A Classical Perspective on Information Ownership

Author : David Fagundes

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Jeremy N. Sheff, *Jefferson's Taper* (Feb. 11, 2019), available at SSRN.

It's not news that normatively fraught debates in legal academia tend to become polarized and then stuck. Scholarship often tends to cohere around preexisting camps, causing debate to focus on which camp (and who within each camp) is right and to ignore the possibility that the available framings may have missed something important. In light of this, one of the most valuable and refreshing moves an article can make is to throw a bomb into the long-accepted binary of a given academic debate by suggesting an entirely new way of thinking about an issue. This is precisely what Jeremy Sheff does to the debate over foundational concepts of information ownership in his fascinating and provocative draft, *Jefferson's Taper*.

Here's the backstory: Some scholars favor a limited vision of information owners' rights and tend to embrace what has become known as the utilitarian theory[1] of copyright and patent. According to this view, property in creative expression or inventions is not rooted in any notion of "right" other than the state's positive law. Rather, the state grants monopolies in information only because (and to the extent that) doing so is necessary to incentivize the creation of things that would earn no profits for their owners absent law's imposition of exclusive rights. Other scholars prefer a more expansive vision of owners' rights; these scholars tend to advocate an alternative view of copyright and patent rooted in the writings of John Locke. This approach locates a pre-political right to ideas in the labor expended in creating them and rejects the notion that copyright and patent are nothing more than state-created monopolies designed to calibrate the optimal level of creative and inventive production.

Adherents of each side in this debate have produced a wide variety of authorities for each view, but none has been as influential as Thomas Jefferson as expressed in his letter to Isaac McPherson. In that letter, Jefferson uses the metaphor of lighting another's candle to make a point about the non-rivalrous nature of intangible property: "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light, without darkening mine." (P. 5.) He deployed this example to argue that "inventions … cannot, in nature, be a subject of property." (P. 5.) The Parable of the Taper has become a shibboleth for those who prefer the low-protectionist "utilitarian" view of copyright and patent.

But what if Jefferson meant something else entirely by the Parable of the Taper? This is the tantalizing question that Sheff investigates. He begins by pointing out that in all likelihood Jefferson did not come up with the Parable on his own, but rather borrowed it from Roman statesman and philosopher Cicero, who used the same story with slightly different phrasing in his philosophical tract *De Officiis*. Did Jefferson's uncited reference to *De Officiis* suggest that he shared Cicero's basic approach to property? If so, that may reframe entirely the meaning of the Parable of the Taper, and indeed the common understanding of Jefferson's position on how to regulate ideas.

We commonly assume that Jefferson is a scion of the Enlightenment and its modern assumption that all persons are created equal. (A proposition that Jefferson adhered to at best in theory not practice, given that he was a slaveowner.) But the pre-Enlightenment Classical tradition of property—which has its roots in Cicero, among other ancients—assumed instead that people are necessarily born unequal. Consequentially, the challenge of law generally, and of property law in particular, is how to allocate rights among people in light of their inequality. Cicero's view of property in particular was elitist and conservative. It accepted without question preexisting distributions of property and offered arguments about how and why these distributions should be preserved.

Sheff is careful not to argue that his discovery proves that Jefferson adhered wholesale to a pre-modern, Ciceronian worldview on property and equality generally. But he does imagine what it would mean to think about copyright and patent through this lens with provocative results. For one thing, in the passage from which Jefferson borrowed the parable, Cicero discusses the obligation of property owners to engage in acts of beneficence, at least toward those who merit such acts. The point of Cicero's relating the parable is that he regards the duty of beneficence to be at its zenith when acting generously costs owners little or nothing, as when someone asks to light their lamp with yours. Sheff suggests that this could be read to mean that Jefferson's view of copyright and patent included the conviction that owners of copyrights and patents had obligations to share the fruits of their intellectual labors with the public. This reading translates the deeply conservative Ciceronian view of property into one that is—in this application, at least—generous and public-spirited.

Sheff's article is enlightening well beyond the ambitious thesis he seeks to advance. For one thing, his eloquent writing makes the seventy-seven pages of historical and philosophical exegesis read like a pleasure, not a slog. For those of us who know little of the Classical tradition of philosophy, Sheff's article is a fascinating and useful primer that moves from a deep dive into Cicero to a tour through Aristotelian, Thomist, and Grotian views on property. One criterion for what makes an article worth reading is that in so doing, you learn something new and important. In this sense, Sheff's work succeeds masterfully.

But how important was Sheff's discovery? He makes a very strong case that Jefferson borrowed the parable of the taper from Cicero, but extrapolating from use of that one metaphor that Jefferson more generally embraced the Ciceronian worldview on property represents a fairly large conceptual leap. Sheff does not, for example, substantiate this suggestion by citing any other passages from Jefferson's writing that embrace the Classical approach to property. And while I am no Jefferson scholar, I am fairly confident that there are indications that he instead embraced (again, with astonishing lack of awareness given his ownership of slaves) the modern Enlightenment view that all people are born equal.[2]

Yet this does not detract from the success of Sheff's article in light of its major ambition: His piece is best viewed not as a claim about Jefferson's own beliefs, but as an attempt to breathe life into the sclerotic debate in copyright and patent between low-protectionist utilitarians and high-protectionist Lockeans. In *Jefferson's Taper*, Jeremy Sheff invites us to think more broadly about the range of philosophical traditions that may illuminate our understanding of owning ideas, and more generally serves as a reminder of the importance of bringing fresh perspectives to scholarly debates with long-fixed battle lines

1. Sheff is right that legal scholars refer to this theory using the term "utilitarian," but this usage is not quite right. This theory of copyright and patent is consequentialist because it looks to outcomes: How well does a given regime of exclusive rights maximize creation and invention? But it is not utilitarian because it does not (necessarily) adopt a Benthamite greatest-good-for-the-greatest-number framework for evaluating the normative appeal of that regime.
2. For example, the familiar language from the preamble to the Declaration of Independence that it is a "self-evident" truth that "all men are created equal."

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