriminating that it is difficult or impossible for laymen to know if they are violating it. For one common example, there are hundreds of video streaming websites on the Internet, and the average user often has no surefire way to verify which ones operate legally and which do not. In the Internet age, differences between different countries further complicate the matter. Most of the works of C.

S. Lewis, for example, are now in the public domain in Canada but remain under copyright in the United States. Online, however, these national boundaries seem all but meaningless, so that it seems arbitrary and surprising if a US citizen finds a free copy of *Miracles* only to realize as he absentmindedly skims back over the webpage later that he was a few miles across the border from having downloaded it legally.

A Positive Analysis of Moral Values and Claims Pertaining to IP

From the many differences between property in the traditional sense and the mental constructs represented by the concept of IP, it should be clear that much of the traditional natural law account of property rights in general is categorically inapplicable to IP. With neither scarcity nor other practical forms of finitude nor basic necessity playing any role in the use of IP, very little common ground remains between IP and tangible goods.

The Principles of IP

However, recalling Locke and some of Pufendorf, there do seem to be a couple promising avenues for establishing some kind of proper handling of IP, if not as prescriptions of natural law at least as human laws potentially fitting to the nature of intellectual labour. The notion that men have some natural claim, even if perhaps an imperfect one, to benefit from the fruits of their labour seems relevant to IP. For IP does require labour, and indeed some practical benefits seem necessary if most men capable of producing mental creations are to have the time and will to carry it out, to the benefit of all mankind. Indeed, Chartier identifies the right to a

return on the investment of time and effort as one of the few plausible arguments in favour of IP law, even though he ultimately rejects it.[16]

On this last note, as well, we should observe that though man has no proper *necessity* for IP as he does for physical goods, many forms of IP are still extremely useful for realizing the perfection of both soul and body. Inasmuch as nature shows that all men have some kind and degree of obligation to communicate good to others where it is in their power, all men would seem to have some kind of *prima facie* claim to at least some fruits of at least some men's intellectual labours.

This leads into the obvious public goods involved in IP. Though most kinds of IP are perhaps not necessary for the common good, many contribute at least some real benefit. This means that a people, so perhaps also the state, does have a vested interest in the production of such creative works. IP law has traditionally tried to represent this interest by rewarding creators with certain monopolistic rights, so this concern, when added to the above issue of a fitting return for mental labour, does help make a case for the good of IP law.

However, on both of these points, both the fittingness of compensation and the benefit of IP toward society in general, there seems no natural ground to identify any *perfect* rights. No plausible arguments can say that, once a man has invented the wheel, all other men are necessarily obligated to give him credit or compensation so that he ought to be able to punish them if they do not render it, particularly once the design has spread so far that most men know not even whence it came. Conversely, if for some reason other men could not quite understand the invention of the wheel, then however useful it might be to them, it is not at all clear they

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16. Gary Chartier, "Intellectual Property and Natural Law," *Australian Journal of Legal Philosophy* 36, no. 1 (2011): pg. 58, 77-79.

would have the right to punish the inventor if he did not share its design and inner workings with the rest of them. At most, it seems the inventor has an imperfect right to benefits from his invention and the wider society has only an imperfect right to their own full appropriation of whatever he has discovered. Surely, however, it would be to the advantage of both the inventor and the wider society if they could strike some kind of agreement that would provide a positive legal form to secure some fulfillment of this hodge-podge of complex imperfect claims.

Prudent Policies for Producing Psychic Properties

As noted above, most contemporary IP law treats of mental productions as clearly identifiable items over which the creators can exercise a set of monopolistic rights. Often popular discourse compares violations of IP law to the theft of tangible goods, and a number of creator's rights make their way into law or at lest the policies and statements of certain organizations. Much of this, however, for the reasons outlined above, does not seem justifiable in the same terms by which property rights in the more conventional sense are. The nature of the differences between the two cases, especially with respect to scarcity, need, and practicability, seem to militate strongly against any particularly straightforward analogy from one to the other.

There can be no doubt that many jurists, politicians, and legislators are aware of these differences and have sought, to a greater or lesser degree, to take them into account. However, the resulting legal edifices for IP are clearly far from representing in any remotely direct way natural duties and obligations. Few, if any, of the specific laws which make up these structures directly represent any perfect moral claims of any party. Rather, they offer elaborate practical systems of positive law meant in highly specific ways to safeguard the natural value of creative labour, seeking to ensure that creators receive a fair return for their efforts and that they are

sufficiently stimulated to produce more of those intellectual creations which might benefit mankind.

To say this of IP law is not, of course, to denigrate it, as all who know the natural law tradition should understand. Bodies of positive law are not "bad" when they serve as only very indirect methods of securing natural rights or obligations. They are, however, in that respect almost infinitely revisable. As Hooker highlighted, "It is a law for law-makers that not all laws are right for every different society, and law-makers must be mindful of the place they live and the people they govern."[17] So even if the current IP structures were ever truly fitting and effective,[18] the possibility always remains that they would be better replaced by something new. This seems especially plausible given that most of the IP laws in the West emerged before the digital revolution, which has made information almost impossible to effectively restrict. The middle section above already mentioned many of the new challenges to traditional IP regulations, but they are even more numerous than anything mentioned here.

A more effective way to secure the great natural goods underlying IP law might be itself visible in the same technological developments which have destabilized the old laws. At the risk of speculation, projects such as Patreon, crowdfunding, Substack, Lulu, and many more seem to bring back many of the benefits which old patronage arrangements used to bring to the world of creative labour, but in a manner more well suited to a modern and more democratic world. Could such arrangements hold the key to the future of intellectual labours? Perhaps they could, for they tend to combine the competitive benefits of the free market with the honours and

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17. Richard Hooker, *The Laws of Ecclesiastical Polity in Modern English*, ed. B. Littlejohn, B. Belschner, and B. Marr, vol. 1 (Davenant Press, 2019), I. 10. 9.

18. A dubious but not impossible claim.

rewards which true talents could acquire for themselves in much older circumstances. They do seem effective means both to the fitting reward of creative labours and to the incentive to multiply potentially valuable works. Upon these two, as said before, hang nearly all the natural rights and duties which have any bearing on intellectual property.

Conclusion

At the time of writing, Amazon still unfortunately has the rights to *The Hobbit* and C. S. Lewis' works are still mostly under copyright in the United States. These sad examples of the problems involved in laws governing intellectual property, which far from proving anything, do help highlight to the attentive conscience that IP law not at all a straightforward application of the law of nature, i.e.e simply what is right.

Instead, having surveyed some select natural law theorists to form a natural law account of property rights in general, the differences between the case of IP and conventional property became quite clear. Many of the key concerns animating property rights in general, especially those pertaining to scarcity or other limitations of finitude but also those involving human need and other concerns, play no role or a very limited one in the case of intellectual property. Instead, the chief natural concerns pertinent to the idea of intellectual property are the rewards due to a man's labour and the non-essential benefit that intellectual works provide to the common good.

Furthermore, far from these moral values prescribing anything like the common constructions of IP law in existence today, these keys allow a great deal of leeway, and countless, quite dissimilar, positive law arrangements are possible to secure them. In the contemporary West it is quite possible that the common methods are out of date on the Internet's account, and

something new, perhaps also originating with the Internet yet taking some cues from the past, might be a helpful way forward. Even if they are not, it remains that there are few, if any, perfect rights in the domain of intellectual property outside a positive law agreement, so the freedom to reevaluate and attempt a new regime remains.

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