

## Abstract

### **Henry George and the Open Knowledge Commons**

This paper draws on some central themes in Henry George's philosophy of economics in order to address the issue of access to the internet commons and more specifically the issue of copyright and the proposed settlement of the class action lawsuit between authors and publishers and Google with respect to the scanning of copyrighted texts. George argued, on moral grounds, that one can have an exclusive property right to the products and exertions of one's labor. If there is an identifiable commons to which all have an equal claim to access and an equal right of natural opportunity, then compensation must be paid to all for the exclusive use of this commons. For George, patents and copyrights are not the same thing because they are qualitatively different claims to the commons. Patents violate the universal right of equality of access to pre-given or discoverable ideas or designs and the natural right of equal liberty. Copyright does not violate the moral law because it does not prohibit anyone from doing a similar thing, only an identical reproduction. These principles will be applied to an evaluation of whether or not the proposed settlement of the Google class action lawsuit is a moral and economic violation of the open knowledge commons.

Key Words: Henry George, Google, copyright, internet, patents, moral law, licenses, natural right, philosophy of economics, Republic of Letters

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## INTRODUCTION

The settlement between Google and the Authors Guild and the Association of American Publishers (Final Fairness Hearing on June 11, 2009, now rescheduled to October 7, 2009) with respect to access to digitized books has brought to the fore fundamental issues about the enclosure of the Internet commons. In terms of culture, knowledge, education, progress and private versus public sector interests few lawsuits have sparked debate as intense as this feud over who should get the spoils of intellectual labor. It is a classic community versus private corporation battle, of competition versus monopoly, of access and gate-keeping, of worthy causes and monied power, all colliding over our cultural patrimony and indeed over the intellectual scaffolding of our civilization.

The technology is new, but not the controversy. The protection of monopoly interests and profits has been as much a part of the history of civilization as has the equally powerful forces in history which have sought to erode and eradicate those monopolies. The history of economics, especially in its modern narratives since the Physiocrats and Adam Smith, can be seen from multiple perspectives as an analytic history of the ebb and flow of monopoly power.

Henry George conceptualized monopoly power in terms of the private capture of economic rent. His discussion of the rights which attach to the products of intellectual labor follow from and are consistent with his overall normative approach to economics. It is, however, a normative approach which encompasses and enhances efficiency arguments for the material advancement of society. Intellectual labor is that which is most directly shaped, diminished or augmented by the “socially conjoined effort,” and any law, agreement, convention or undertaking which obstructs such effort must be seen as inhibiting the advancement of civilization.

The advent of the Internet commons complicates significantly George’s advocacy for the protection of author’s rights and income. Myriad problems of enforceability, ease of reproduction and remix, the profit-making power of social communities through “peer production,” and the necessity of global licensing arrangements in order to even modestly protect rights-holders require innovative legal and institutional structures that George could not have imagined. The question now is whether the Google settlement is in keeping with George’s basic philosophy of the commons with respect to intellectual labor or whether it is the creation of yet another monopoly which will impede, rather than advance, the *Respublica literarum*.

## HENRY GEORGE’S PHILOSOPHY OF INTELLECTUAL LABOR

In *Progress and Poverty* (1879) and *The Science of Political Economy* (1898) Henry George articulated the basic tenets of his philosophy of economics. It is important that it be described as a “philosophy” because these texts embody a theory of economic justice as well as a theory of productive efficiency. The two cannot be separated. To treat them only analytically, and not concretely reinforcing, is to engage in economic and social abstractions, which may have the malignant effect of supporting special interests, but which certainly thwart what George called the “socially conjoined effort” and the goals of political economy.

The first principle of political economy is that there is an inherent disposition in human beings “to seek the satisfaction of their desires with the minimum of exertion.”<sup>1</sup> Exchange markets, production, distribution and wealth all integrally flow from this principle. It is not a principle of inclination or of human economic motive, but one that has scientific neutrality as would the laws of motion or chemical affinity. Economics can no more not concern itself with efficiency than could gravitation not encompass concepts of mass and the force of attraction.

How does one apply this principle of efficiency to intellectual labor? One could try to articulate it in terms of individual work practices but that is very difficult to conceptualize when it comes to the labor of authors, inventors, composers and the like. How would one evaluate the tortured workings of a Beethoven versus the divine pre-giveness of a Mozart concerto. Whether one composer spent less time than the other on the ultimate “product” would be very low on the critic’s list of desirables.

The intellectual community or socio-historical context in which the work was created has often been analyzed, but rarely in terms of any recognizable criterion of efficiency. The outcome of the exercise of genius often transcends its age, or sometimes it only consummates it in a manner passed over by that culture such as what happened with the corpus of J.S. Bach. George saw authors as laboring mightily, the exertions of mental life being at least as strenuous as those of the physical. It was not the ideas so much as the particular arrangements of words and notes that are the critical element. Bach was, like many artists of his time, the ultimate remixer, hijacking themes and ideas from other composers and popular culture. In today's world of absolute and pervasive copyright he is undoubtedly a thief, who did not pay for the right to use a sample. How value is created in the Internet commons has become a subject of academic theorizing. Yochai Benkler, for instance, argues that it is access to expertise on the Internet that is a source of value.

How does George elaborate the concept of “economic value” out of the first principle of political economy? The key is the inseparable notions of plus-exertion and minus-exertion. Value, generally is “worth in exchange” and “the value of a thing in any time and place is the largest amount of exertion that any one will render in exchange for it; or to make the estimate from the other side, that it is the smallest amount of exertion for which any one will part with it in exchange.”<sup>2</sup> There is an ineliminable subjective element in value. It is not something that is intrinsic to things. On the other hand, value is not exclusively subjective, i.e. simply a function of the intensity of desire, but rather value is something that flows from how much one is willing to give for something. In effect this is an objective check on the intensity of desire. This is the economic concept of effective demand, or as George states, “the desire to possess, accompanied by the ability and willingness to give in return.”<sup>3</sup> This objective check is competition, or the “higgling” of the market. George's concept of value is not exclusively labor based, like Ricardo's. Although his philosophy of economics is fundamentally producerist, it is not the quantity of labor that is exerted in production that determines value, but the amount of labor that is rendered in exchange for it. Value, determined through competition, is a “point of equation,” or a measurable compromise between desire and satisfaction, demand and supply and it tends to “the present cost of producing a similar thing.”<sup>4</sup>

Land generally, or nature as such, cannot have any value since it is not produced, but created. Or more crucially we may say here with respect to discussions about intellectual labor, it is something that lies to be discovered. However, land as a particular quality, or a certain locality, has no objective delimitter because it cannot be checked by the possibility of production, and thus is not subject to the competitive forces of the marketplace. The value of land which is monopolized, or which has an entry price, is therefore not in the nature of an exchange of service, but one of an “obligation to render service.”<sup>5</sup> This leads us to the all important distinction in George's philosophy of economics between “value from production” and “value from obligation.”

George defines value from production as an addition to the socially conjoined effort or the

“common stock” of a community.<sup>6</sup> This is wealth in the strictly politico-economic sense. Value from obligation “consists merely of the power of one individual to demand exertion from another individual.”<sup>7</sup> This form of value causes a new distribution of what already exists - it re-distributes the common stock, but it cannot be characterized, according to George, as wealth in the politico-economic sense.

In George’s view the single most pernicious and pervasive error in the history of political economy has been its failure to define wealth because it has not recognized the fundamental distinction between these two kinds of value. And because it has not made this distinction systematically and forcefully it degenerated into the common idea that the wealth of a community is the sum of the wealth of individuals. Increases in value from obligation, which impose obstacles to the satisfaction of desire, or which are exertion-plus, are regressive in the politico-economic sense, while value from production which saves future exertion, or which is exertion-minus, is progressive.<sup>8</sup>

A progressive and reformist philosophy of economics is therefore both descriptive with respect to the identification of the negative effect of value from obligation on value from production, for example deadweight losses from income and sale taxes, and normative with respect to its recommendations to remove or reduce monopolistic values from obligation. George likes to use the word “obligation” in this context because it expresses everything which may require the rendering of exertion without the return of exertion. Values from obligation are therefore market destroying and generative of spurious competition, or “effort-imposing activity through domination.”<sup>9</sup> The true, or absolute, value of anything is “the difficulty or ease of acquiring it.”<sup>10</sup> High value usually results from scarcity.

The natural economic philosophy of George views wealth as a “service embodied in material form.”<sup>11</sup> Such notions as immaterial wealth, natural wealth, or natural capital are, in terms of political economy, oxymorons. Production from wealth is not the only purpose of human effort. It is, however, the exclusive focus of a science of political economy. George’s treatment of capital has been generally criticized. In terms of the first law of political economy it is not difficult, however, to understand how capital, by increasing the sum of satisfactions, is exertion-minus. Capital suspends the time in which a given exertion shall be utilized. Capital changes the timing of the exercise of exertion that is utilized in the satisfaction of desire. This enhances efficiency and minimizes exertion. It is the calling of past exertion to present exertion.

In a well known statement, George declares that “all capital is wealth, but not all wealth is capital.”<sup>12</sup> It is very difficult in our capital intensive culture to imagine the creation of wealth without capital. There are three key concepts in George’s view of the relationship between wealth and capital: power, permanence and utility. In a summary passage George states:<sup>13</sup>

Wealth, in short, is labor, which is raised to a higher or second power, by being stored in concrete forms which give it a certain measure of permanence, and thus permit of its utilization to satisfy desire in other times or other places. Capital is stored labor raised to a still higher or third power by being used to aid labor in the production of fresh wealth or of larger direct satisfactions of desire.

All three concepts are linked to the basic idea of economization in wealth-production. The storage of labor in certain concrete forms has an inherent labor-saving power. The second power or capacity for satisfying desire is not capital *per se*. Rather it is a concrete form that can be used at a later time or different place in the direct satisfaction of desire. Capital is stored labor raised to a third power because it is used in the production of more wealth and not in direct satisfaction. Capital is then a form of investment in the wealth-creation process. In the final analysis, capital is resolvable into labor. It is what generally makes the process of production continuous. Capital, in the economic sense, must therefore be involved in the creation of value from production, i.e. in the changing of matter in place, form or condition in aid of further production or in the satisfaction of desire. The Internet is certainly an aid to further production and has facilitated unimaginable efficiencies in production.

Value from production is an economizing process of the more efficient utilization of capital in terms of its inherent power, permanence and ease of utilization. As the Greater Leviathan progresses such values are constantly diminishing. As more wealth is produced through technological innovation and the replacement of labor by capital, there is a diminution of the value of articles associated with economic production. On the other hand, the values associated with obligation tend to increase as society advances. There is thus an inverse relation between wealth and the two forms of value. As wealth increases, value from production decreases and at the same time value from obligation increases.<sup>14</sup> This paradox of true wealth leading to the destruction of value and spurious or relative wealth augmenting a pseudo-value is the direct cause of the tremendous maldistributions of wealth in modernity. And it is these maldistributions that cause the great social and political upheavals which plague modern civilization.

The all important distinction between value from production and value from obligation is equally applicable to intellectual labor. Patents laws add an “artificial reward” that is a form of value from obligation. They have the morally reprehensible character of enclosing the intellectual commons in much the same way as does the privatization of economic rent. Copyright on the other hand protects value from production and is symmetrical with the principle that the right of property is based solely in the effort of the producer.

Finally, the concepts of directed and spontaneous (conscious and unconscious) co-operation are important for resolving the tension in George’s thought between open access to the Internet commons and the producerist claims of copyright-holders. Directed co-operation comes from without and has “a controlling will to a definite end.”<sup>15</sup> Spontaneous co-operation proceeds from within and from the correlation in the actions of independent wills. For George the originating element in all production is thought or intelligence. Thought cannot be aggregated.<sup>16</sup> It

is thus only in independent action that the full powers of humanity can be utilized. The subordination of one will to another will inevitably involve the loss of productive power.<sup>17</sup> George's comments on spontaneous co-operation in *The Science of Political Economy* make him a proto-peer-producer, someone who envisaged well over a hundred years ago the crowd-sourcing, open source, free software advocacy of the Internet commoners.

## GEORGE ON PATENTS AND COPYRIGHTS

There is a brief discussion of patents and copyright in *Progress and Poverty*. George initially subsumed patents under the heading of spurious capital in *Progress and Poverty*. When discussing spurious capital as distinguished from the real earnings of capital, he states:

Receipts from patents granted for a limited term of years for the purpose of encouraging invention are clearly attributable to this source, as are the returns derived from monopolies created by protective tariffs under the pretense of encouraging home industry.<sup>18</sup>

This statement is clearly at odds with his position later in *Progress and Poverty* where the returns from patents and copyright are not seen as monopolistic practices. It should be pointed out that George sees monopolies primarily as a form of pre-emption and secondarily as market dominance. To occupy exclusively a certain location or a particular time-slot, without compensating the community, can certainly lead to market dominance, but its root cause lies in the artificial privilege so granted.

George later recognized the confusion of his thought in *Progress and Poverty* where he equated patents and copyright as “but recognitions of labor to its intangible productions and constitute a reward held out to invention and authorship.”<sup>19</sup> Subsequently he added a note to correct the error and referred to his principal text on the matter which is to be found in *The Standard* (June 23, 1888) under the title “Property in Literary Productions.”<sup>20</sup> The argument there can be summarized as follows:

- (1) there is a fundamental difference between patent for an invention and the copyright for a book;
- (2) patent can only be upheld as a matter of policy, while copyright is a natural right;
- (3) discovery gives no just claim to ownership;
- (4) declaring that *both* patents and copyright give a right of property to ideas;
- (5) the grantee of a patent is given an exclusive privilege or right to produce a certain kind of machine or device or applying a certain combination for certain purposes;

- (6) the grantee of a copyright merely has property in a book, but no property in the content of the book, its ideas, its facts, its thoughts, etc.;
- (7) a work of discovery is effected once, the work of producing things is perennial;
- (8) the idea of a machine gives no natural right to the ownership of the idea, which ought to become after invention or discovery the common heritage of humanity;
- (9) the just or natural reward of labor expended in discovery or invention is in the *use* made of that discovery;
- (10) patent laws add an artificial reward to the natural reward to labor in discovery and interfere with the rights of others to such use;
- (11) the labor of discovery and the labor of production are two components which go into the creation of a book - copyright secures the latter but not the former, and in doing so there is no interference with the rights of other authors;
- (12) patents are a system of spoliation, while copyright is a system of protection of the natural right of ownership in the production of a book;
- (13) copyright is in accordance with the moral law, while patents are in defiance of it.

In terms of wealth creation, copyright simply protects the identical reproduction or reprint of a text without the consent of the author. It is a means whereby value from production is rewarded to the producer(s), the author(s), and their copyright carves out this property right, and thus makes possible an enforceable system of protection against theft, while at the same time preserving, i.e. not pre-empting, the equal rights of all others to the ideas, thoughts, sentiments and conclusions contained in the printed text. George appeared to be in favor of a perpetual copyright, although the limited terms of rights-holders in his time were significantly shorter than today.<sup>21</sup>

The system of patents, on the other hand, creates a monopoly interest or profit for someone who has staked a claim on an idea or a design in its application that existed there all along, for a certain period of time to the exclusion, and pre-emption, of all others to this idea or design as applied. Human law therefore carves out an artificial and enforceable property right, that is an obstacle and legal barrier to all others who may wish to avail themselves of the idea. Patents therefore create value from obligation for the patent grantee at the expense of the rest of society, which must pay for the right to use such a patent. This obviously restricts the division of labor and restrains the advancement of civilization, since only the patent grantee is allowed to engage in the use and application of the patent. Patents thus create inefficiencies and negate the economizing process.

## THE GOOGLE SETTLEMENT

In recent years Google Inc., the premier Internet search engine, has been digitizing books in major university libraries and making them available on-line, the so called Google Library Project. Many of these books were copyrighted. Authors and publishers understandably objected to Google's digitization program and promptly sued the company. Digitization *per se* of an entire book is an obvious copyright infringement and no fine legal arguments need to be made about moral rights, the fair use doctrine and so on.<sup>22</sup> Making available on the Internet large amounts of out-of-print books is universally seen as beneficial to society. It expands the knowledge commons almost unimaginably and democratizes the process of education and enhances innovation. The issue is whether it can be done at a reasonable cost and whether the Google settlement ensures that in the future monopolistic powers will not be exercised in such a way as to erode that reasonable cost?

In one way or another huge public expenditures have been made in many countries on university research libraries and public libraries. Some mechanisms have been developed to protect authors' proprietary interests through developing formulas for compensation based on the lodging of books in libraries.<sup>23</sup> The age of the Internet complicates considerably the plight of authors, given the ease of reproduction of texts and the difficulties of enforcing copyright. A big part of the problem is the current, automatic, default position of copyright. No registration is required and everything is by definition not in the public domain. Many copyright-holders cannot be identified, which has created a whole realm of "orphan works."

In fact, many academics view copyright as unnecessary barbed wire. They are a part of what today is called the "gift" economy, but for centuries were denizens of the *Respublica literarum*. The reasons are obvious. Academics are interested in the dissemination of knowledge and research, have very limited audiences for their writing and could not possibly make a living solely off such publications. The issue has come into the limelight since the Faculty of Arts and Sciences at Harvard voted in February, 2008 that all scholarly articles by its professors be placed online with open access before they are printed elsewhere.<sup>24</sup> Universities as a whole are moving more and more towards electronic journals and various consortia have organized to defray the cost of access to such journals.

Authors who sign on to the Google settlement will receive income for their labor through the Book Rights Registry.<sup>25</sup> Google will also pay \$34.5 million to establish the Registry and \$45 million payment to rights-holders of books and inserts already scanned prior to the settlement date.

## FINAL EVALUATIONS

Internet commoners have tended to view copyright as the main obstacle to the digital commons.<sup>26</sup> Few, however, are calling for an outright abolition of copyright laws. The challenge is to develop licensing practices that avoid the either/or logic of absolute property in copyright or an unconstrained public domain status, which deprive intellectual labor of any reward.<sup>27</sup> The response has been hybrids such as General Public Licenses (GPL) and Creative Commons (CC) licenses.<sup>28</sup> The former, for instance, allow the use of copyrighted software programs so long as any copies or amended versions are made available on the same terms. These types of licenses allow for sharing and collaboration, and thus the expansion of the division of labor rather than its restriction. They are an attempt to enhance George's notion of spontaneous co-operation in the digital republic without totally annihilating the property claims of authors.

Does George's distinction between patents and copyright help us with respect to the current debate between advocates of open and universal access to the digitized *Respublica literarum* and the protection of the intellectual labor that goes into the writing of a literary works and software programs?<sup>29</sup> Certainly George recognized that social communities and indeed the historical accumulation of knowledge and culture over many generations belies any imaginary notion of the isolated genius or writer who can lay claim to a pure mental production *ab initio*, without the help of some form of cultural or intellectual capital.

In this debate George could easily be seen as not so much the defender of the commons as the champion of the intellectual producer. Internet commoners dislike the Google settlement because it uses the principle of expanding access to the knowledge commons as an excuse to construct a dangerous monopoly. David Bollier and others seem to have a legitimate objection that the Internet commons is essentially enclosed if we have to access Google's property to get to it, even if the providers of the content to that property are compensated for their labors.<sup>30</sup> The Google settlement itself is about dividing the spoils of this enclosure between Google, authors and publishers, as is in the nature of any private litigation, and not about the overarching public interest.

What if Google or the Book Rights Registry were a governmental agency? This would fit George's notion of government for the most part being populated by administrative agencies. It would at least make the knowledge commons subject to democratic, society-wide regulation and thus the accountability that would come with it. It would assuage critics who say that a private corporation, even if at present benignly run and well intentioned, cannot over time be trusted.

Does the Google settlement represent a hybrid on the order of the GPL or CC licenses? Not really. Universal access is granted to anyone who has a computer, but for a price. Google will make money from advertising, but more importantly it will get revenue from motivated access-seekers, both individual and institutional. It will have unprecedented pricing power over that access and thus it will be able to control it through pricing. Google has no competitor in this massive digitizing project. It will therefore maintain as far as one can see into the future a

formidable monopoly over the digital *Respublica literarum* - a situation quite unlike the labile world of Aldus Manutius and Isaac Casaubon well over four hundred years ago.

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