

Liberalism and Intellectual Property Rights

Author

Breakey, Hugh

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Liberalism and Intellectual Property Rights

Justifications for institutions governing intellectual property rights typically fall into one of two categories. First, there are those which speak of the economic, social, and utilitarian gains of innovative thought, and show that we can expect free markets to underproduce such entities.¹ On this account, intellectual property rights are artificially established to motivate innovators to create socially desirable products. Second, arguments are adduced on either Lockean or Hegelian themes to establish natural property rights over ideational entities, thereby justifying such regimes out of respect for property.² My project is rather different.³ I argue that adherence to two central liberal rights can obligate states to establish intellectual property rights institutions not wholly dissimilar from those regimes of patent and copyright we find established in most liberal democracies.⁴

My argument proceeds as follows: in the first section I outline the two core liberal rights forming the basis for this project: the right to one's embodied ideas and the right to contract. In Section Two I show that protection of these rights allows citizens to trade in ideas – giving rise to an idealised world I refer to as the *Contracting Situation*. However, enforcing such trade in ideas – which is to say, protecting the two stated rights – is deeply problematic. Politics wishing to take seriously these rights may have to set up enforcement regimes that trade off rights against one another. In Section Three I argue that, in some circumstances at least, enforcement regimes may justifiably take the form of modern intellectual property rights institutions such as copyright and patent.

A prefatory word on rights. By a 'right' I connote an interest that an individual has, or choice she can make, of special moral standing, such that it may be morally asserted against the wishes of other individuals or the goals of society as a whole. Moreover, I refer to a natural right, a pre-conventional, pre-legal ethical norm – a way someone should properly be

treated. Such a right morally informs pre-political action, and plays a role in the proper creation of jural relations. I do not consider the following rights to be indefeasible by other moral concerns – I am asserting their status merely as *prima facie* rights.⁵ Such rights constitute, in and of themselves, a moral reason to respect a particular interest or choice, but not in all cases an overriding reason. Nor do I claim such rights are metaphysically fundamental – rather, they may be secondary principles of some deeper consequentialist or deontological theory. Finally, I attempt to leave the following argument general enough that it may, *mutatis mutandis*, be applicable to the various conceptualisations of liberalism offered throughout history. That said, the variations of liberalism are disparate enough that at times I directly discuss considerations that are relevant to one liberal paradigm but not another.

Section One: The Two Key Rights

The first right I wish to table is the *right to one's ideas*. I am drawing upon the commonsense use of this term 'idea', which is to say that an idea is a *propositional attitude* typically of the form 'X believes...' (or 'X imagines/supposes...') followed by some proposition – 'the sun is shining'.⁶ Expressed thus, we immediately invite an ambiguity. On the one hand, ideas are something very personal, embodied within particular minds. If I have the idea, 'the sun is shining', that is *my* idea insofar as it is a property – in some sense – of *my* mind. On the other hand, it is quite meaningful to say that you have just the same idea as I do, as might occur if you too believe that 'the sun is shining'. On this reading, the idea is the propositional content of the propositional attitude. In the everyday world and in many philosophies of mind it is thought that – in that sense – we can share ideas, communicate ideas, and both have the same idea.

Although I want to accept both these usages, it is important to distinguish them, particularly at this early stage so we are clear in understanding exactly what I am asserting

rights over. Is the assertion of ‘the right to one’s ideas’ the seemingly mild claim that one may use, control, express, or keep private those particular ideas embodied within one’s head? Or is the assertion of this right intended to connote ownership over the proposition itself, wheresoever it might be tokened?

My assertion involves the former usage – and so I will refer to the *right to one’s embodied ideas*, using this prefix ‘embodied’ so as to preclude the possibility that I am referring to the rights to ideas *qua* abstract propositions. That said, I will speak of ‘sharing ideas’, ‘having the same idea’ and ‘communicating ideas’ – in these senses and without the qualifier ‘embodied’ I am referring to the idea *qua* proposition. I am dipping my feet into deep metaphysical waters here, but I trust the essential thought is relatively simple: I have rights over the particular contents of my mind, but this does not entail any rights over the same proposition embodied within another mind.

It is often supposed that in order to defend intellectual property rights regimes on the basis of natural rights one must posit rights over the idea *qua* proposition – the idea in its universal sense. One needs, perhaps through application of Lockean labour or Hegelian personhood, property rights to be established over the proposition itself. My argument challenges this assumption – I contend we can get at least within the vicinity of modern intellectual property rights regimes working our way up purely from the rights to our embodied ideas.

So much for discussing *what* it is we have rights over – I now need to sketch what those rights amount to. There are three interests being protected in the right to one’s embodied ideas. First, the interest we have in using our own ideas. This might involve creating new ideas (new beliefs or judgements) or creating new plans of action. Second, the interest we have in being able to withhold our ideas; we are entitled to keep silent about our thoughts when we so desire, and not to have our minds read against our wishes. Third, we are

entitled to communicate our ideas – we have free-speech and can choose the conditions under which we want to share our thoughts.

The right to our embodied ideas, in this minimal threefold sense, is a central part of the liberal corpus. Our embodied ideas, as an integral part of our identity and personality, as the product of our choices and efforts, and as the font of all our actions, have as much moral warrant for liberty and protection as our bodies. Indeed, it is typical of arguments for individual freedom to begin with the regency we must hold over our own thoughts and their expression, even before turning to our continuing interests in our bodies.⁷ Ultimately, the level of moral protection that most liberals will wish to place over our embodied ideas extends well beyond the minimal requirements of my argument.

Militating against the unqualified scope of the right to one's embodied ideas, there are situations where an agent has duties to part with certain information. Quotidian examples abound: if one knows the time, or knows the way to City Hall, it seems unreasonable, *ceteris paribus*, not to inform an enquiring person of these facts. Moreover, sometimes we might be morally – even legally – enjoined to volunteer information; perhaps we have knowledge of a violent crime that is yet to be committed, or we witness such a crime. Such cases are explained not by denying we have general and powerful rights to our embodied ideas, but simply by recognising that this right's final contours, its borders and exemptions, are ultimately shaped by pressures borne of other moral exigencies. In the case of giving directions to a lost traveller the cost involved to the informer seems exceedingly slight – and in any cases where the cost is significantly amplified, the intuition supporting the duty dissipates rapidly. In the case of reporting on crimes the moral gains of doing so – in terms of the effects on human lives and the facilitation of the cause of justice – are powerful enough to require exemptions in the general right to our embodied ideas. Furthermore, we find these

exemptions are themselves powerfully circumscribed; consider the well-entrenched rights not to provide information incriminating oneself or one's spouse.

The second right I wish to assert, alongside the right to one's embodied ideas, is the *right to contract*. Two interests are held important on this account. First, two agents are free to come to some agreement and act upon it, provided such interaction – consisting of the agreement and the subsequent execution of the promised activities – does not impinge on the liberal-rights of agents external to the contracting dyad, and perhaps also that, on some liberal purviews at least, such activities do not derogate the future freedom, or disrespect the moral status, of either of the contractors. For instance, agreements to enter into slavery, or coerced on the basis of an exploitative situation, would not be accepted by many liberals.⁸ The second interest: presuming the agreement itself to be respecting of the rights of others and the future-freedom and current status of the contractors, the two agents are, if they so desire, able to formally and legally bind themselves to the dictates of that agreement.

The first interest sits centrally within the liberal world-view. Consensual interaction, respecting rights and freedoms in the ways sketched above, is emblematic of the way that liberals wish all interaction between citizens would occur. The second interest appears slightly more contentious because it directly requires the setup of legal regimes capable of looking after such interests. This invites questions of who is responsible for the funding of such institutions, and what powers may be vested within their agents. Nevertheless, there is a clear sense in which the first interest – that of consensual interaction – can only be properly protected if citizens at least have the option of together formally describing their understanding of the interaction to which they are consenting, and of having *that* interaction, on *those* stipulated terms, protected by the state. On this reading, contract is merely a clearly articulate form of the right to consensual interaction.

Again, there are principled exceptions to this general right. Setting aside contracts which violate the above stipulated conditions (as such contracts will obviously not be enforced), there remain further contracts that liberal states typically do not enforce. In this class we might consider contracts enabling blackmail and price-fixing. For brevity, I simply note that such contracts, or the interactions they formalise, typically have structural features rendering them morally suspect – features, moreover, absent from the type of contracts I envisage. For instance, price-fixing is structurally distinct from more standard consensual agreements insofar as the benefits of price-fixing agreements necessarily derive from sources external to the dyad (arising directly at the expense of third-parties), whereas in a simple trade the benefits chiefly arise from internal sources.⁹

Both consensual interaction and contract have consequences for distributive justice. While some liberals may find my initial remarks about the rights to one's embodied ideas innocuous enough in the context of political discourse and personal interaction, they may balk at the unfettered conjunction of this right with a right to contract, because of the potential for inequitable economic outcomes. Such liberals will wish to attenuate the right to contract sufficiently to allow for taxation on certain types of economic transactions. I presume similar welfarist constraints could be incorporated into the system herein proposed.

Section Two: The Contracting Situation

These then are the two liberal rights I take as axiomatic – the right to one's embodied ideas and the right to contract. In this second section I consider what it would be like to live in a world where such rights are taken seriously. Consider an agent, Mary, emplaced within a political arena protecting the two key rights, who comes up with an idea she believes is likely to be useful to other citizens. The idea is not one that is currently known by anyone in this environment apart from Mary.¹⁰ Suppose furthermore that Mary is interested in acquiring

pecuniary reimbursement for the provision of this idea to those who she thinks might benefit from having it, and indeed who would willingly pay for the having of it.

Recall that my initial characterisation of the term ‘idea’ allowed almost any type of belief or supposition. Thus I mean to cover all manner of ideational entities, including the paradigmatic cases of patents (blueprints, industrial designs, chemical processes) and copyright (expressions of imaginative or artistic ideas, typically through prose, lyrics, or musical notation). ‘Idea’ also includes ideas about facts and discoveries, emotional states, and about such techniques as various ways of kicking a football. The following discussion, drawing out the problems confronting Mary in her quest for profit from the provision of her idea, is intended to be broadly applicable to all such ideas and ways of communicating them, though outcomes will change depending upon the nature, features, and applications of the ideational product or service. To foreshadow certain conclusions, we will find that this account provides reasons why particular types of ideas should not fall under the auspices of intellectual property rights regimes.

From the right to her embodied idea, Mary is free to keep her idea to herself, or part with it on whatever conditions she deems acceptable. From her right to contract, she is entitled to enter into specific and precisely crafted legal arrangements with other consenting agents. In such a milieu, how would Mary proceed? Within intellectual property literature, we can discern three potential problems we might think Mary will be keen to avoid, in order to procure her maximum possible economic gain.¹¹

First, she and her potential buyer, Bill, may encounter difficulties in ascertaining a price. Mary does not want to communicate the idea to Bill before Bill has contractually committed to paying a fixed price for it, but on the other hand Bill may not be able to know how much he is willing to pay for the idea until he knows what it is. They appear to have a quandary. Call this the problem of *Pre-Sale Revelation*.

Second, and most important, Mary may wish to sell her idea to other buyers after she sells it to Bill. But there is as yet no reason why Bill may not ontrade it himself. Post sale, he will be in the same doxastic state as Mary (*viz.* believing this particular idea) and may well have a similar desire to use the idea for economic gain. If the option is open to him, he may therefore ontrade it. Mary might consider this a problem because it creates a competitive market, where previously she held a monopoly. Call this the problem of *Post-Sale Doxastic Equivalence*.

Third, Bill's subsequent usage of the idea may occur within the public arena. Other agents, either innocuously going about their business, or assiduously studying Bill within the limits of privacy and property laws, may spontaneously, or very laboriously and deliberately, come to apprehend the idea. Again, Mary may see this as a problem, because it once again opens the possibility of a market-competitor for the sale of her idea. Call this the problem of *Third-Party Cognizance*; 'third-party' because these other agents are not part of the initial contracting dyad.

So Mary is faced with what she considers to be these three impediments to her procuring the maximum economic gain possible from the sale of her idea. The solution she will plausibly arrive at is to exploit her right to contract in order to obviate, or at least ameliorate, these obstacles. It should be clear that contractual arrangements may be utilised to substantially resolve at least the first two problems.

As regards the problem of Pre-Sale Revelation, Bill may be willing to contract such that Mary will tell him the idea before he makes the purchase – so he may thereby be able to arrive at an informed offer of a price. He can do this by guaranteeing that if this eventual offer should not satisfy Mary, then the sale will fall through, and Bill will not then go on to use the idea in a number of pragmatically obvious and contractually specified ways.

Turning to the problem of Post-Sale Doxastic Equivalence, both Mary and Bill may be keen to come to an arrangement. If Bill's main interest in the idea is not in onselling it, but in using it in some other capacity, then he will be happy to contractually bind himself against onselling, as otherwise Mary may want him to pay the much more exorbitant price she would require to cover her losses if he does onsell. So Bill contracts to not publicise or onsell the idea, and possibly also to keep any expressions of the idea out of the view of third parties, who would not be subject to such contractual obligations.

The third problem, however, has no contractual solution, save the attempt at privacy just outlined. Indeed, if the buyer is willing and able to keep the ideational product appropriately sequestered, then the issue of Third-Party Cognizance need never arise. However, in many cases this will be difficult and in some cases simply impossible. On the morally parsimonious account I am rendering, with only the two rights being protected, Mary simply has no recourse at all here. Through the mechanism of contract Mary can exact control over the buyers of her idea and their subsequent uses of it. But to avoid the problem of Third-Party Cognizance, and the corollary dissolution of her monopoly, Mary wishes to be able to ensure that third-parties (who have not engaged in any contractual agreement with Mary) viewing public objects cannot act without restriction upon their apprehended ideas. But neither her right to her own embodied ideas, nor her right to contract, give Mary any claim over the behaviour of such individuals. Indeed, the right of third-parties to *their* embodied ideas, combined with their general right to engage in any non-harming activities of their choice, constitutes a positive case against Mary being able to control their behaviour in this way.

Another way of construing this point is to recall that Mary has no rights over the abstract proposition, but only the embodied idea that resides within her head. So long as she can manipulate the conditions of that particular idea's disclosure to exclusively agents who

are contractually obligated to Mary's satisfaction, then she retains, effectively, control of the only legally unfettered embodied idea. She retains her monopoly. The moment any non-contractually-bound agent also forms that isomorph in their mind, whether by independent creation or the public apprehension of some utilisation of Mary's idea, they too have a legally unfettered embodied idea and are free to use it in whatsoever way they desire – including copying and publishing, naturally.

Notwithstanding Mary's comparative powerlessness when it comes to the problem of third-party cognizance, the two key liberal rights do provide significant opportunities for her. There are contractual solutions to Mary's first two problems, and Bill may well be willing to be a party to such contracts.

Presuming that the liberal regime we are envisaging also upholds physical property rights (even if only fairly weak ones¹²), Mary might additionally wish to profit by selling a physical object such as a book, blueprint or invention that expresses her idea. While the same three problems just discussed arise, there is in such cases an additional complication. It is this: what happens when a buyer (Bill) accidentally leaves a book behind where another person can pick it up and read it? For all I have said so far, there would be no impediment to this person picking the book up and freely replicating its ideas and expressions. Of course, Mary, our author, will not want this result, and so she would like to contract Bill into guaranteeing he will not simply leave the book lying around (though he could perhaps sell it to another person similarly contracted). But making such a guarantee could expose Bill to a potentially enormous risk of liability if he happened to misplace the book, so he would be well-advised not to sign any such contract. Unless buyers have some other option of safeguarding against this eventuality we might find that the focus of creative energies shifts to more ephemeral products such as cinema, book readings, plays and concerts, where this issue does not arise so easily. Fortunately however, there is another option.

In at least some cases, for example at a train station, when we see a misplaced or lost book, we intuitively see it as property that has been *abandoned* – i.e. that now has no property rights over it. In such cases of abandonment, it is legitimate for us to pick it up, read it, and perhaps even sell it to a used bookstore. Such praxes of abandonment are important to the nature and function of property-rights – they allow us to be free of property we no longer want.¹³ But in a milieu where buyers sign contracts over their use of books, this norm would not apply, because it would be known that book-owners still have intentions regarding their books (*viz.* those intentions settled by the terms of their contract). So the standard duties of others to exclude themselves from physical property would still apply, even to books left at train stations.¹⁴ Such a norm would have to be balanced, of course, with other social exigencies, such as cleaners being able to clean train stations. Keeping in mind the book-owner's contractual intentions, a balanced norm of abandonment might stipulate, for instance, that all lost books be taken to a used book-store to be sold only to contracting parties. Perhaps this sounds strange, but in fact the way we understand the limits and scope of tangible property rights routinely incorporates complexities regarding the reasonable uses of different sorts of property and the intentions of property-owners.¹⁵ More significantly though, it might be charged that this solution sounds impracticable inasmuch as book-finder's might tend to illicitly pocket (and then read and even publish) the books they find. In the following section I consider such issues of impracticability and enforcement.

This solution only applies to property such as books where the standard exclusionary rights over the tangible item are sufficient to prevent another's access to the work. That is, one must actually pick up the book and read it in order to learn what is going on. Similarly, this solution protects against reverse-engineering processes that require physical interaction with an invention, for such interaction requires purchase, and so may be contractually constrained. However, this solution cannot be used to prevent those who see a new

mousetrap, say, from thinking about how it works and subsequently designing a direct copy or to prevent movies played over free-to-air television from being copied by those picking up the signals (this is just to rehearse the earlier point about Third-Party Cognizance).¹⁶

I will call the world where such contracts – over both the direct communication of an idea and over the sale of a physical product expressing an idea – are commonly made and rigorously enforced, the *Contracting Situation*. In general, it seems there will be a healthy trade of ideas and ideational products in the Contracting Situation. The only major constraint on such sale will be the limitation imposed by Third-Party Cognizance. This limitation makes the sale of any item whose application typically occurs within the public arena very difficult. For example, ongoing monopolistic control over ideas for new hairstyles, or ways of kicking a football, will not be easy to sustain in the Contracting Situation. Apart from this practical limitation, any and all ideas may potentially be sold, but naturally market value for different ideas will be extremely variable. Even considering only novel ideas, buyers will only purchase ideas for which they have a use, and, moreover, they will judge the market-value of the idea to be heavily dependent on how likely they perceive it is that another seller will arrive on the market in a given period of time. If the idea is deemed particularly innovative, idiosyncratically creative, or required vast amounts of research expenditure, then buyers are more likely to suppose that another creator arriving on the market soon is unlikely, and are therefore more likely to buy, and do so at a higher price. On the other hand, if they surmise that a second independent inventor may not be so far away, they can credibly threaten to hold out until the seller's monopoly is dissolved and the price falls.

I will refer to these second creators as *Johnny-come-lately's*. In the Contracting Situation, Johnny-come-lately's are able to enter the marketplace and immediately acquire the same status as the original inventor. A duopoly will replace a monopoly, and a wide range of contingent economic factors will determine the downward shift in the market-value of the

product. As more Johnny-come-lately's come up with the idea over time, the market will gradually shift from duopoly towards full competition, and economic rents will diminish accordingly. With the sale of pure ideas (as distinct from their products) it may be that an effectively infinite supply distributable by each creator will cause profits to dwindle, ultimately towards zero.

Largely, third parties to these interactions (i.e. the general citizenry at large) should remain broadly unaffected, in the sense that any ideas they formulate in their daily lives are unfettered and entirely their own.

This then – this Contracting Situation where ideas are freely exchanged under contractual arrangements – is the situation plausibly arising from taking the two basic rights seriously. Before moving on to discuss issues of efficiency and enforcement within this idealised realm, I wish to briefly examine two possible appurtenances to the basic structure above that may be appropriate to some, but not all, liberal paradigms.

The first addendum recognises that the *intellectual commons* – conceived as the sum total of all manner of knowledge broadly available to the public¹⁷ – could be construed as a public good, potentially worthy of positive protection within a liberal polity.¹⁸ If so, then there seems a rather simple addition that could be made to the system with minimal consequences for individual economic agents, but conducive to the intellectual commons. It is this: when the market value of a particular idea falls to an extremely low level (presumably because of the presence of many market-players – many non-contractually bound citizens with the same idea), all rights over that idea dissolve and it becomes freely available to all.

Even without this decree, however, it may be that the Contracting Situation can have generally propitious consequences for the intellectual commons. The possibility of occasional acts of benefaction do not ordinarily impact significantly on market analyses, but when the product being provided *gratis* is infinitely replicable (perhaps even costlessly replicable –

such as placing a missive on the internet) such acts can have telling economic consequences. Any time any market player decides to give away the idea to individuals willing to pass it on, the ideational cat is out of the bag. In this way the idea becomes a part of our intellectual commons.

The second addendum notes that many liberal paradigms do not uphold contracts that deeply compromise the future freedom of one of the contracting parties (e.g. if they contract into slavery¹⁹). Clearly, the capacity to freely use, at least internally, one's embodied ideas is very much the freedom to be a rational, creative, thinking human being. But it is to some extent exactly this freedom which Bill has contracted away, *vis-à-vis* the particular idea Mary has communicated to him. Though Bill purchased a variety of profitable uses of the idea, he also contracted away his ability to use the idea in certain ways – particularly to simply onsell it. But there are subtleties here: suppose Bill comes up with a new idea for a product, which involves (and communicates) Mary's idea as well as his new idea. Evidently, Mary has familiar reasons to want Bill to be contractually prohibited from selling this product. But this seems to create a potentially worrisome restriction on Bill's future freedom of thought and action. There is in addition a difficult question of whether Bill has given his *informed* consent to this occurrence. As we saw earlier, the problem of Pre-Sale Revelation may mean that in some contractual arrangements Bill will have to sign away his rights to use the idea before he hears it.

Insofar as the liberal deems that some restrictions on the ability to contract of Bill-at-time-t1 are required to protect the future freedoms of Bill-at-time-t2, then changes to the Contracting Situation may be in order. One way of resolving some of these concerns would be to ensure that the only uses of the embodied idea that Bill is legally entitled to contract away are those that are *directly* required by Mary for her to avoid exploitative copying and reproduction. All other uses of the idea, particularly more peripheral uses, are not fit subjects

for alienation by Bill's contractual powers.²⁰ Another way of mitigating long-term concerns might be to maintain that such contracts have a mandatory sunset clause, and expire naturally after a certain period, thus attenuating Bill's capacity to unduly straightjacket the freedom-of-thought of his distant future self.

The second part of my argument is now complete. I sketched a world where particular interactions take place – the exchange of ideas under contractual arrangements whose dictates are protected by the state. These interactions seem to be a reasonable way that the two rights (or three rights, if we include the weak property right allowing sale of physical products) would be utilised by citizens who wished to organise themselves some benefit from their ideas. I noted some possible supplements to the basic situation which may be required by some liberal paradigms. All that said, however, this Contracting Situation may not seem recognisably similar, or perhaps even broadly subjacent, to regimes of patent and copyright – the exemplary intellectual property rights institutions of the Western world.

Section Three: Copyright and Patent

I now consider whether there is any way that institutions of copyright and patent can be justified through appeal to the Contracting Situation – in short, whether there are good reasons for believing that the Contracting Situation can only (or most expeditiously) be approximated by such institutions. In what follows, I assume that deviations from the Contracting Situation which prevent the proposed activities and interactions of agents are morally relevant. The two rights have implied that agents have an assertable interest to a particular type of interaction, and the Contracting Situation is the result of myriad agents being able to act upon this interest. The contracting agents are entitled to nothing less than the Contracting Situation – *but they are also entitled to nothing more*, at least, not if granting

them such will interfere with the similar freedoms of others, such as Johnny-come-lately's or third-parties.

Consider one move that might be made to improve the efficiency of the Contracting Situation, just as it applies to certain expressions of fictional imaginings – books, say. On the account offered above, in order to avoid the problem of Post-Sale Doxastic Equivalence, writers would require all the purchasers of their books to be contractually bound not to copy or publicly express substantial portions of the work. It might therefore be highly expeditious to both buyers and sellers if these contractual obligations were assumed as default conditions of an activity such as buying the book, such that any agent purchasing the book is deemed to have signed away rights to copying, performing, and publishing the text. If this policy were to be implemented, it seems that the rights and opportunities of the contracting parties in the Contracting Situation are broadly upheld – with the only major alteration being the highly felicitous improvement that normal buyers and sellers no longer have to actually sign any contracts, thus enormously facilitating these exchanges. The only potential for concern within the contracting parties is that changing the default conditions may change the negotiating position of one party or another. However, *ex hypothesi* these are conditions that would have been almost ubiquitously mandated by writers. Even without default legal status, such conditions would have inevitably formed the backdrop to negotiations.

Outside the dyad, Johnny-come-lately's can still enter the market in the normal way.²¹ Third parties, provided they are appropriately informed of the obligations book-buying incurs and so do not innocently incur obligations, seem no worse off. Of course, unless the writer absolves herself of all claims, third-parties cannot purchase a book without immediately incurring obligations, but then they could not do so within the Contracting Situation either.

With such default conditions in place, the situation begins to resemble a nascent copyright regime. As with copyright, purchasers of texts are automatically prohibited from

performing and publishing them. And if we include the position taken on private property and abandonment in the foregoing section, then those who happen to find a lost book will also, just as with copyright, have to accept such prohibitions before they are authorised to read it. However, this regime would have substantially smaller scope than contemporary copyright law, as it could not apply to, for example, musical compositions played over free-to-air radio. Still, I hope to have said enough to show how institutions not wholly dissimilar to copyright might be justified over at least some media.

Let's now confront a problem for the Contracting Situation which may have immediately occurred to the attentive reader. It is the issue of enforcement. The contractual solutions offered earlier seem wide open for abuse, in the sense that it might be exceedingly difficult to prove that mendacious individuals had breached these contracts or otherwise engaged in illegally exploitative activity.

There are two rather obvious modes of illegal exploitation. First, there is a simple method of contractual breach. Some agent purchases the product (and signs the contract) and then breaches said contract by selling in secret the idea to a third party, who then publishes or otherwise exploits the idea. Provided there are a significant number of purchasers of the original product, it could prove incredibly difficult to show the link between the defaulting agent and the agent making money from the idea.

In a second scenario, some agent illegally and surreptitiously breaches the privacy or property of a legitimate and contractually bound purchaser, in order to study or copy the product or communiqué sufficiently to allow exploitation. This breach could also include merely finding a book on a park bench and – against the abandonment property norm canvassed earlier – breaching the tangible property in the book by using it in order to republish the text. In all such cases it may be very difficult to subsequently show that the exploiting agent violated privacy or property in this way.

Just as these are obvious ways of illegally abusing the contractual setup, it seems there is an equally obvious policing response. One may make the rather plausible stipulation that, if some agent comes up with an identical idea to one being popularly contracted out, the onus might be placed on that agent to show that the idea was independently created, or created from legitimate third-party cognizance. This reversal of the onus of proof would prevent very simple application of the above ruses. The enforcement regime will be required to set up some type of registry for new ideas and to arrive at some socially accepted construal of the ‘identity-’ or ‘similarity-conditions’ residing between ideas.

However, in many cases reasonable proof of independent creation may be exceedingly difficult to provide. While it might be simple enough to show the existence of research programs, or similar creative work being done, it is almost impossible to show the presence of the innovative epiphanies that are the *sine qua non* of many of these sorts of advances. On the one hand, if one demands that such epiphanies be proven, then almost all independent creation will ultimately be decreed illegal copying and genuine Johnny-come-lately’s will be unjustly excluded from market entry. On the other hand, if the regime accepts that such epiphanies cannot be proven, and is willing to countenance claims made merely on the basis of the existence of similar research programs, then, first, dissembling businesses will likely set up token research facilities, and second, many research programs will not be unduly concerned with results, knowing that if a rival program has a breakthrough the courts will accept their equal claims to it. In order to police such duplicitous behaviour it may be deemed worthwhile adopting a powerful – perhaps even infeasible – default assumption that no similar creation within the jurisdiction is an independent one.²²

These two moves – the reversal of the onus of proof, and the stipulation that proof of independent creation must be of an extremely (perhaps even impossibly) high standard – effectively solve the enforcement problems alluded to above. They also move our institutions

recognisably closer to the modern system of *patent*. However, the consequences of this strategy are radical. For one thing, the contracts themselves stipulating the two conditions which solve the problems of Pre-Sale Revelation and Post-Sale Doxastic Equivalence are no longer required. The reversal of the onus of proof has the effect of requiring that a prospective publisher of the idea must be able to show how his copy is a legally unfettered idea, meaning he must show the causal concatenation which culminates in either his independent act of creation or an explicit contractual arrangement with the registered owner. Since the bar for proof of the former has been set impossibly high, he is left with recourse only in the latter. But if he must provide such explicit contractual documentation, then it is no longer the case that ordinary sales of ideas need to incorporate the above conditions. What was once contractual breach has now become the unauthorized (and illegal) use of a registered idea.

One crucial impact of the loss of these contracts is that, as we will see, various measures have to be taken in order to allow the position of other stakeholders to reasonably approximate their situation in the Contracting Situation. The Contracting Situation solved issues such as ‘how long should first-inventors hold monopolies?’ and ‘what ideas are most profitable?’ by decentralised dyadic agreement and action among actual citizens. Such decisions are now forced into the hands of legislators (and patent officers) making one-size-fits-all judgements. The ensuing ersatz solutions are inevitably of a rough and ready character.

Moving to specifics, in adopting this default assumption the regime has to guard against three very important ways in which it may unintentionally grant far too powerful rights in favour of those who register new ideas. For the regime may grant rights interfering with the freedoms and opportunities of the various other stakeholders within the Contracting

Situation – those of later independent creators (Johnny-come-lately's), those of the buyers, and those of third-parties.

The foremost issue the regime must consider is the interests of genuine Johnny-come-lately's. These inventors are prohibited from being able to freely use and sell their independently created ideas. This opens up two questions. First, does the dissolution of these freedoms undermine the justification of this enforcement strategy? Second, is there something else this regime can offer Johnny-come-lately's in order to compensate them for their loss?

The first question involves determining which injustice is greater – the annulment of the Johnny-come-lately's freedoms to use and sell their ideas, or those injustices that would occur without deploying this radical enforcement strategy.

There are two scenarios worth consideration on this point. First, we might consider the milder case, where there is significant fraud, but it is not debilitating to the entire process. In this case it is not uncommon – soon after the advent of a new invention or breakthrough – for rival researchers to fraudulently claim they too have made the identical advance. First-inventors will thus occasionally be defrauded of the benefits of their protected interactions. The injustice here – in terms both of there being an identifiable victim, and allowing a specific criminal enterprise to go unchallenged – is significant, and must be weighed against the alternative – the enforcement strategy dissolving all Johnny-come-lately claims. There are rights on both sides of this equation and any proposed answer will not be uncontroversial. The result may turn on whether there are some further strategies compensating John-come-lately's for their losses, an issue I investigate below.

Consider now a second possible scenario, where fraudulent assertions of independent invention are so common that the entire process is threatened. Continual free-riding by fraudsters removes the rewards that would normally follow invention to the point where

inventors and researchers are unable to make a normal living. The loss here to first-inventors is obvious. There is also a serious loss to buyers (and to the status of the intellectual commons generally) – for without the motivation to invent, innovative products are less likely. But most importantly for our purposes, there is equally a loss to genuine Johnny-come-lately's. The mendacious activity of fake independent inventors will undermine the activities of Johnny-come-lately's as much as – indeed, typically more than – the activities of first-inventors, as first-inventors will at least have a brief window of monopoly before fraudsters can mobilize production. In this situation, our choice of whether or not to accept the enforcement decision is not one between first-inventor rights versus Johnny-come-lately rights, but rather between looking after at least some rights or none at all.

Suppose then the balance of rights was on the side of the enforcement decision. Can Johnny-come-lately's be recompensed in any way for this loss?²³ One way of conceptualising what this enforcement strategy takes from them is in terms of a lost legitimate opportunity and the material gains that may have accompanied its successful exploitation. Suppose the intellectual commons consists of the set of ideas [a, b, c... q, r, s] and from this Mary, our original inventor, innovatively arrives at idea ϕ . Our intellectual property regime, acting on the above enforcement strategy, grants Mary monopoly rights over the proposition ϕ . John, another inventor working in the same area has lost the opportunity of being able to conclude ϕ from the set [a, b, c... q, r, s] and then being entitled to use ϕ as he sees fit.

There is a way, however, that John might be to some extent compensated for his loss. For Mary's idea ϕ is not merely a conclusion. It can also serve as a premise for some further innovation. If John were to be supplied with the idea, such that he has unfettered access to the set [a, b, c... q, r, s, ϕ] then there may be a variety of further useful and economically profitable ideas that could occur to him. This solution would allow John the use of ϕ for the purposes of researching further profitable ideas. If this is correct, then strong research

exemptions to the patent regime are justified. Also, dissemination of the registered idea to potential Johnny-come-lately's becomes important. This gives an impetus to those parts of the *first sale doctrine* within copyright law allowing for, *inter alia*, the existence of libraries.

Let us now turn to the question of whether this enforcement strategy interferes with the position of the other stakeholders in the Contracting Situation. In order to protect the buyers of ideas, we must consider the temporal ambit of the artificially-protected monopoly. As we saw in the Contracting Situation, there are reasons to think that any inventor's monopoly will be temporally limited, ultimately to be dissolved by a Johnny-come-lately. It thus seems clear that sellers should not have a perpetual monopoly over their idea. Just as the monopoly is being artificially sustained, so too it must be artificially dissolved. To fail to do so would not reflect the position of buyers of ideas within the Contracting Situation, who can always choose to hold out for the dwindling prices created by the appearance of a Johnny-come-lately.

While it is therefore imperative that such rights be temporally limited, my account does little to specify a particular time-frame for these sunset-clauses. In the cases of highly-personal and idiosyncratic creations (such as the lyrical expressions of ideas) where we might suppose Johnny-come-lately independent creation is extraordinarily unlikely, there may be few temporal limitations. When it comes to the discoveries of facts, Johnny-come-lately independent creation is extremely likely – so much so that for many discoveries we might consider not protecting monopoly rights at all. The grey area in between these poles is vast, however, and my account is too speculative to suggest that temporal limitations should be a specific number of years. At best, perhaps, all we can say is that initial creators will be aware of a Sword of Damocles hanging over their golden goose (to mix metaphors intolerably) and their economic plan will probably be to get in and get out as quickly as possible, with as

much as possible. If so, we may only be able to gesture towards a wide window, within which any particular limitation seems reasonably justified.

The last set of issues to consider regards the position of both third-parties and buyers. This consideration impacts upon the selection of *which ideas* should be allowed registration. This decision may appear innocuous. There was no need within the confines of the Contracting Situation for the state to choose between which contracts to enforce on the basis of the nature of the idea, so we might assume there need be no strictures on entry into the registry. This would be a grievous mistake, however, and would lead to the creation of artificial value. Ideas of no worth at all in the Contracting Situation could suddenly acquire great and entirely unwarranted market value.

To see this, recall the most profitable types of ideas in the Contracting Situation. It was noted that novel, innovative, and useful ideas would command high prices. Imagine now that Mary has come up with a novel idea, but with little innovative thought, and no specific utility, though it does not seem unreasonable to her that it may at some point in the future become useful to someone. On attempting to contract out the idea Mary finds a dearth of buyers. Even those who agree the idea may in some future situation become useful to them are disinclined to offer any money for it. The lack of innovation makes them feel they could find an alternate creator at a budget price if and when this future need arose. So Mary returns to her desk to do some more serious and hopefully innovative and useful thinking.

Now enplace Mary within our incipient intellectual property rights regime. What might happen if she is allowed to register this same novel, but non-innovative, idea? If in the future this idea becomes useful to someone, they will have to pay Mary for the use of it – despite the fact that they might well have been intellectually capable of thinking it up for themselves. Our regime will have artificially created a market-value for Mary's idea. Without due attention to this problem, the regime could literally allow the 'staking out' of intellectual

space, where any and every novel idea – howsoever trivial and obvious – is appropriated, and registrants simply sit back and wait until one or other of their ideas appears in some inventor’s useful project, at which point they claim unauthorized usage. To avoid this outcome, the regime must carefully choose which ideas it is willing to accept onto its registry, using the Contracting Situation as a touchstone.

Another way the enforcement regime must take care in the selection of ideas for registration will be with an eye to Third Party Cognizance. In the Contracting Situation agents had complete freedoms regarding the utilisation of any ideas that occurred to them in their everyday activities. Just as new types of hairstyles, or ways of kicking footballs, could not be practicably sold within the Contracting Situation, these types of publicly cognizable ideas should not be able to be registered with the intellectual property rights regime. Allowing their registration would violate the very basic freedom of ordinary humans to use all those ideas that naturally occur to them in their daily affairs.

This last point leads us to confront a serious complication. Third Party Cognizance interacts with Johnny-come-lately invention. Within the idealised world of the Contracting Situation it would be entirely permissible for a third-party to apprehend another person’s public use of some sophisticated invention, and then go away and excogitate how this invention must have worked, and all this without ever purchasing the invention or signing a contract. Naturally, duplicitous agents in the Contracting Situation may fraudulently claim to have arrived at their ideas in this way. If so, we will once again be propelled towards our radical enforcement strategy. However, here the complexities are significantly amplified, because there will be some ideas which it is straightforwardly plausible *were indeed created* by legitimate third-party viewing of the public object.

There are many inventions that are utilised in a public milieu but whose actual inner workings are hidden. For instance, to be useful to most organizations a computer cannot be

hidden from the view of third-parties. Third-parties will obviously realise that there exists a type of machine that performs a variety of information processing tasks through inputs from keyboard and mouse, and provides outputs through a screen or printer. What we *want* is for our enforcement regime to make sure that any application of a publicly visible idea cannot be registered. Thus, one may be able to register the software that allows the mouse to move its marker across the screen, but an inventor cannot lay claim – because of the obvious possibility of third-party cognizance – to the basic idea of having a mouse move a pointer across a computer screen. Thus, even though the ‘look and feel’ of the mouse and its onscreen pointer may have been (let us suppose) novel, innovative, and useful, it could not itself be patented, as it breaches the third-party cognizance limitation.²⁴

With such complications in mind, a word on the level of speculation involved in the foregoing discussion of enforcement regimes is in order. Suppose we grant that the two key rights are important and that our polis should take their protection seriously. There is a stronger and a weaker interpretation of the ways we might take the Contracting Situation to have prescriptive force in guiding the formation of our institutions.

On the stronger interpretation, the Contracting Situation provides us with a precise account of the allowed interactions, and subsequently demarcates the appropriate economic opportunities for initial inventors and Johnny-come-lately’s, and the interests at stake for buyers and third-parties. On this account we should aim for our enforcement regimes to approximate our best estimates of the scope of these economic opportunities. In principle I don’t see any reason why, if this were possible, it would not be morally required, at least *pro tanto*. However, to use the model for this purpose is to overlook its inability to provide anything greater than incredibly course-grained economic projections. As noted earlier, the ability to know where to place the sunset clause on patent is particularly fraught. We would ideally wish the artificial monopoly to begin to dissipate around the time Johnny-come-

lately's would counterfactually have arrived on the scene in the Contracting Situation. But the answer to this subjunctive question depends on innumerable and incalculable contingencies, and our answers will inevitably be speculative.

Turning to the weaker interpretation, the Contracting Situation provides us with a moral touchstone for understanding what it means to respect the freedom of all the stakeholders involved; the creators, the buyers, the Johnny-come-lately's, and the third parties. Incapable of offering specific legislative prescriptions, the Contracting Situation can at least let us understand the types of life-choices, activities, and consensual interactions which respect for freedom makes possible. Importantly, it provides a yardstick to the rights and interests of *third-parties*. The history of much recent intellectual property legislation tends to efface entirely the possibility that ordinary citizens have freedoms at stake.²⁵

On reflection we may decide that there are a variety of ways of achieving the broadly construed ideal that the weak interpretation draws out of the Contracting Situation. Perhaps alternative social praxes and state institutions would be more conducive to these freedoms and more protective of these interactions than the enforcement regime I have just sketched. If so, then for some types of ideas and some realms of intellectual pursuit we may think there is good reason to carefully consider alternatives to patent and copyright. The Contracting Situation is, on this reading, a way of thinking about the rights-based issues at stake in intellectual property, but is not a blueprint for specific legislation.

Conclusion

Before finishing, allow me to place the result of this argument within the context of contemporary analyses of intellectual property rights. There are two rights-based reasons we might think that this analysis is not the full story. The first reason emphasizes people's rights

to their labour and contends that they have much stronger intellectual property rights than I have envisaged.²⁶ The second reason (pressing in the opposite direction) asserts people's rights to access and learn information. I have said nothing that refutes either of these contentions. But the argument I have presented, if cogent, has consequences for those who subscribe to either position.

Firstly, labour-based arguments typically justify appropriation-through-labour, in part, through the use of the Lockean proviso: that 'enough and as good' be left for others.²⁷ While there is a voluminous literature on how this provision should be interpreted, a common and intuitive construal is that it refers to whether or not we *worsen the position* of others as compared with their situation before our appropriation.²⁸ If so, then the Contracting Situation is important because it can serve this touchstone function; it sketches the levels of access and control that individuals have to information and ideas before labour-based appropriation occurs.

Secondly, it has been argued that individuals should have, as a matter of moral right, learning capabilities and access to certain types of information.²⁹ If the foregoing argument is cogent, then it is not merely (highly contentious) natural property rights in ideas that press against unfettered learning rights, but also more basic freedoms such as rights to our embodied ideas, to contract and to tangible property. If we wish to respect these basic rights, then the Contracting Situation may be viewed as the backdrop from which alterations in favour of access and learning may occur. Of course, the Contracting Situation proposes significantly weaker intellectual property rights than those found in most current regimes, and so proponents of learning rights will doubtless have substantially less cause for concern than they do at present. Moreover, I earlier sketched some modifications for improving accessibility that could easily be incorporated into the system presented here.³⁰

On a slightly different tenor, D. B. Resnik argues that we should adopt a pluralist approach to intellectual property rights, able to weigh between a congeries of moral concerns including autonomy, privacy, utility, and justice.³¹ For those who find such an approach attractive, my account could be deemed a contribution to such pluralism by outlining the issues at stake for the most basic human freedoms.

Having said all that, I do not wish to water down my conclusions. If we are committed, first and foremost, to the protection of key liberal rights then we have strong reason to accept the propriety of the trade in ideas occurring in the Contracting Situation. In the presence of certain empirical contingencies we may find that intellectual property rights regimes similar to copyright and patent are the most efficient and practicable methods for realising this Contracting Situation. Whether or not these contingencies inhere in our environment, I hope I have said enough to show that respect for basic freedoms has consequences for the formation of our intellectual property rights regimes.³²

¹ E.g. K.J. Arrow, 'Economic Welfare and the Allocation of Resources for Invention', in *Economics of Information and Knowledge*, edited by D. M. Lambertson (Baltimore: Penguin Books, 1971): 141-159. Alex Rosenberg, 'On the Priority of Intellectual Property Rights, Especially in Biotechnology', *Politics, Philosophy and Economics* 1 (2004): 77-95.

² E.g. Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974), pp. 181-2. Adam Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick: Transaction Publishers, 2001). Lysander Spooner, *The Law of Intellectual Property* (Boston: Bela Marsh, 1855).

³ The argument here has affinities with Murray Rothbard's brief early treatment of copyright as tacit consent. Murray Rothbard, *Man, Economy and State with Power and Market: Government and the Economy* (Auburn, Alabama: Ludwig von Mises Institute, 2004), pp. 745-53. The argument I offer here is significantly different however. I enquire into the makeup of a milieu created by actual bilateral contracts, and then I seek to show why rights might best be protected and enforced by moving to regimes not entirely dissimilar to copyright and patent. This process results in prescriptions quite removed from Rothbard's (namely, weaker copyright and at least some patent protection). *Ibid.*, pp. 748-9.

⁴ My focus is on copyright and patent, though parts of the argument have relevance to aspects of trademark, rights of publicity, and plant protection acts. L. Sharp Paine undertakes the important yet more modest project of using moral injunctions similar to my two core liberal rights to justify trade-secret legislation. L. Sharp Paine, 'Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger', *Philosophy and Public Affairs* 20 (1991): 247-263.

⁵ In Joel Feinberg's terminology the proffered rights are *prima facie* rights in the 'ideal directive' or 'manifesto' sense. Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J: Prentice-Hall, 1973), p. 75.

⁶ I am herewith committing to belief-desire psychology (folk psychology/the propositional attitudes) that is canonically opposed to the theory of mind known as eliminative materialism. Paul Churchland, 'Eliminative Materialism and the Propositional Attitudes', *Journal of Philosophy* 78 (1981): 67-90.

⁷ E.g., John Stuart Mill, *On Liberty*, edited by Elizabeth Rapaport (Cambridge: Hackett, 2003), p. 13.

⁸ E.g., John Locke, *Two Treatises of Government* (New York: Hafner, 1947), Bk. I: §42, Bk. II: §23.

⁹ Russell Hardin, 'The Utilitarian Logic of Liberalism', *Ethics* 97 (1986): 47-74, p. 54.

¹⁰ I have moved directly to discussing the sale of *novel* ideas. However, the two rights will evidently render intuitive answers for the rights of agents to negotiate the sale of services communicating other ideas, from teachers giving lessons, to doctors providing diagnoses, to spies relaying reconnaissance, and so forth.

¹¹ All three problems are neatly summarised in Arrow, 'Economic Welfare and the Allocation of Resources for Invention', pp. 615-6.

¹² These property rights need not be strong in any sense that would prohibit, say, welfarist taxation. As such, they will be broadly acceptable to most liberal purviews.

¹³ J. E. Penner, *The Idea of Property in Law* (Oxford: Clarendon, 1997), pp. 78-80.

¹⁴ Tom Palmer observes that we need an explanation of what happens in contractual copyright systems when a person did not buy the item, 'but simply saw it, heard of it, or found it'. Tom Palmer, 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects', *Harvard Journal of Law and Public Policy* 13 (1990): 817-865, p. 852, fn. 137. The argument here protects against other persons who *find* the item, but not against others who *see* or *hear* of it.

¹⁵ E.g. consider the importance of such factors in eminent domain doctrine, Adam Mossoff, 'What Is Property?', *Arizona Law Review* 45 (2003): 371-443, pp. 427-439.

¹⁶ Both these well-placed examples are made in Palmer, 'Are Patents and Copyrights Morally Justified?', pp. 853-5.

¹⁷ There is intense debate as to how best to characterize the intellectual commons or 'public domain'. I have in mind a characterization along the lines of Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain', *N. Y. U. Law Review* 74 (1999): 354-446, p. 358. See also Pamela Samuelson, 'Challenges in Mapping the Public Domain', in *The Future of the Public Domain: Identifying the Commons in Information Law*, edited by Lucie Guibault and P. Bernt Hugenholtz (Alphen aan den Rijn: Kluwer Law International, 2006): 7-25, p. 16 (Fig. 6).

¹⁸ Focus on the normative significance of education (in Locke, Rousseau and Dewey) and access to ideas and information (in J. S. Mill and F. A. Hayek) are recurring motifs in liberalism. Recent arguments discussing learning and access rights in the context of intellectual property include Lyman Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens, Ga.: University of Georgia, 1991), pp. 4, 50, 238-40 and Yochai Benkler, 'Free as the Air', pp. 358, 383, 390.

¹⁹ E.g. Locke, *Two Treatises*. Bk. II: §23.

²⁰ If so, then the Contracting Situation may provide a powerful defence of 'fair use/dealing' provisions within copyright.

²¹ For idiosyncratic works such as expressions of fictional imaginings, it might be assumed that Johnny-come-lately independent creation is highly unlikely. To the extent that it *is* likely, the issues of enforcement discussed below become increasingly relevant.

²² For comparison with extant intellectual property rights, copyright regimes *do* (at least in principle) allow rights to independent creators (Johnny-come-lately's). Patent regimes explicitly deny rights to Johnny-come-lately's.

²³ Here I follow Jeremy Waldron's thought that rights involve the creation of successive 'waves of duties'. Jeremy Waldron, 'Rights in Conflict', in *Liberal Rights* (Cambridge: Cambridge University Press, 1993): 203-224, p. 212. Given that we have a conflict between rights, deciding it in one way rather than another does not complete our moral enquiry, for there may be further opportunities for ameliorating the harm done to the victim of our decision.

²⁴ *Q.v. Apple Inc. v. Microsoft Corp.*, 35 F.3d 1435 (1994) where Apple claimed Microsoft infringed copyright when it copied the 'look and feel' of graphic and interface elements of Apple's operating systems.

²⁵ Jessica Litman, *Digital Copyright* (Amherst: New York, 2001), Ch 3. Peter Drahos and John Braithwaite, *Information Feudalism* (Ebbw Vale: Earthscan, 2002).

²⁶ Adam Moore, *Intellectual Property and Information Control*. Lysander Spooner, *The Law of Intellectual Property*.

²⁷ Locke, *Two Treatises*. Bk II: §33, §36.

²⁸ Particularly as compared with their situation in terms of the capacities and material resources required for supporting their lives. This is the use Locke seems to make of the proviso in *Ibid.* Bk. II: § 35, §37. See also A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University, 1992), pp. 282, 292-3. Nozick, *Anarchy, State, and Utopia*, p. 177.

²⁹ Re learning see: Patterson and Lindberg, *The Nature of Copyright*, pp. 4, 124-8, 210-7, 238-40. Re access-rights see: Benkler, 'Free as the Air', pp. 358, 383, 390.

³⁰ See §II and text accompanying nn. 17-18.

³¹ D. B. Resnik, 'A Pluralistic Account of Intellectual Property', *Journal of Business Ethics* 46 (2003): 319-355, pp. 322-327. Resnik's discussion of autonomy does not address the basic rights posited in this paper. Rather it is limited to discussion of Lockean property rights and Hegelian person-hood.

³² This paper has benefited from critiques of earlier drafts by Julian Lamont and two anonymous reviewers for *Politics, Philosophy, and Economics*.