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INCONSISTENCIES IN PREVALENT APPROACHES TO INTELLECTUAL PROPERTY

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Abstract

The entire ethos of the postmodern and post-industrial world is being transformed. The changes felt in the postmodern era are reflected at the level of economic and social order. Businesses now focus on producing intangible goods, in accordance with the increasing demand of today's society. Of the numerous issues brought to the forefront of cultural, social and philosophical thought and discourse by the changes inherent to postmodernity, the issue of intellectual property rights is one of the more poignant. In this article I will try to stress why intellectual property is becoming an acute problem in our world, a problem which is affecting more and more people. Taking into consideration all the inconsistencies generated by the anachronic application of intellectual property institutions, we need a new approach and a new institutional framework, one that incorporates the interests of the public and is suitable to the dynamism of our ever changing society.

Keywords: postmodernity, art, intellectual property, copyright, property rights, John Locke.

Today's society is a post-industrial one, and, as such, its economic landscape is dominated by specialized services, access to information and advanced technology. In this era of increasing globalization and automatisisation, secondary sectors which used to rely on manufacturing are gradually disappearing, being replaced by niche services which employ advanced technology. This mutation of the economic order brings about changes at a societal level. More precisely, the ethos of the modern world is being transformed and replaced by postmodern and post-industrial mutations. Most successful business models today are based on the production of intangible goods, as opposed to old models which were focused on producing tangible products (Hettinger 1989, 31). The characteristics of the postmodern era mentioned above are raising numerous problems which are leading to the reevaluation of the legitimacy of intellectual property. At this point, a distinction should be made: the objects that fall under the protection of intellectual property are ideas, information and other products of the human

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mind that can be commercialized; intellectual property institutions that are meant to protect the objects mentioned above are copyrights, patents, trade secrets and trademarks. In this article I will try to stress why intellectual property institutions are becoming an issue which is affecting more and more people through generating inconsistencies². In the first part, I will approach the way intellectual property institutions are engendering postmodern art. More precisely, I will analyze the transformation that some forms of art suffer, in the process of being created, consumed and internalized. In this section, the discussion will aim to show why the institutions that are governing intellectual property are anachronic, due to their intensification and failure to take into consideration the changes that are affecting our society as a whole. The second part will be focused on deconstructing the prevalent grounding of intellectual property, the Lockean one. The foregoing discussion implies that there are contradictions inherent in the attempts to justify intellectual property institutions by appeal to Locke's theory of property. Also, the argumentation will uncover why the analogy between tangible objects and intangible ones isn't strong enough for the transfer and application of Locke's theory of property to ideal objects. In the conclusions I will merge the two parts, showing why intellectual property has damaging effects on a societal level, and why at the level of its grounding, the attempt to justify the existence of IP on Lockean foundations fails because it does not take into account some important points of Locke's theory of the emergence of property.

1. The Clash of Postmodernity and Intellectual Property Institutions

Our society is often called a computerized society (Lyotard 1984, 7). This means that the digitalization of all aspects of our lives is growing more and more important. These phenomena lead to a substantial increase in the power of personal and digital means of communication and in the acquiring or production of information, which are directly dependent on the Internet and pertaining technologies. The digital production of information and the growing accessibility of new technologies allow the majority of users direct interaction with the information and data that they create, transmit and receive, by making it possible to alter every bit of it. However, these rapid changes are having a serious effect on the social, legal and political level. As such, creators are in constant conflict with the public concerning intellectual capital and property. The weapons the former use are systematic attempts at strengthening and

² Throughout the article I will be using the term inconsistency as it is referred to in the common vocabulary.

overregulating the Internet and the uses of new technologies, with the help of intellectual property institutions.

One of the fields in which these changes are most easily observed is art, which is itself altered by the increased digitalization of life. The creative process is now open to almost everyone thanks to new technologies. Postmodern art is increasingly democratic, and everybody can participate in the creation, dissemination and transformation of pieces of art. This change is not unnatural in itself: “For as long as art has existed, it has been in flux. That is, art has always gone through a process of denial of its very essence, its right to be art and then redemption, usually in the form of critical acclaim and then institutional acceptance” (Tang 2011, 72). This new type of art, postmodern art, is deeply rooted in the social sphere and has strong political consequences. Sometimes, art is not just one man’s expression but a collective affirmation of an issue that touches everybody in a community (for example Ai Wei Wei’s work). In a certain way, “contemporary art is about learning to inhabit the world in a better way” (Bourriaud 2002, 13). Art in itself is “a game, whose forms, patterns and functions develop and evolve according to periods and social contexts; it is not an immutable essence” (Bourriaud 2002, 11). Hence, art is ever changing by means of being contested, questioned, critiqued, and then accepted and even institutionalized. This is the natural trajectory of art, it is a process that starts with the creator and ends with the public³.

The postmodern era is characterized mainly by skepticism towards metanarratives, by the fragmentation of absolute values, abandonment of the quest for an objective truth and the acceptance and integration of subjectivity in every aspect of our lives (Lyotard 1984, 37). All the manifestations of postmodernity that I have mentioned above are present in the way people create and internalize art. Postmodern art is often called remix art, a kind of making, creating and disseminating art that encourages derivative works. Navas (2010) defines remix culture as follows: “Generally speaking, remix culture can be defined as a global activity consisting of the creative and efficient exchange of information made possible by digital technologies. Remix, as discourse, is supported by the practice of cut/copy and paste”. This also captures the new way of making art, which in turn, is based on appropriation. Appropriation is the process of incorporating and combining pre-existing works in a new piece of art (Schimanoff 2002, 13). The purpose of this process is to use already existing images, videos, music, and thus re-contextualize them in order to obtain a more relevant work of art that signifies more information and

³ I am assuming here a Hegelian account of art. Even though it might seem west-centered, it is the only approach that serves for our purposes, taking into consideration that intellectual property institutions were conceived into this framework.

symbolizes more thoughts and ideas about contemporary society, especially for the digital natives.

Moreover, new technologies allow people to partake in the creative process and become an author. Everybody can create new pieces of art from pre-existing material with the help of a mobile phone, camera, computer or other devices. They can even share it with the rest of the world through the Internet, in the blink of an eye. This is the same process that permits the dissemination of information, news and any bits of data that one may consider useful. This translates into the fact that the categories of creators and the public are becoming deeply intertwined, before finally fading away or transforming in what is now called a 'conducer' (a hybrid between consumer and producer) (Reuveni 2007, 1802). Hence, postmodern art is completely different from modern art. What differs is precisely the way in which people create, receive, share and interact with it. In this ever changing context, the institutions that govern ideal objects are becoming the political, social and institutional material that dictate and delimitate the possibility of a society to continually develop and create the culture that serves as its foundation. Because one cannot freely use an ideal object that is under copyright institutions for the purposes of remixing, without paying a considerable amount of money to the owner of these rights, art is stagnating and progress is being stalled⁴. Moreover, many pieces of art don't get to see the light of day because the cost of finding and negotiating with the copyright holder are too high (Posner 2005, 183). In a postmodern culture that is becoming more and more democratic, participative and reflective, any law or institution that tries to change or stop the natural flow of society and that imposes tough penalties for its breaching, is actually causing more harm than good, by stopping the progress of Arts and Sciences (Williams 2011, 53). In a postmodern world, progress is what subjects systems of knowledge to be criticized, analyzed and sometimes changed. What intellectual property does is precisely to make it difficult for individuals to change the superstructure⁵ of their communities, a thing that is fundamental for a free society. Postmodern

⁴ Throughout this article I am referring to the Progress of Arts and Sciences as is meant in Article I, Section 8, and Clause 8 of the Constitution of the United States. A possible synonym is spread, diffused. For further reading on the ambiguities around the concept of Progress see Pollack, *What Is Congress Supposed to Promote? Defining "Progress" in Article I, Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause*.

⁵ In this article I am referring to superstructure as it is defined by Marx: "Upon the different forms of property, upon the social conditions of existence, rises an entire superstructure of distinct and peculiarly formed sentiments, illusions, modes of thought, and views of life. The entire class creates and forms them out of its material foundations and out of the corresponding social relations. The single individual, who derives them through tradition and upbringing, may imagine that they form the real motives and the starting point of his activity". (Marx, *The Eighteenth Brumaire of Louis Bonaparte, Chapter III, Rise of Louis Bonaparte*, <http://www.marxists.org/archive/marx/works/1852/18th-brumaire/>).

culture has developed into one that acknowledges and empowers the average users of the Internet and new technologies, by offering them the necessary tools for expressing themselves, resulting in the emergence of a semiotic democracy (Williams 2011, 53). Along similar lines, Marshall McLuhan argues that: “The medium is the message. This merely to say that the personal and social consequences of any medium – that is of any extension of ourselves – result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology” (McLuhan 1964, 7). This means that the Internet, with all its pertaining techniques (including remix art and culture) and technologies are transforming our society structurally, in ways that we cannot yet perceive. Remix art, and more generally remix culture, are the effects of the digital medium, a medium that is affecting the world on a multitude of levels from inter-personal dynamics to the societal and political levels. *In extenso*, remix culture is not a disposable and low culture, but a new way of presenting and representing the world; and this means that copyright institutions should not impede and should not obstruct or even stop the creation of such art. Moreover, intellectual property institutions, by means of overregulating, are affecting both the medium and the message of a new era of digital innovations. What we need is a new design for intellectual property institutions, one that manages to integrate, allow and even encourage the art of remix and collage and all forms of art that are yet to come, and also one that integrates the interests of the public.

2. Problems with the Lockean Grounding of Intellectual Property Rights

Taking into consideration all the problems generated by the anachronic imposition of intellectual property rights on ideal objects in a postmodern era, my next step will be a critical assessment of the Lockean justification of these rights.

The current literature on intellectual property abounds with new justifications and theories. But throughout time, there have been four persisting theories that served as the groundwork for the development of a legal framework concerning intellectual property. One of the most common justification is the natural law right to the fruits of one’s labor. Just as one has property rights over the physical products of one’s labor (be they crops, or any other objects) so one has property rights over the intellectual products of one’s mind (Palmer 1990, 819). Another tradition is the personalist one that states the necessity of property rights for the proper development of personality. There is also the utilitarian justification that bases itself on providing incentives for the creation of socially optimal output of intellectual objects (Hettinger 1989, 48). Another attempt to justify intellectual property rights is to derive them from the retention of property rights in tangible objects. Ownership rights are in this view

a bundle of rights that can be modified and rearranged in order to satisfy both parts of a contract (Palmer 1990, 820).

Among these, the most prominent directions of argumentation in favor of intellectual property rights in ideal objects is the labor-based moral desert theory, which finds its roots in Locke's argument for labor as the foundation of property (Palmer 1990, 890). Proponents of intellectual property apply the same scheme of argumentation as Locke does for tangible objects, in the case of authors, creators and inventors, implicitly for their creations. The view that the author/creator deserves to be rewarded is very much in line with the prevalent view concerning intellectual property. Even though *prima facie* this strategy seems consonant with our common sense, upon a more careful analysis some inconsistencies can be spotted. The first and most important objection to the Lockean justification of intellectual property is the impossibility of the coexistence of liberty and intellectual property.

For the Lockean theory of property to be fully functional, we need to identify the grounds for the justification of the importance of private property. In numerous interpretations, the base on which the whole edifice of property in tangible objects is constructed is the provision of a sphere of liberty (Attas 2008, 33). This sphere of liberty is meant to provide a tangible zone necessary for rendering available the material goods for subsistence (either by itself, or through contracts and exchanges), and the assurance of the level of independence necessary for developing autonomy, that is called self-ownership (Tavani 2005, 88). If an individual is the owner of one's own body, then everything that the body does, namely labor, is also in that individual's property. Because the product of one's labor cannot be separated from the person's labor, ownership of the latter is assured only by owning the former. In other words, ownership of one's person and labor is translated into ownership of the fruits of one's labor. Hence private property is derived from self-ownership (Hettinger 1989, 37). Private property is seen as a contract between an individual and the rest of the world, through which the individual can control the way other people interact with the respective object. This type of property guarantees the liberty of the owner, but limits the liberty of other individuals. Turning back to intellectual property, a natural question appears. More precisely, is there a strong analogy between the consequences of property in tangible objects and that in intangible ones? The answer is clearly no. While property in tangible objects limits the liberty of some individuals concerning a particular object that in intangible ones restricts the liberty of all individuals, no matter the time or the space, because it restricts the use of their own bodies in a certain way (Palmer 1990, 831). Moreover, the right to sell the fruits of one's labor on the market is not a natural right, but a socially created phenomenon that can interfere with other's people autonomy (Hettinger 1989, 40). For example, if a certain dance or way of constructing radios are under the protection of

copyrights or patents, those that are not the owners are prohibited to use their bodies in the way specified by the dance or to engage in the activity of building a radio (even if they legitimately detain the necessary materials). The way in which intellectual property restricts liberty doesn't depend on the material or spatial conditions of accomplishing an action (Attas 2008, 33). Moreover, intellectual property implies a right to control people, mostly because it is enforceable by force and because it is very large in scope. While property in tangible objects limits the liberty of some individuals in relation to a single object, intellectual property limits an entire spectrum of actions for all individuals, regardless of time or the space (Palmer 1990, 829). In fact, asking for property rights over a process (for example, that of building a particular smart phone) is tantamount to asking for an umbrella-right over the actions and the way in which individuals use their bodies.

The main reason for which intellectual property restricts liberty is that the imposition of copyrights or patents is aimed directly at restricting the way in which an individual can interact with his private property that he legitimately acquired (Palmer 1990, 830). For example, if an individual buys a lamp, he can use it as he wishes. He can take it apart and reuse the remaining components, he can try to figure out its mechanism for building other lamps, or he can ask for money if anybody ever wants to use it. All these actions are perfectly legitimate for a tangible object that is protected by private property. But things are completely different for ideal objects. If one buys a painting, even though he is *de facto* the owner of that painting, he cannot do as he wishes with it. He cannot modify it, he cannot copy it, and he cannot disseminate its pictures. So, the right of ownership of the creator or the producer outbalances the property right of the buyer/consumer. Granted, we don't have a hierarchy of property rights in tangible and intangible objects, but even so, it seems that the first category is seen as more important at an individual level in the present legal and political frameworks.

In debates regarding intellectual property, two concepts that seem to have shaped and developed modern society – liberty and private property – are being left aside. Moreover, they are systematically ignored, being seen as of secondary importance to intellectual property rights. Accordingly, creators and producers, in other words, owners of intellectual property capital, can assume a post-sale right of controlling the way in which the object legitimately bought by an individual is being used. In the process of restricting the use of one's private property, liberty disappears as well. All the conditions imposed for using the instantiations of ideal objects in material substrata, transcend a limited sphere of actions and aim, more directly and profoundly, at individual liberty (Palmer 1990, 830). Not only do creators of content assume property rights after the title exchange, but they also feel justified in encroaching upon the private sphere of individuals in order to control the way in which they use certain objects.

A second possible problem with the application of the Lockean argument of property to ideal objects is the inconsistency of the analogy between property in physical objects (to which Locke specifically refers) and that in ideal objects. These two kinds of objects are qualitatively different (Tavani 2005, 87). Even though at a first glance the moral desert of those who, through their work, alter certain goods (either physical or ideal) is indisputable, the use of the same legal framework in both cases doesn't hold, in virtue of the different nature of the objects concerned. A clear distinction should be made: private property refers to the ownership of a material good, which falls under the category of scarcity, rivalry and exclusivity; intellectual property rights are rights in ideal objects that should be differentiated from the material substrata in which they are instantiated (Palmer 1990, 818). One should keep in mind that intellectual property rights offer the owner property in every single physical object that his idea or creation instantiates. Moreover, the different nature of these two types of objects is in part determined by scarcity, rivalry and exclusivity which are not typically consistent with ideal objects (Tavani 2005, 92). While physical objects are characterized by scarcity, meaning that they are limited, and the use of a unit deprives other human beings of the same unit, ideal objects do not fall under this category, especially not in the digital world (Hettinger 1989, 32). This means that everybody can benefit from the use of a movie or a book in digital form, without limiting the number of units available for others, because the marginal cost of providing an additional copy to another user is zero (Hettinger 1989, 32). Although sharing has the effect of preventing the original owner of the intellectual object to sell his property to the public, one should take into account that sharing doesn't hinder in no way personal use (Hettinger 1989, 33). In essence, ideas cannot be counted and indexed. My use of an idea doesn't affect anyone; moreover it can improve the idea, therefore amplifying its utilitarian value. Hence, property in physical objects and that in ideal objects cannot be reduced one to another, and the settlement of a legal framework for one of the categories doesn't offer the conceptual scheme for creating the institutions that are going to govern the other category (Posner 2005, 173).

3. Conclusions

The clash between owners of intellectual property and the public is becoming a cultural war. Current institutions governing copyrights and patents are anachronic, meaning that they are not in concordance with the global changes that alter the modern status-quo. When the majority becomes criminalized by laws drafted by a minority, it is clear that something has gone wrong. We need a new design for intellectual property institutions, one not only

that takes into consideration the interests of creators and producers, but also those of the public.

I have tried to show why the institutions that were created some hundred years ago are not adapted and revised for a better application and functioning in a postmodern world. A culture that becomes more and more democratic, participative and reflective needs institutions that defend the development and improvement of each human being, no matter his or her financial status. On a societal level, it is observed that these institutions affect not only the public, but sometimes even creators, by not allowing them to recreate and remix already existing pieces of material into new content, a new work of art.

From a theoretical perspective, things are not much brighter either. One of the most used arguments in favor of intellectual property is the labor-based moral desert theory. Even though, at a superficial level this theory seems suited for application even in the case of ideal objects, on a deeper level a number of inconsistencies appear. One of them is the impossibility of applying the same theory for objects with a different ontological nature. If such a theoretical framework is suited for physical objects, in the case of ideal objects things are completely different. Locke's theory of property is constructed in order to avoid the waste of limited resources and to provide a context in which these resources are efficiently valued. This means that the main concept taken into account is scarcity. If this theory is wonderfully applied in the case of physical object, for ideal objects it just doesn't work. And this is mainly because ideas aren't subject to scarcity. In the end, if the present institutional framework works on this basis, as I have shown above, the consequences are severe: the restriction of liberty.

What we need is not the abolishment of intellectual property institutions, but a new design for them, one that is grounded in a theory that takes into consideration the nature of ideal objects and the present conditions of our society. For this cultural war between creators/users to stop, we need a new approach towards intellectual property that is well founded and avoids the severe consequences I mentioned above.

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