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Article

**FINDING A FOUNDATION: COPYRIGHT AND THE CREATIVE ACT**

Darren Hudson Hick<sup>a1</sup>

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What is a reasonable ground for the right of copyright? Approaches to grounding the "right" of copyright come in a variety of forms. In the United States, two views dominate the field, both historically and theoretically: that of copyright as a natural right, and that of copyright as a positive instrumental right.<sup>1</sup> The first is typically framed in terms of Lockean property rights and the second in terms of a state-sanctioned monopoly stemming from the U.S. Constitution. In this paper, I outline these two views and show why each ultimately fails to adequately ground our current notion of copyright law, for reasons both internal and external to each theory. Having shown that the right to copyright, as it is traditionally understood, cannot be supported by these theories, I sketch my own view of copyright as a creative right and then consider some reasonable and probable responses to this view.

**\*364 I. A Quick Primer on Copyright**

Copyright, broadly defined, is a form of proprietary ownership of "authored works," a class of items including literary, pictorial, musical, dramatic, and selected other intellectual kinds.<sup>2</sup> While copyright protection today extends to a wide range of objects, its central objects remain works of art. As a topic of both ethical and legal debate, the volume of literature dealing with copyright, in both historical and theoretical terms, is staggering, and I shall not attempt to summarize it here. However, to grasp the problem at hand requires understanding certain theoretical points upon which copyright rests.

First, copyright protection does not apply to an author's ideas, nor to facts, or information per se, but only to the author's original expression of those ideas.<sup>3</sup> This distinction is known traditionally as the idea/expression dichotomy in copyright law.<sup>4</sup>

Second, copyright protection does not protect any physical object per se, but rather the abstract object embodied in the physical object.<sup>5</sup> At the very least, it is the sort of object that (i) can be created (and, at least theoretically, destroyed); and (ii) is in principle capable of multiple instantiation.<sup>6</sup> The very idea of copyright implies that particular works are created by particular authors, and that these works are capable of being copied, whether in whole or in part. As such, the object protected by copyright seems to most closely align with the notion of a "type," as it is commonly understood in the standard type-token dichotomy of aesthetic theory.<sup>7</sup> I shall take it as such for the purposes of this paper, though other interpretations seem tenable.

Although each of these points is deserving of much greater discussion, both the Lockean and constitutional bases for

copyright have customarily taken them as \*365 granted. I shall do likewise in my own sketch in this article and leave such further discussion to another time.

## II. Copyright as a Natural Right: Locke's Theory of Acquisition

Typically, natural rights are conceived of as a class of conceptually and/or ethically prior rights arising from the nature of their bearers, rather than from social conventions or institutions.<sup>8</sup> Although natural rights theorists diverge regarding which human attributes they contend give rise to such rights, most commonly cited are such attributes of personhood as rationality, free will, and autonomy.<sup>9</sup> Contrasted with views on natural duties, natural rights are ordinarily conceived of as negative rights, barring interference or forbearance by outside parties.<sup>10</sup> Outlined in his *Second Treatise of Government* (1690), Locke's natural-rights approach to property is a familiar one:

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is one joined to, at least where there is enough, and as good, left in common for others.<sup>11</sup> According to Locke, then, one has a sole right to, and property in, one's own person.<sup>12</sup> The common--the Earth and its inferior creatures--are owned by no particular person.<sup>13</sup> But by altering some element of the common through labor (by "mixing one's labor" with it), one lays claim to the result, and so gains a right in it--a claim against all others.<sup>14</sup> This is provided that the laborer has not, in so doing, exhausted the common of this resource.<sup>15</sup>

\*366 One view on Locke's natural right in property, then, is that of a desert.<sup>16</sup> That is, where one has no natural right to the common, but rather only the liberty to exploit it, one deserves a right to the fruits of his labor by virtue of having earned that property.<sup>17</sup> The resultant property is thus removed from the common and placed outside the reach of others' liberty, just as the man himself is outside the reach of others.<sup>18</sup>

For example, say as a settler in a new land, unowned by anyone, I pick a plot and stake it out, marking it as my own. On Locke's theory, I do not yet have a natural right to the land, for I have done nothing to it--it remains in its natural state, and thus belongs to the common. However, upon tilling the land and sowing the fields with seed, I have "mixed my labor" with what was once common to all, and so have claimed a right in it. Moreover, in chopping down trees to build my house, I now own the wood; in building my home upon the plot of land, I should now own the land it occupies. Locke's view is enviable in its elegance.

As Locke notes, however, a right of property based on acquisition extends only insofar as "there is enough, and as good, left in common for others."<sup>19</sup> In citing this restriction, which has come to be known as the "scarcity" proviso, Locke recognized an inherent limit to his theory.<sup>20</sup> Robert Nozick notes in *Anarchy, State, and Utopia* (1974): "[A]n object's coming under one person's ownership changes the situation of all others. Whereas previously they were at liberty . . . to use the object, they now no longer are."<sup>21</sup> In most cases, the change of situation to most people will be essentially a null issue. If I gain ownership in a deposit of oil by mining it, or a deposit of water by building a well, there will still be, in most cases, oil or water available for others to find and use. There is, in Locke's terms, "enough, and as good" left for others.<sup>22</sup> Similarly, our pioneer, by obtaining property in his land by his labor, has not negated others from doing likewise, though, notably, he has restricted the liberty of others to encroach on his land. As Nozick interprets the matter, "Locke's proviso . . . is meant to ensure that the situation of others is not worsened."<sup>23</sup>

\*367 Laying claim to a minute percentage of the available water in an area does restrict the liberty of others in a minute way, but it does not (at least noticeably) worsen their situation, for while water is always, strictly speaking, in limited supply, it is in most cases not so limited that there is not enough for everyone. When it does become a problem, however, is when there is short supply--either not enough, or just enough, to go around. On a desert island with only one source of water, the appropriation of this well by a single individual would, indeed, worsen the situation of any others inhabiting the island. According to the proviso, such an appropriation would be impermissible. The same will be true for our pioneer if he appropriates the only land in the region capable of supporting crops, or chops down the only trees from which dwellings

might be built. The scarcity proviso, as such, is not a problem for Locke's theory, as some have claimed,<sup>24</sup> but is rather an admitted limitation to it, arising from overriding considerations.<sup>25</sup>

Over and above the complications arising from the scarcity proviso, the arena of copyright presents unique problems as a field of application for Locke's theory of acquisition.<sup>26</sup> First, taken at face value, a system of copyright based on a labor-based theory of property seems to protect only the physical object molded by the artisan, for this is the product of his labor, as we normally understand it. Tom Bell notes:

The labor-desert justification of property gives a creator clear title only to the particular tangible item in which he fixes his creativity--not to some intangible wisp of the \*368 metaphysical realm. It speaks only to the ownership of atoms, not to the ownership of bits. Locke himself did not try to justify intangible property.<sup>27</sup> Though Locke does not specifically discuss abstract objects, we might attempt to extend the notion of labor to include mental labor, as some have done.<sup>28</sup> However, such an addendum only shifts the problem. For it seems that, if labor is what we value, so long as a copyist spends the labor needed to fabricate an object (mixing his labor--whether mental or physical--with the common), there is little reason that he should not be free to do so, even if the result is simply a copy of that which is owned by another individual. After all, on a labor-based theory of acquisition, we would not find fault with the pioneer's neighbor, who builds a farm and homestead identical with that of the pioneer, provided he has not removed, nor trespassed upon, any property of the pioneer.

Further, if labor is what we value, we might imagine that, on a labor-based justification of property, the strength of one's ownership would be proportionate to the amount of labor spent: the greater the labor, the stronger the ownership.<sup>29</sup> The reasons for this are not difficult to imagine. As a variation on the earlier case of our intrepid pioneer, consider a case where three brothers set about building a farm (tilling the field, constructing a house, etc.). Two of the brothers work hard from sun-up to sundown; the third putters about, doing a little work, but accomplishing little. When the brothers are finished building the farm, a neighbor offers to buy it from them. If the brothers accept the offer, it seems reasonable that the lazy brother should not receive a share of the payment equal to that of his brothers, for his labor paled in comparison to theirs. That is, his ownership should be less than that of his brothers.

But if ownership is, indeed, proportionate to labor spent, then in at least some circumstances, a labor-based theory of property would seem to extend greater protection to the copyist than to the original artist. In cases where what is copied makes up only a small element in some new work--a "derivative work"--the labor spent by the copyist will often be greater than that spent by the original artist, at least as regards that element copied. The same may also be true, however, for more straightforward cases of copying. For example, Jackson Pollock's paintings are the result of the seemingly random dripping, tossing, and splashing of paint. While these paintings certainly took Pollock time and effort, the copyist who hopes to \*369 create a perfect duplicate of Pollock's Blue Poles (1952) will have to spend a greater amount of labor (perhaps physical and mental) than did Pollock himself, just as the forger of a signature must spend more labor than the original signator in creating the same signature.

The final (and, I believe, deepest) problem with a labor-based justification for the intellectual property of copyright is that such a justification does not, in fact, align with what we centrally value in the objects of copyright and why we tend to think they deserve protection. In valuing an authored work--be it a painting, a film, a poem, or a boat-hull design--it is not the labor (or at least not solely or even predominantly the labor) that went into creating the work that we tend to foreground in our valuation. As Levinson notes in *The Pleasures of Aesthetics* (1996), "When all is said and done, in art we primarily appreciate the product, viewed in its context of production; we don't primarily appreciate the activity of production, as readable from the product."<sup>30</sup> Certainly, we might be impressed with the amount of labor that went into making a work, given the sheer scale of some works, but we might be equally impressed when the amount of labor was minimal, as in a sketch dashed off by Da Vinci or Picasso. More than labor, we tend to appreciate ingenuity, vision, sensitivity, and, if we are formalists, unity, intensity, and complexity.<sup>31</sup> Even if we wish to consider mental labor, we tend to be as impressed with (and value as much) a work stemming from a vision that appeared fully-formed in the mind of its creator as that which took months or years of mental wrestling to create. In short, what we tend to value in works is creativity. Thus, a theory that bases the value of works, and the reason for protecting them, on the labor they involve misses the point. In *The Philosophy of Intellectual Property* (1988), Justin Hughes noted, "The labor theory of property does not work if one subscribes to a pure 'eureka' theory of idea."<sup>32</sup> But, of course, whether the idea expressed in a work appeared in a "eureka" moment, or required years of mental effort to crystallize, it is not the idea that copyright is meant to protect, but the author's expression of that

idea. And, while we tend to appreciate a good idea, in \*370 an authored work I believe we primarily value how that idea has been “brought to life” in the work, be it a painting, a dance, a sonnet, or a bicycle rack design. And this, I believe, may be why we value the efforts of copyists less than that of original creators, even where their labor outstrips that of such creators.

Although the Lockean justification for copyright has a long history in U.S. law, both in court decisions and legal scholarship,<sup>33</sup> the “official party line” in the law has, since 1834,<sup>34</sup> been that copyright is a form of state-sanctioned monopoly granted to authors by Congress.

### III. Copyright as an Instrumental Right: The Constitutional View

The right of copyright officially arises in U.S. law from the passage of the U.S. Constitution that has come to be known as the “intellectual property clause” or the “copyright clause”: “The Congress shall have power . . . [t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>35</sup> As this passage is standardly interpreted, constitutionally speaking, the right of copyright possessed by authors exists to promote the progress of mankind’s body of knowledge--or, to put the matter a slightly different way, “to expand the marketplace of ideas.”<sup>36</sup>

As thus described, a claim over one’s authored works does not arise from a natural right in the work, but is rather a gift that the government bestows on its authors as an incentive to promote society’s pool of knowledge. This thinking behind intellectual property as a socially-mandated, instrumental right is reflected \*371 in the writings of Thomas Jefferson.<sup>37</sup> Although Jefferson was writing specifically about patents, his pattern of thought also reflects the traditional thinking behind U.S. copyright law:

Stable ownership is the gift of social law, and is given late in the progress of society. . . . Society may give an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body.<sup>38</sup> We want authors to pursue ideas because ideas are themselves valuable--perhaps both instrumentally and intrinsically (Jefferson focuses on the former)--not merely to the author but to society at large. Fewer authors leads to fewer ideas. By offering protection to authors as a reward for their work, the state encourages the growth of the “marketplace of ideas,”<sup>39</sup> thus achieving an optimal distribution of interests.

In his seminal work, *Code* (1999), Lawrence Lessig put the standard view succinctly: “[E]ven if some authors write for free, it is still the case that the law needs some intellectual property rights. If the law did not protect the author at all, there would be fewer authors.”<sup>40</sup> And with fewer authors, one can assume that fewer ideas would be contributed to the marketplace. Granted, in principle, existing as they do in the common, ideas are always available to all, but expressing ideas has an exponential-growth tendency. The creation of some new work makes available not only the ideas of that author, but opens up the possibilities of new ideas stemming from those. In this way, providing incentive to create the new work seems clearly in society’s best interest.

Clearly, however, not all works protected by copyright expand the marketplace of ideas. Notably, U.S. copyright law does not require that a work be novel to obtain a copyright; only that it be original to its author--that is, not a copy of some pre-existing work or element thereof.<sup>41</sup> Without a requirement of novelty, copyright provides protection for many works that may, in fact, contribute little-to-nothing to the pool of knowledge or ideas available to mankind. That is, not all authored works contribute to this desirable end. Indeed, as stated in the Constitution, copyright is granted to promote the “Progress of Science” by securing the exclusive right to authors, that is, not merely to authors whose works do in fact \*372 promote such progress.<sup>42</sup> Granting such rights only to those who in fact will expand the marketplace of ideas would require not only unusual sensitivity to the nature of authored works (and extensive knowledge of their history), but also an impossible predictive power. This latter reason, of course, is a regular thorn in the side of act-consequentialist<sup>43</sup> reasoning. Rather, the thinking behind copyright seems to be that, by protecting the sort of product that tends to bring about this good, the government serves society’s best interests.

But, we might ask, is offering protection to the author necessary to promote this activity? That is, without recognition of copyright, would the proliferation of works, and thus the growing pool of knowledge and ideas, slow down and eventually dry up? David Post argues that the Internet serves as a telling case study of what a copyright-free world would look like:

We know how much creative activity we'd get if there were little or no copyright protection in cyberspace, because there has been, in effect, little or no copyright protection in cyberspace. . . . [N]obody in his right mind would voluntarily make information available on the global network in the expectation that copyright law will protect that information (and any lawyer who has been advising clients otherwise is probably guilty of malpractice).

So a "copyright-free" cyberspace would look much like what cyberspace looks like today.

And what does it look like? It looks to me like the greatest outpouring of creative activity in a short span of time that the world has ever seen.<sup>44</sup>

Putting aside the fact that Post mistakes a case of rampant crime as one of no crime, his overall point stands: with full knowledge that anything they put on the Internet, if worthwhile, is likely to be copied, plagiarized, and otherwise infringed, people continue to post essays, photographs, art, movies, and countless other works to their websites and those of others. And somehow, without any expectation of protection, this outpouring of works onto the World Wide Web only continues to increase. And while infringement is rampant, one would be hard-pressed to claim \*373 that there has been any decrease in the rate at which works are added to the body of works available to mankind, and thereby ideas to the marketplace.

Of course, the Internet is not a copyright-free zone, however much infringers might treat it like one. That said, we could easily look back not so far to the time before works were protected by copyright. Long before the state offered protection for authored works, such works flourished. Certainly, Chaucer and his contemporaries were not protected by copyright,<sup>45</sup> and neither were the works of Shakespeare,<sup>46</sup> Bach, or Monteverdi.<sup>47</sup> Indeed, musical recordings were not protected by U.S. federal copyright law until 1972,<sup>48</sup> but a lack of such protection did not prevent the birth and rise of Rock and Roll in the 1950s and '60s, nor any of its musical successors, despite the dependence on the recording industry, the availability of reel-to-reel, and, later, more inexpensive cassette tape recorders, that allowed for easy copying of vinyl albums.<sup>49</sup>

Justin Hughes argues, "[T]he instrumental argument . . . proposes that the unpleasantness of labor should be rewarded with property because people must be motivated to perform labor."<sup>50</sup> That is, because works require labor to create, and labor is something we wish to avoid if we can, if authors were not motivated by the promise of "rights," society as a whole would be deprived of new works, and thus the ideas contained therein. However, this is again clearly not the case, as both pre-copyright history and the growing proliferation of works disseminated on the Internet indicate.

\*374 So it is questionable whether granting the right of copyright is necessary to promote the creation of new works, and thus to expand the pool of available ideas. Other forms of compensation--or no compensation whatsoever--may serve the same end. Though perhaps unnecessary, it may nevertheless be sufficient for such ends. However, even this much seems suspect. Tom Palmer notes that copyright protection may, at least in some cases, actually decrease innovation, rather than increase it.<sup>51</sup> In particular, Palmer cites Shakespeare's rewriting of Thomas Kyd's play, *The Spanish Tragedy*, to give us *Hamlet*.<sup>52</sup> Had the modern form of U.S. copyright law applied to Kyd's play, Shakespeare may have been legally prevented from writing what is generally considered to be one of the greatest works of English literature.<sup>53</sup> Ultimately, whether the current system of copyright does in fact provide the necessary incentive it is designed to, or whether some other system--or none at all--would do as well, is an empirical (and certainly non-obvious) question.

Like the Lockean justification for copyright, the view of copyright as an instrumental right (as formulated in U.S. law) seems to neglect recognition for any value of the works themselves or for the activity that brought them about. Indeed, it is reasonable to conjecture, the instrumental right that adheres to authored works does so because of their instrumental value. On such a basis, however, it is unclear why equal protection should not be offered for the authors of speeches, improvised jazz performances, and, indeed, ordinary conversation, which would equally tend to enrich the marketplace of ideas.<sup>54</sup> What tends to distinguish the class of protected authored works from other means of conveying information, such as ordinary conversation, is that in the former cases, we value the works not only for the ideas they contain or information they provide, but (perhaps primarily) for the ways that they do so. That is, to value an authored work is centrally to value it as an expression. New York Times contributor Mark Helprin makes the point, "Mozart \*375 and Neil Diamond may have begun with the same idea, but that a work of art is more than an idea is confirmed by the difference between the 'Soave sia il vento' and 'Kentucky Woman.'"<sup>55</sup>

Responding to views like that of Jefferson, above, Ayn Rand contends, "The government does not 'grant' a patent or

copyright, in the sense of a gift, privilege, or favor; the government merely secures it.”<sup>56</sup> Rand professes some strange and often untenable views on intellectual property,<sup>57</sup> but her point here is correct, and indeed reflects the language used in the Constitution. Although the reasoning for doing so may not be sound, we do not question that the government secures property rights through the law, be they rights to physical property or rights to authored works. Siva Vaidhyanathan echoes Rand’s view, “[T]he public understanding of property is more fundamental, more exclusive, more natural, and precedes specific policy choices the state may make about its regulation and dispensation.”<sup>58</sup> The government’s securing such property rights does not indicate that such rights did not already exist to be secured by the law; rather, the contrary. The views of copyright as a natural right and of copyright as an instrumental right are not in principle mutually exclusive. In general, advocates of the Lockean position tend not to argue that copyright has no instrumental value.<sup>59</sup> And conversely, advocates of the instrumental argument tend not to attack the natural-rights view directly, but instead point to the advantages of the constitutional approach, particularly the “balance” struck between authors and the public. Indeed, the two views are largely complementary.<sup>60</sup> Unfortunately, however, neither is capable of making up for the shortcomings of the other. In particular, neither the Lockean nor the constitutional approach bases the right of copyright in what it is we value in the works. Indeed, each view on copyright seems, at best, incidental to the nature of its objects, their creation, and their creators.

#### **\*376 IV. Copyright as a Creative Right: A Variation on Locke**

What is missing from both of the views discussed above is a basic reflection of what it is we value in the works we are protecting. What we primarily value is not the labor expended by authors, nor the ideas they communicate, but the means by which they communicate them: the choices of words, colors, shapes, sounds, and their arrangement in the works. As an author, intuitively, what one gains a right to is not the product of his labor, but rather the product of his creativity.

The value we place in an authored work, and the rights of the author, arise because the work did not exist prior to his creative activity. Granted, the basic atomic elements used to construct the work--colors, shapes, sounds, words--were pre-existing, but the particular selection and arrangement of such elements made by that author did not exist. The work created by the author--be it a painting, a symphony, a novel, or an architectural design--will always be composed of unownable elements, but these elements, by the author’s creative activity, have been arranged into something new. This is the essence of the creative act. Hence, the author’s rights should not be in the atomic elements used to construct the work, nor necessarily the physical object or objects that embody the work, but rather the result of that creative construction: his particular selection and arrangement--the creation as attributable to him.

On this basis, let us sketch a variation on the Lockean position appropriate for the objects of copyright. As with the more standard Lockean view, I agree that one has a sole right to, and property in, one’s own person. However, unlike that considered by Locke, the common that concerns us here includes such unowned and/or unownable things as shapes and colors, sounds and words, and also facts and ideas. As with the physical common, these items are not owned by anyone; rather, they are free for use by anyone who so chooses, and inherently undepletable. By selecting and arranging these unownable elements (the creative act), one lays claim to the result (the authored work), and so gains a right in it--a claim against all others.

On this basis, the object that the author has a right to is not the physical object that embodies the work, but the abstract object so embodied.<sup>61</sup> Where rights-claims to physical property bar certain uses and not others, the same is true of rights-claims to the objects of copyright. The difference in what uses are prohibited arises \*377 from differences in the nature of the respective objects. The pioneer’s right to his property is found in the duty that others not trespass upon it, or generally interfere with his exclusive right to exploit it as physical property--to occupy it and to work or develop it. The central right to an authored work, thus, would be parallel, but different: the author’s right is found in the duty that others not interfere with his exclusive right to exploit it as an abstract object. Abstract objects, unlike physical objects, are in principle multiply instantiable--that is, capable of existing in many copies, each of which qualifies as a fully authentic instance of the object. Unlike physical property, intellectual property is not something one can trespass upon. Rather, one exploits an abstract object by instantiating it, in short, by making a token of the type.<sup>62</sup>

Just as looking upon or studying another individual’s physical property does not interfere with his exclusive right to occupy it, reading a book or watching a film does not interfere with the copyright owner’s exclusive right to instantiate his creation.<sup>63</sup> And so such activities should not be forbidden (nor, in most cases, would a copyright-owner want them to be). However, several other activities do interfere with the copyright owner’s exclusive right to instantiate his creation, including:

- Outright copying of the work, regardless of the method of doing so, by: photocopying or retyping a literary work; photographing and printing a copy of a pre-existing photograph; duplicating a videotape, CD, or DVD; or recreating a painting or sculpture from scratch.
- In cases of dramatic or musical works, performing, or broadcasting a performance of, the work.
- Creating a derivative work that instantiates an element of the original work, such as its plot, characters, melodies, or other higher-order elements that arise from the selection and arrangement of the author, and that are not reducible to the unownable elements of the common. This includes such works as film adaptations and novelizations, translations, and sequels to narrative works.

**\*378** In each of these cases, the action results in a (full or partial) instantiation of the type in a token--an embodiment of the work over which its author holds a natural right.

The nature of creativity is a much-discussed topic, but in this sketch of a theory, I want only to say that the right to the products of one's creativity, as realized in an authored work, likely arises from man's rational, autonomous capacity to reform the world around him, and so to create new objects (both physical and abstract).<sup>64</sup> And it is the same capacity that enables man to infringe upon these same rights in others. The same capacity, I suspect, is at play in Locke's own theory, and so the fact that my approach formally parallels his should not be surprising. The primary difference lies in what sort of objects this capacity is directed towards, and so to how each right is defined. Just as my view of copyright as a creative right formally parallels that of the Lockean position, it also seems in danger of collapsing under the weight of the same problems. As such, let us consider the problems discussed above in turn.

First, the standard Lockean position, on face value, seems only able to justify rights in a physical object. While a right based on creativity would seem to grant rights to certain physical objects, such a right would in fact not be a right to the physical objects, but to the abstract objects that those physical objects embody. That is, by slathering paint onto a canvas, or chiseling a shape from a block of stone, one creates two things: a new physical object and a new abstract object. This is true provided that the painting or sculpture represents the first token of a new type. The right of copyright covers only that abstract object, which is embodied in the physical object. If a Lockean natural rights claim can be justified, however, it may cover the physical object (the painting or the sculpture) that is also made. Creating the abstract object centrally involves creativity; making the physical object centrally involves labor. The two should not be confused. However, if the Lockean position is sound, then the artist has distinct rights claims over each.

Where we are concerned not with the original author, but with a copyist, an interesting result arises: by copying some pre-existing work, the copyist infringes the right of the author. Because he cannot lay claim to having created the abstract **\*379** object--the type--he cannot claim a right to it. However, as he spent the labor required to copy the work (whether by using a photocopier, retyping a literary work, repainting a pre-existing painting from scratch, or otherwise), he could perhaps (at least on Lockean principles) make a property claim in the physical object embodying the abstract one. The copyist may indeed have a right to the product of his labor (the manuscript, painting, or other physical object that is the result of his labor), but not to the abstract object that it embodies. And so, even if the Lockean argument for natural rights in physical property is sound, the right to the products of one's creativity does not displace the right to the products of one's labor. Given the differences in their nature, the abstract, embodied object and the physical, embodying object have different bases to ownership claims, and a right to claim ownership in one does not, therefore, bring about a right to claim ownership in the other.<sup>65</sup>

The second problem for the standard Lockean position is that it seems to indicate that, so long as a copyist spends the labor needed to fabricate a new object, there is little reason that he should not be free to do so. Because we are dealing with a right based on creativity, and not labor, the parallel would be: so long as one exhibits the creativity needed to bring into existence a new type, there is little reason that he should not be free to do so. This much seems absolutely correct. My notion of creativity in no way precludes two or more individuals from independently selecting the same elements from the common and putting them in the same arrangement. All that my view disallows is copying the pre-existing work, for doing so does not result in the creation of a new type, but rather in manifesting a token of a pre-existing type, which may already be subject to copyright ownership. Bringing into existence a new physical object is enough to distinguish it from pre-existing physical objects, but the same does not necessarily distinguish any abstract objects embodied in the new physical object from those embodied elsewhere.

Finally, on the standard Lockean position, as I stated, it would be reasonable to contend that the strength of one's ownership claims is proportional to the labor spent on that object. As discussed, this is an undesirable and counterintuitive basis for copyright.<sup>66</sup> Where this is a problem for the Lockean position, however, its parallel is an entirely welcome upshot for my own. The parallel claim for my view would be that one's ownership claim over an authored work is proportional to the creativity exhibited by the author. Where an individual copies an entire work, his creative contribution is nil, for nothing in the work is the result of his independent selection and arrangement of elements from the common. Where he copies and **\*380** modifies the work, however, he can reasonably claim ownership over those aspects that result from his modifications--those elements he selected and arranged. Such is the case with "derivative works"--works distinct from, but directly owing to, other particular works.<sup>67</sup> When a filmmaker adapts a literary work for the screen, he cannot lay claim to having created the story present in the original source, but he can claim ownership of what he introduced into the work--how the story would be brought visually to the screen, any modifications made to the story, the adjoining of certain musical selections to certain parts of the story, and so on.<sup>68</sup> The rights of the filmmaker are to these elements alone, as these are the elements that result from his selection and arrangement. The remaining elements belong to the original copyright owners, and so they will retain a certain degree of copyright ownership in the film adaptation. The same will be true for the academic who publishes an annotated edition of someone else's work, the literary enthusiast who translates another's German text to English, and similarly for other derivative works. Although the author of the derivative work has a valid claim to his creation--that is, that which specifically arose from his creative act--what he cannot lay claim to is that which he took from the author of the work he used in creating his work, and so infringes that other author's right to exploit his work.

With these problems thus alleviated--indeed, in some cases, turned from problems into assets for my view--let us turn to what is by many considered to be the most serious problem for the Lockean justification for physical property rights, and see if we can alleviate it. The problem I speak of is the one that Locke attempts to alleviate with his scarcity proviso: that the acquisition of property by individuals always serves to deplete the common.<sup>69</sup> The physical common is, by its very nature, rivalrous. Even if the loss to others is often imperceptible, one's annexing of property always restricts the liberty of others: where they were previously free to walk upon some spot of land, with another's annexing of that land, they are now restricted from doing so.<sup>70</sup> Locke introduces his proviso as a restriction to the limits of his theory: that, so long as an individual's annexing such property does not harm others, such a property claim is justified.<sup>71</sup> But, of course, it might be reasonably argued that, at least in some minute way, property acquisition always harms others. It does so by restricting their liberty--by restricting some freedom they previously enjoyed.

**\*381** Some have attempted to argue that copyright and other intellectual property rights do very much the same thing. Bell, for example, contends that, "Because it . . . gags our voices, ties our hands, and demolishes our presses, the law of copyrights and patents violates the very rights that Locke defended."<sup>72</sup> Unlike the annexing of property from the common, while the creation and copyrighting of an authored work draws from the public common, it in no way depletes it. There is always "enough, and as good left in common for others." Benjamin Damstedt makes the point, "The most important difference between the common of intangible goods and the common of tangible goods is the nonrivalrous nature of the undeveloped intangible materials in the former. Nonrivalry means that there is infinite allocative capacity of materials contained in the common of intangible goods."<sup>73</sup> Moreover, following the approach I have sketched, and given an understanding of the nature of authored works as abstract objects distinct from the ideas they express, the public at large has no fewer freedoms following the copyrighting of some work than they had prior to that copyrighting. They remain free to pillage the common as much as they were before; they remain free to write precisely the same words in precisely the same order as in the copyrighted work. All that they are restricted from doing is copying the work--which they could not have done before the work existed (and so was copyrighted) in the first place.<sup>74</sup> **\*382** Indeed, the public gains the freedom to use the new work in ways not restricted by the right of copyright, such as the freedom to read or view the published work.<sup>75</sup>

## V. Discussion

As emphasized above, what I have provided is only intended as a first sketch of a plausible right of copyright. As such, there remains much to be filled in, far more than the scale of this paper will allow. However, to forestall at least the first round of objections, I wish to briefly consider here a couple of issues that might be raised against my view.

One of the strongest arguments against natural rights claims is that, *prima facie*, such rights seem to be absolute, inviolate rights, and this flies in the face of consequentialist counterexamples.<sup>76</sup> So, one might ask, granting that I describe the right to copyright as a natural right, should it thus be taken to be an absolute right? I contend no such thing--far from it. The list of rights and interests that may conflict with that of copyright is surely a long one, including the right to free speech, standard

property rights, and all manner of personal and societal interests. As such, I do not wish to conflate the de jure infringement of a copyright with the wrongful violation of that right.<sup>77</sup> Although I suspect considerations of such conflicts must generally be made on a case-by-case basis, I would suggest that where infringing a copyright is necessary to expanding the pool of ideas and knowledge available to mankind, such should not be considered a violation of that \*383 copyright. That is, while I find our interest in expanding the pool of ideas an unsuitable grounding to or purpose of copyright, it is nonetheless a very reasonable limiting factor to copyright. After all, it is on the growing pool of ideas that authors draw in creating their works. With each new idea added to the marketplace of ideas, the possibility of still more ideas grows exponentially. As the authors of new works draw from, or build upon, this pool of ideas, its growth is even more in their interests than it is in the interests of the general public. There is much more to be said on this issue,<sup>78</sup> but that my view allows for overriding ethical contingencies, and so does not describe an absolute right, seems to count heavily towards its plausibility, and that it does not describe an absolute right does not itself count against such a right being a natural right.

Next, one might argue, arising as it does from the creative act, and operating over the product of this act, the right I describe would also prima facie extend to ownership of ideas, which, as I stated in the beginning of this article, standardly fall outside the domain of copyright. Indeed, I suspect something very much like the position I sketch could also ground something like a right to ideas. Such could provide an explanatory foundation to our intuitions regarding plagiarism, for instance. However, given the difference in their objects, the implications of a right over ideas, and the limitations to such a right, are very likely to diverge in kind from a right over their particular expressions authored works. Given the nature of ideas and their instantiation, I suspect a right to ideas faces far more conflicting rights and interests than does a right to their particular expression in authored works. Moreover, where authored works seem best understood within the type/token framework (that is, multiply instantiable abstract objects that can be created and destroyed), there seems a much stronger claim to ideas being of the universal/particular sort (which are not created, but only discovered), and as such not the sorts of entities that any individual can state a claim to having created, and so to having a right over, at least a right based on creativity.

#### Footnotes

<sup>a1</sup> Darren Hudson Hick (Ph.D., University of Maryland) is Visiting Professor of Philosophy at Bucknell University. My thanks to Jerrold Levinson, Christopher Morris, Judith Lichtenberg, Samuel Kerstein, and Craig Derksen for criticism and comments on drafts of this article.

<sup>1</sup> A distant third position is that intellectual property rights in general, and copyrights in particular, arise from and contribute to the author's personality, a model of framing intellectual property rights that finds its genesis in the work of Hegel, particularly Georg F. Hegel, *Elements of the Philosophy of Right* (1821). As the position is something of an outlier, and given space restrictions, I put the Hegelian view to the side. For interesting reading on the personality justification of copyright, see generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L.J.* 287 (1988); Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 *Chi.-Kent L. Rev.* 609 (1993); and James V. DeLong, *Defending Intellectual Property*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 17 (Adam Thierer & Clyde W. Crews, Jr. eds., 2002).

<sup>2</sup> See 17 U.S.C. §102(a) (2006).

<sup>3</sup> See 17 U.S.C. §102(b); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

<sup>4</sup> *Eldred*, 537 U.S. at 219.

<sup>5</sup> See 17 U.S.C. §102(a) ("Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression ..."); Huei-ju Tsai, *Media Neutrality in the Digital Era*, 5 *Chi.-Kent J. Intell. Prop.* 46, 54 (2005) (explaining that §102(a) is media neutral--fixation of the expression is required for protection but the form, manner, or media used for that fixation does not matter).

<sup>6</sup> See 17 U.S.C. §101 (2006) (defining an expression "fixed" as when "its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration").

- 7 This is to be distinguished from the type-token dichotomy as explored in linguistics and philosophy of language, logic, philosophy of mind, and other sub-fields of philosophy. For more information on the type-token dichotomy of aesthetic theory, see generally Richard Wollheim, *Art and its Objects* 74-79 (Harper & Row 1968); Joseph Margolis, *The Ontological Peculiarity of Works of Art*, 36 *J. Aesthetics & Art Criticism* (1977); Joseph Margolis, *Art and Philosophy* (Humanities Press 1980).
- 8 See Hadley Arkes, *Natural Rights and the Right to Choose* 11-12 (Cambridge Univ. Press 2002).
- 9 E.g., Richard Tude, *Natural Rights Theories* 93 (Cambridge Univ. Press 1979); Michael P. Zuckert, *Natural Rights and the New Republicanism* 218 (Princeton Univ. Press 1998).
- 10 Joel Feinberg, *Duties, Rights, and Claims*, 3 *Am. Phil. J.* 137 (1966).
- 11 John Locke, *Two Treatises of Government: Second Treatise of Government* §27 (Crawford B. MacPherson ed., 1980) (1690).
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 There is, of course, a great deal more to be said on this matter, requiring a close reading and interpretation of Locke's *Second Treatise*. Although accounts differ, I suggest as a starting point Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *New Essays in the Legal and Political Theory of Property* 138 (Stephen R. Munzer ed., 2001).
- 16 Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 *Chi.-Kent L. Rev.* 609, 611 (1993).
- 17 See Locke, *supra* note 11, §§27-28.
- 18 See Locke, *supra* note 11.
- 19 Locke, *supra* note 11, §27.
- 20 See, e.g., Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 *Harv. J. L. & Pub. Pol'y* 401, 406 (1987).
- 21 Robert Nozick, *Anarchy, State, and Utopia* 175 (1974).
- 22 Locke, *supra* note 11, §27.
- 23 Nozick, *supra* note 21, at 175.
- 24 Nozick, *supra* note 21, at 176.

- 25 Most likely, the scarcity proviso directly conflicts with Locke's law of nature that no harm shall be done to other persons. See Locke, *supra* note 11, §§7-8.
- 26 Interestingly, Locke does discuss intellectual property in limited terms in a letter opposing the renewal of the Licensing Act of 1662. See John Locke, *Liberty of the Press*, in *Political Essays* 329, 333 (Mark Goldie ed., 1997) (1694). He writes, [N]obody should have any peculiar right in any book which has been in print fifty years, but any one as well as another might have the liberty to print it, for by such titles as these which lie dormant and hinder others many good books come quite to be lost.... [N]or can there be any reason in nature why I might not print [classic books] as well as the Company of Stationers, if I thought fit. This liberty to any one of printing them is certainly the way to have them the cheaper and the better ....  
Id. Of interest, first, seems to be the fact that Locke is not applying his own approach to natural rights to the domain of intellectual property. Second, Locke seems to suggest a limited term to copyright, which would seem to indicate a lack of belief in natural intellectual property rights. These issues, although perhaps not entirely eliminable, seem at least explainable. First, it should be noted, Locke's letter is written some two or more decades before he wrote the *Two Treatises*; the apparent discrepancy may reflect no more than a change in the author's ideas over this time. Second, the intellectual property law to which Locke was responding was the perpetual monopoly held by the Stationers' Company in England, wherein exclusive printing rights were held by publishers, not authors. It may simply be that, with no alternative having been proposed at the time, Locke rejects the notion of publishers holding natural rights in their wares. For further discussion, see Shiffrin, *supra* note 15.
- 27 Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE*, *supra* note 1, at 1, 3.
- 28 For instance, Justice Thomson in his dissent of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 669-70, (1834), states, "The great principle on which the author's right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property ... and it is difficult to perceive any well founded objection to such a claim of right. It is founded upon the soundest principles of justice, equity and public policy."
- 29 See, e.g., Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *Phil. & Pub. Aff.* 31, 41-43 (1989); Becker, *supra* note 1, at 624-25; Hughes, *supra* note 1, at 326 .
- 30 Jerrold Levinson, *Art as Action*, in *The Pleasures of Aesthetics* 138, 141 (1996). In its original context, Levinson uses this reasoning to rebuff the claims of action-type theorists such as Gregory Currie and R.G. Collingwood. Although the action-type theorists might in fact value the labor in fabricating an authored work more than the final product, I believe even they would not foreground labor, strictly speaking, over and above other aspects that make up the "action" of creating a work.
- 31 Edwin C. Hettinger makes a similar point, arguing, "Clearly authorship, discovery, or development is necessary if intellectual products are to have value for us: we could not use or appreciate them without this labor. But it does not follow from this that all of their value is attributable to that labor." Hettinger, *supra* note 29, at 37. I make the stronger argument that what we centrally value in such works is not the labor that went into them at all.
- 32 Hughes, *supra* note 1, at 300. Hughes goes on to argue that, regardless of the mental effort required to come up with the idea expressed in the work, the expression of that work requires labor. I see no reason to challenge him on this insight, though, again, I feel it misses the point of why we tend to value the objects of copyright.
- 33 For example, from 1922 to 1991, the law adopted the Lockean "sweat of the brow doctrine" or "principle of industrious collection" by recognizing authorship (and so copyright) in the laborious collection of facts, such facts being themselves uncopyrightable. See *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83 (2d Cir. 1922); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).
- 34 See discussion and case cited *supra* note 28.

- 35 U.S. Const. art. I, §8, cl. 8. There has been, in the history of interpreting this passage, much quibbling over the precise language used by James Madison and Charles Pinckney, who introduced the clause into the Constitution. Lyman Ray Patterson, *Copyright in Historical Perspective* 192-94 (Vanderbilt Univ. Press 1968) . In particular, it has been generally noted that “useful Arts” refers not to painting, literature, and the like, but to more technologically-oriented endeavors--in other words, to science. Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* 349 (Wm. S. Hein 2002). Conversely, “Science” in this passage is regularly taken to refer to our more contemporary notion of the arts. *Id.* at 125. That is, we associate “Inventors” in this passage with “Discoveries” and the “Useful Arts”, and “Authors” with “Writings” and “Science” . The domain of the former became the basis of U.S. patent law, and the latter of U.S. copyright law.
- 36 This particular turn of phrase is used by Donald L. Diefenbach, *The Constitutional and Moral Justifications for Copyright*, 8 Pub. Aff. Q. No. 3, July 1994, at 225, available at <http://facstaff.unca.edu/ddiefenb/paqart.htm>.
- 37 See Thomas Jefferson, *Writings* 1286, 1291 (Lib. of Am., 4th prtq., 1984).
- 38 Letter from Thomas Jefferson to Isaac MacPherson (August 13, 1813), reprinted in THOMAS JEFFERSON, *WRITINGS* 1286, 1291-92 (Lib. of Am., 4th prtq., 1984).
- 39 Diefenbach, *supra* note 36.
- 40 LAWRENCE LESSIG, *CODE and Other Laws of Cyberspace* 133 (Basic Books 1999).
- 41 See *Burrow-Giles Lithographic Co. v. Sarony*, 111 US 53, 58 (1884) (stating that the Constitution covers works as long as they are representations of “original intellectual conceptions of the author.”).
- 42 U.S. Const. art. I, §8, cl. 8.
- 43 Stanford Encyclopedia of Philosophy, [http:// plato.stanford.edu/entries/consequentialism](http://plato.stanford.edu/entries/consequentialism) (last visited Feb. 5, 2009) (“Act consequentialism is the claim that an act is morally right if and only if that act maximizes the good, that is, if and only if the total amount of good for all minus the total amount of bad for all is greater than this net amount for any incompatible act available [at that time] ....”).
- 44 David G. Post, *His Napster’s Voice*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE*, *supra* note 1, at 107, 115. Post is certainly correct in saying that a lawyer who advised his client that the information he put on the Internet would be protected by copyright would likely be guilty of malpractice, but for different reasons that he states. As in this quotation, Post and many of his Libertarian compatriots spin their arguments by referring to copyright as a protection for “information” or “ideas.” See Post, *supra*, at 112 (reminding developers of the importance of making sure users are not exchanging copyrighted “information”). As explained earlier, however, it is no such thing, as copyright law explicitly excludes protection for ideas or facts. See *supra* note 3 and accompanying text.
- 45 Britain’s Stationers’ Company printing monopoly--the predecessor to the 1709 Statute of Anne, the direct ancestor of English and American copyright law--did not come into effect until 1557, and would not have protected Chaucer, anyway, but only his publisher, because the company only covered copyrights to publishers, not authors. Cyprian Blagden, *The Stationers Company: A History* 1403-959, at 33 (Stanford Univ. Press, 1977) (1960).
- 46 The Stationers’ Company monopoly and the Statute of Anne protected only published works, not performed ones. See *id.*; Lyman Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of User’s Rights* 27-28 (Univ. of Ga. Press 1991) (stating that protection only vested in copies of printed books).
- 47 Continental copyright arose during the period of the French Revolution, prior to which existed monopolies similar to that of the Stationers’ Company in England, again covering only printed books and the like. See generally Carla Hesse, *Publishing and*

Cultural Politics in Revolutionary Paris, 1789-810 (Univ. of Ca. Press, 1991); Anne Latournerie, *Petite Histoire des Batailles du Droit d'Auteur*, *Multitudes*, May 5 2001, available at [multitudes.samizdat.net/article168.html](http://multitudes.samizdat.net/article168.html). Certainly, musical and operatic works were not protected.

48 Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971). See also H. R. Rep. No. 92-487 (1971) (Effective date of the 1971 amendments is February 15, 1972).

49 Reel-to-reel tape recorders became commercially available in the 1940s. Phillips introduced the "compact cassette" in 1963. John Eargle, *Handbook of Recording Engineering* 352 (Kluwer Academic Publishers 4th ed. 2003).

50 Hughes, *supra* note 1, at 303. Locke himself refers to labor synonymously with "Pains." See Locke, *Liberty of the Press*, *supra* 26, at 139-40 .

51 Thomas G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in *Copy Fights: The Future of Intellectual Property in the Information Age*, *supra* note 1, at 43, 68.

52 Thomas G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in *Copy Fights: The Future of Intellectual Property in the Information Age*, *supra* note 1, at 43, 68 n.127.

53 Hettinger contends that this approach is paradoxical: "It establishes a right to restrict the current availability and use of intellectual products for the purpose of increasing the production and thus future availability and use of new intellectual products." Hettinger, *supra* note 29, at 48. The matter, of course, is only paradoxical if that to which access is restricted outweighs that which is created, and this is an empirical matter that Hettinger does not pursue. Hettinger argues, however, that alternative systems of reward may better achieve the stated ends of copyright in U.S. law, and tentatively suggests a system of government support and public ownership. *Id.* at 48-49. This suggestion is further discussed, and countered, in Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 *Hamline L. Rev.* 65, 71-72 (1997).

54 Each of these fails to be protected by copyright under current U.S. law. See 17 U.S.C. §102 (2006) (setting forth the categories of work protected by U.S. copyright law).

55 Mark Helprin, *Op-Ed, A Great Idea Lives Forever. Shouldn't Its Copyright?*, *N.Y. Times*, May 20, 2007, available at [www.nytimes.com](http://www.nytimes.com) (follow "Opinion" link; then search "2007 Helprin Copyright"; then follow link with article title).

56 Ayn Rand, *Patents and Copyrights*, in *CAPITALISM: THE UNKNOWN IDEAL* 130, 131 (The New Am. Library 1967) (1966).

57 These views are strange in that Rand contends intellectual property is the *sine qua non* of property rights generally; they are untenable in that Rand contends copyright protection is protection over ideas. See *Id.* at 130.

58 Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* 253 (N.Y. Univ. Press 2003).

59 See generally Shiffrin, *supra* note 15, at 141-42.

60 See generally Hughes, *supra* note 1.

61 Conversely, Adam D. Moore contends, "Intangible property is generally characterized as non-physical property where owner's rights surround control of physical manifestations or tokens of some abstract idea or type.... Intangible property rights surround control of physical tokens, and this control protects rights to types or abstract ideas." Adam D. Moore, *Intangible Property:*

Privacy, Power, and Information Control, in *Information Ethics: Privacy, Property, and Power* 172, 174 (Univ. of Wash. Press 2005). Moore's view seems to get the matter backwards: at least as standardly understood, and maintained in my view, what the author centrally owns is the abstract object, and only derivatively (if at all, for example in the first sale rule) the physical object that embodies it.

62 Tony Honoré points in this direction in his seminal essay, *Ownership*. See Tony Honoré, *Ownership*, in *Making Law Bind: Essays Legal and Philosophical* 161, 166 (Oxford Univ. Press 2002) (1987). For instance, he describes the right to possess centrally as having "exclusive physical control of a thing, or to have such control as the nature of the thing admits." *Id.* (emphasis added). He also notes, "We are left, not with an inclination to adopt a terminology which confines ownership to material objects, but with an understanding of a certain shift of meaning as ownership is applied to different classes of things owned." *Id.* at 183.

63 Jeremy Waldron, for one, contends that intellectual property rights "prohibit[] anyone from using or enjoying the work except on terms agreed with the author." Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 *Chi.-Kent L. Rev.* 841, 854 (1993). Of course, the rights enveloped by copyright are not so catholic. One might question how a copy--with clear attribution--undermines the creative achievement of the original. I do not contend that it does; rather, I argue that it infringes the right that arises as a result of the achievement.

64 Waldron advances the postmodern proposal that the role of author is contestable: that in the circumstances of contemporary cultural production, there is no entity to fill the role of author--source of the original spark of creative genius, responsible for something entirely new--... that ideas, words and images circulate freely and haphazardly in a sort of cultural maelstrom, and that we speak more or less arbitrarily of works of authorship whenever some combination of ideas, words and images crystallizes out of the maelstrom.

Waldron, *supra* note 63, at 878. On such a view, neither praise nor blame is due an "author" for she is merely a conduit in the realization of an altogether inevitable product. Waldron contends that this perspective threatens the Lockean perspective, but not the instrumental or constitutional one. See Waldron, *supra* note 63, at 879. However, it is unclear why providing incentive to authors should--if they are merely conduits for the inevitable--serve to increase society's cultural output. Further discussion of the implications of, and problems with, this view are certainly warranted, but outstretch the bounds of the present paper.

65 Conversely, on my view, if I own a plot of land, and you sneak onto it and create wonderful sculptures from the mud in my garden, you will (assuming they are original creations in the sense discussed) obtain rights to the designs, but you will gain no right to the physical object used to embody your works.

66 See *supra* text accompanying note 61.

67 See 17 U.S.C. §101 (2006) ("A 'derivative work' is a work based upon one or more preexisting works....").

68 Cf. 17 U.S.C. §103(b) (2006) ("The copyright in a ... derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").

69 See Miller, *supra* note 20, at 406.

70 See Locke, *supra* note 11, at 19.

71 See Locke, *supra* note 11, at 19.

72 Bell, *supra* note 27, at 4. Arnold Plant further contends, "[P]roperty rights in patents and copyright make possible the creation of a scarcity of the products appropriated which could not otherwise be maintained." Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, in *Selected Economic Essays and Addresses* 35, 36 (1974). Palmer makes the more unusual assertion: "[P]atent and copyright monopolies interfere with the freedom of others to use their own bodies or their own justly acquired property in certain ways .... [A] copyright over a musical composition means that others cannot use their mouths to blow air in

certain sequences and in certain ways into musical instruments they own without obtaining the permission of the copyright holder.” In his article, Palmer distinguishes between the restriction of “liberty” and the restriction of “action,” focusing here on how copyright and patent do the latter. Palmer, *supra* note 51, at 72, 77. For our general understanding of liberty, however, I believe it would include freedom to act in certain ways.

Adam D. Moore presents alternate arguments against Palmer’s sort of position than those which I spell out. See Moore, *supra* note 53, at 84-86; see also Jan Narveson, *The Libertarian Idea* 77 (1988).

<sup>73</sup> Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 *YALE L.J.* 1179, 1191 (2003).

<sup>74</sup> Henry Sidgwick makes a similar point, though couching it in terms of labor and not creativity: “It can hardly be an interference with A’s natural liberty to exclude him, in the interest of B, from the gratuitous use of utilities which he could not possibly have enjoyed except as a result of B’s labour.” Henry Sidgwick, *The Principles of Political Economy* 438 (1883). Jeremy Waldron rejects this line of thinking (though he discusses the matter in terms of endured hardship, not loss of liberty) by introducing what he contends is a parallel case: imagine that a patient, Q, is dying of some disease to which P has developed the only cure. See Waldron, *supra* note 63, at 866. P personally dislikes Q, and so does not make the drug available to him. Waldron, *supra* note 63, at 866. Waldron contends that P will suffer from Q’s exercising his exclusive right, and would have died a stoic death except for the knowledge that the drug was denied him by Q. Waldron, *supra* note 63, at 866. Waldron thus argues that the patient does indeed suffer as a result of the drug owner’s miserliness, and implies that a parallel holds true in copyright cases. See Waldron, *supra* note 63, at 866. Putting aside particular problems with the case itself, it isn’t at all clear that anything approaching this level of hardship would occur in a roughly parallel copyright case, where someone is, say, denied access to a particular song, computer code, or poem-- certainly no more hardship than would result, say, from the patient’s being bedridden and thus unable to obtain the material from his local library.

<sup>75</sup> Notably, other objects of intellectual property--particularly those of patent--do seem to substantially restrict the freedom of the public in ways that copyright does not. Although stemming from the same clause in the Constitution, U.S. patent law operates in several important ways that differentiate it from copyright law. First, unlike copyright law, the objects of patent law are functionally defined. An object is differentiated by other objects insofar as it does a different thing than other patented objects and/or does so in a different way. In other words, if your invention does what mine does in the same way that mine does it, your invention is the same as my invention, regardless of whether you invented it completely independently. Second, following from this, to obtain a patent in an invention or discovery, one must establish not only originality, but also novelty--that is, the object one wishes to patent must not have, nor have ever been, protected by patent. 35 U.S.C. §102(a) (2006). That is, if there exists (or has existed) another patented object, which does the same thing in the same way as one’s own invention, one is barred from patenting it. As such, for the duration of some patent’s protection (currently 20 years from the date of filing), others are restricted from certain acts that might legitimately be considered original creation. Nozick notes how patent thus restricts the freedom of others through scarcity. See Nozick, *supra* note 21, at 182.

<sup>76</sup> See, e.g., Thomas Nagel, *Concealment and Exposure: and Other Essays* 36 (2002).

<sup>77</sup> Here, I adhere to the distinction between infringement and violation adopted by Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 *Ariz. L. Rev.* 45, 47-48 (1977).

<sup>78</sup> See Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and Users’ Rights*, 56 *J. Copyright Soc’y U.S.A.* (2009).