THE MAKING OF A NEW COPYRIGHT LOCKEAN

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I. INTRODUCTION: TWO FATAL FLAWS

A. The Ubiquity of Lockean Justifications in Copyright Discourse

Two main factors consolidated the hegemony of John Locke's philosophy in copyright discourse. First, Locke's main theme of property ownership is based on a person's natural entitlement to the products of his labor. Second, scholars find in Locke's theory of property, and the limits he sets on what a laborer can come to exclusively own and control, a solid argument with which to solve contemporary problems in copyright. There are, however, three additional reasons why Locke merits detailed attention. First, many misconceptions of how to interpret Locke exist when we discuss copyright. Second, copyright scholars ignore Locke's *explicit* discussion of authors' rights and then invoke his general theory of property to justify the status quo. Third, Locke's epistemology and philosophy of the mind display important social constructionist overtones.

This Article argues that a comprehensive Lockean approach to copyright would provide significant recognition for the public role in the making of authorship and art. Locke's wider phi-

losophy strengthens the argument for recognizing the role played by a society's shared pool of ideas and experiences in the creation of new works. Locke's property philosophy guarantees authorial rights, but it also acknowledges the collective role of the public in the creative process. When read together with several other of his writings, Locke's property philosophy highlights the mistakes embedded in contemporary Lockean approaches to copyright, eliminates inconsistencies in his theory of property, and supports a plausible vision of what copyright should be.

Modern copyright Lockeans repeatedly invoke Locke's natural right philosophy of property in discussions on copyright.[1]

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1. *See, e.g.*, Carys J. Craig, *Locke, Labor and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1 (2002); Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3 (2003); Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75 (2004) [hereinafter Gordon 2004]; Wendy J. Gordon, *Intellectual Property*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 617 (Peter Cane & Mark Tushnet eds., 2003) [hereinafter Gordon 2003]; Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 177–81 (2004); Richard A. Spinello, *The Future of Intellectual Property*, 5 ETHICS & INFO. TECH. 1 (2003); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005); Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179 (2003); *see also* PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 41–72 (Ashgate 1996); Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993); William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) [hereinafter Gordon 1993]; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon 1992]; Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31 (1989); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532; Adam D. Moore, *Intangible Property: Privacy, Power, and Information Control*, 35 AM. PHIL. Q. 365 (1998); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65 (1997); Adam D. Moore, *Toward a Lockean Theory of Intellectual Property*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL AND INTERNATIONAL DILEMMAS 81 (Adam D. Moore ed., 1997) [hereinafter Moore 1997]; Dale A. Nance, *Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757 (1990); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817 (1990); Joan E. Schaffner, *Patent Preemption Unlocked*, 1995 WIS. L. REV. 1081; Seana V. Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001); Horacio M. Spector, *An Outline of a Theory Justifying Intellectual Property Rights*, 8 EUR. INTELL. PROP. REV. 270 (1989); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841 (1993); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149 (1998); Steven Wilf, *Who*

Although this phenomenon is interesting on its own, one need not map the many differences between scholars in the way they invoke Lockean justifications because one common problem affects the strength and coherency of their arguments: they base their analysis and vindication of copyright solely on the twenty-six sections of Chapter V, "Of Property," of the *Second Treatise of Government*.[2] These scholars also claim that Locke does not, either in the *Two Treatises* or elsewhere, address the issues of the intellectual commons, intellectual property in general, or copyright in particular. They also devalue the potential impact of Locke's philosophy on discussions of the sociality of copyright, authorship, and the creative process. In reaction, other scholars criticize the adherence to Locke because he is believed to have nothing to say about intellectual property, and argue that Chapter V justifies strong private rights which we should avoid in copyright. This latter perception is erroneous, but it is a perception on which a well established contemporary history of copyright theory is premised. What follows will illustrate and explain this point.

It seems plausible to use Locke's property theory to justify copyright because statutory and doctrinal innovations place private property rights at the forefront of the Anglo-American intellectual property system. This is particularly true since the main focus of his theory is "the reconciliation of strong private property rights with a common of materials available to all."[3] At the same time, Chapter V is applicable to intellectual property just as it is applicable, for example, to environmental and ecological regulation.[4] The problem in basing copyright justifications solely on Chapter V is that it presents Locke—who has been called first British Empiricist[5] or traditional natural-

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Authors Trademarks?, 17 CARDOZO ARTS & ENT. L.J. 1 (1999); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Wendy J. Gordon, *Towards a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009 (1990) (book review); Barbara Friedman, Note, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L.J. 157 (1994); R. Anthony Reese, Note, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707 (1995).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE, §§ 25–51, at 302–51 (Peter Laslett ed., 2d ed., Cambridge Univ. Press 1967) (1690) [hereinafter LOCKE, SECOND TREATISE].

3. Damstedt, *supra* note 1, at 1181.

4. *See* Brent M. Haddad, *Property Rights, Ecosystem Management, and John Locke's Labour Theory of Ownership*, 46 ECOLOGICAL ECON. 19 (2003).

5. Douglas Odegard, *Locke as an Empiricist*, 40 PHILOSOPHY 185, 185 (1965).

ist[6]—as the undisputed champion of exclusive private property, legitimizing inequalities at the expense of public good.[7] This Article develops a normative conception of Lockean copyright and shows that any argument based solely on the commonly cited twenty-six sections of Chapter V is incomplete.

B. A Rejoinder to Contemporary Copyright Lockeans: The Two Fatal Flaws

In two landmark articles, Justine Hughes[8] and Wendy Gordon[9] introduced us to the lore behind Locke's property theory for matters of copyright discourse. Legions of commentators subsequently followed them, but they all confine their discussion to Chapter V of the *Second Treatise*.[10] Apart from two clear exceptions,[11] most other academic writings dealing with Locke and the justification for property rights in copyrighted materials follow this trend.

This selective reading of Locke has sometimes led to unfavorable judgments of his theory. Wendy Gordon, for example, argues that "the common explicitly discussed in the *Two Treatises* was the physical realm"[12] and asserts that "Locke's labor theory of property and allied approaches have been used so frequently as a justification for creators' ownership rights that Locke's *Two Treatises* have been erroneously credited with having developed an explicit defense of intellectual property."[13]

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6. *See* Philip Kitcher, *The Naturalists Return*, 101 PHIL. REV. 53, 54 (1992).

7. Craig thus claims that "the normative force of labor-acquisition theory simply does not lie in the protection or furtherance of public interest." Craig, *supra* note 1, at 56.

8. Hughes, *supra* note 1.

9. Gordon 1993, *supra* note 1.

10. For example, Damstedt uses a Lockean justification to devise a cultural fair use doctrine. Damstedt, *supra* note 1, at 1207. He rightly claims that "[r]evisiting Locke for a theory of intellectual property has become vital," yet confines the analysis to Chapter V. *Id.* at 1180.

11. There are two clear exceptions to this general observation. The first is an article by Wilf, in which he considers both Chapter V and Locke's ESSAY CONCERNING HUMAN UNDERSTANDING for the justification of a community-wide right in trademarks. Wilf, *supra* note 1. The second exception is an article by Shiffrin, in which she discusses, apart from Chapter V, Locke's letter entitled *Liberty of the Press*. Shiffrin, *supra* note 1. It should also be noted that references to other writings by Locke were made by some scholars, and in different contexts. For example, Rosen applies Locke's definition of language in the ESSAY CONCERNING HUMAN UNDERSTANDING for purposes of drawing a distinction between ideas and expressions. Allen Rosen, *Reconsidering the Idea/Expression Dichotomy*, 26 U. BRIT. COL. L. REV. 263, 270–73 (1992). *See infra* notes 149, 152–57 and accompanying text.

12. Gordon 1993, *supra* note 1, at 1558.

13. *Id.* at 1540 (footnotes omitted).

Peter Drahos argues that "when Locke wrote on property[,] . . . it was the ownership of physical rather than abstract objects that occupied his attention."[14] Anthony Reese remarks that Locke's tangible property "might not simply apply *mutatis mutandis* to intangible intellectual property."[15] Carys Craig claims that "Locke's labour theory is so commonly invoked in examinations of copyright doctrine that one might be forgiven for believing that he explicitly defended intellectual property rights."[16] And more recently, Richard Epstein asserts, "To be sure, Locke did not offer any explicit treatment one way or the other of intellectual property rights, which adds to his charm."[17] As argued below, these claims are misleading.

Another fundamental problem enshrined in contemporary approaches to Lockean copyright has been recently raised in a question posed and challenged by Craig: whether "Lockean property theory can be re-imagined to shape a copyright system that furthers . . . maximum creation and dissemination of intellectual works."[18] Craig is concerned with the social and cultural aspects of our copyright regime and whether these aspects can be accommodated in a copyright law drafted close to a robust property rights system. She does not believe that Locke's theory can be refashioned in this manner because Locke's property theory clearly "carries the same threat of copyright expansionism."[19] This Article argues that her conclusion is partially incorrect. It is indeed difficult to reimagine Locke within the confines of the *Second Treatise* because in that work he was concerned primarily with the individual. It is wrong to assert that Locke subjected every type of property to the principle of exclusive ownership as envisioned in Chapter V of the *Second Treatise*, notwithstanding his acknowledgment of the difference between traditional property and intellectual and cultural property.

Locke's ideals of property and copyright, however, should be reexamined in light of his other works, particularly the philosophy of knowledge and his idea of authors' rights. Such scrutiny reveals that it is wrong to associate Locke solely with

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14. DRAHOS, *supra* note 1, at 47.

15. Reese, *supra* note 1, at 708.

16. Craig, *supra* note 1, at 21.

17. Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 21 (2005).

18. Craig, *supra* note 1, at 54.

19. *Id.* at 55.

exclusivity and individualism. Indeed, this Article defends a collectivist and social approach to copyright, based on Lockean principles of ownership and knowledge creation. These principles support the view of authorial collectivity and the imposition of additional limitations on copyright ownership.[20] Debating these principles reveals the importance of Lockean approaches to copyright. The debate also shows that the ongoing academic dialogue on whether the justifications of our copyright system are solely utilitarian, or rather a merger of utilitarian and natural law justifications, is unnecessary because Locke's theory itself includes elements from both schools of thought. Debating these principles also proves that a shift from the stringent utilitarian approach—an approach capable of converting the public domain into a "fallow landscape of private plots"[21]—to the natural law approach is not inconsistent with the social objectives behind the instrumentalist objective of the Constitution's Copyright Clause, granting Congress the power to "promote the progress of Science and useful Arts" through copyright and patent.[22]

This Article argues that Locke's theory of property can be reimagined in three ways. First, Locke presents a clear vision of a system of authors' rights in which he balances private rights against public interest. Second, although Chapter V addresses traditional property, the chapter applies to intellectual property as well. Third, Locke's theory of knowledge in his *Essay Concerning Human Understanding*[23] has a social constructionist dimension. As a way to access these arguments, Part II of this Article

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20. Scholars sharply disagree on how to read and interpret Locke. For example, James Tully advocates a collectivist Locke, JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980), while Macpherson asserts that Locke designed his theory to justify class-based social wealth to serve as an ideological basis for modern capitalism, C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1972). *See also* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 172–75 (2002); Vere Chappell, *Locke's Theory of Ideas*, *in* THE CAMBRIDGE COMPANION TO LOCKE 26, 55 (Vere Chappell ed., 1994) ("It is however, one of the attractions of Locke's work for contemporary philosopher-scholars that credible answers to philosophical questions he himself never considered can often be drawn from his text, even when they are not obviously present there.").

21. JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 116 (1996).

22. U.S. CONST. art. I, § 8, cl. 8 ("To 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").

23. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690).

reviews and examines Locke's letter entitled *Liberty of the Press*, in which he examines his ideals of authors and authorship.[24] Part III challenges prevalent Lockean conceptions of property and labor, and argues that Locke's property theory explicitly refers to intangibles. Part IV presents a social constructionist approach to Locke's ideals of property and authorship based on Locke's epistemology. Part V concludes the discussion and claims that Locke's writings offer much to contemporary copyright affairs.

II. INDISPUTABLE LOCKEAN COPYRIGHT

A. Liberty of the Press*: Property in Authorial Commodities*

In a 1694 letter entitled *Liberty of the Press*, Locke writes that he is aware of the dilemmas and tensions inherent in any regime securing rights in authorial commodities. In particular, he is sensitive to the social and economic impact that a long-term right will have both on authors and on ordinary members of the community. The letter is the first time Locke attempts to reconcile the connection between self-constitution and property ownership. It is also the first time he explicitly refers to authorial entities, and the first time he introduces his vision of the limits a property institution must recognize in the field of authorial creations.

Liberty of the Press is a letter opposing the renewal of the Licensing Act of 1662. The Act was a punitive instrument for controlling printing and printing presses.[25] It restricted the number of printing presses and revived the pre-Civil War practice in which all publications had to be approved by a Licensor. "The

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24. John Locke, *Liberty of the Press* (1695), *reprinted in* LOCKE: POLITICAL ESSAYS 329 (Mark Goldie ed., 1997) [hereinafter Locke, *Liberty of the Press*].

25. The Act entered into force on June 10, 1662 and was entitled, "Act for preventing abuses in printing seditious, treasonable and unlicensed books and pamphlets, and for regulating of printing and printing-presses." Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 33 LIBRARY (5th Ser.) 296, 297 (1978). Under the Act,

> Legislative authority was given to the Rules and Ordinances of the Stationers' Company whereby the activities of printers, booksellers, and bookbinders were controlled. Sanction was afforded the ancient custom of the Company whereby the entrance of a book or copy in the Register was deemed to vest a perpetual copyright in the stationer who entered it; and protection was provided for the printing privileges of the two universities and the monopolies granted by royal letters patent to the Company or to individuals.

Id.; *see generally* FREDERICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL 237–302 (1965).

Licensing Act," in the words of Lord Macaulay, "is condemned, not as a thing essentially evil, but on account of the petty grievances, the exactions, the jobs, the commercial restrictions, the domiciliary visits, which were incidental to it."[26] The Act lapsed in 1679, was renewed in 1685 for seven years, and was again renewed for an additional year in both 1692 and 1693. In November 1694, the House of Commons appointed a committee entrusted with reviewing laws due to expire. In January 1695 the committee recommended renewal of the Licensing Act. In February 1695, the House took a step back and appointed a committee to prepare a new bill.

Locke was able to influence the government's initiative through friends such as John Freke and Edward Clark who were members of the "College," a private club founded by Locke as a forum to discuss political affairs. Clark, who was a member of the bill's committee, introduced the proposed bill in March 1695. A copy of the bill was sent to Locke, inviting his comments. Clarke informed Locke that, despite the title of the bill "for regulating the press," it was "so contrived that there is an absolute liberty for the printing everything that 'tis lawful to speak."[27] Locke was satisfied that Clarke was entrusted with introducing the bill, and in a comment he sent in March 1695 he articulated his support and suggested amendments designed to defend the rights and interests of authors, scholars, and other users.

Neither the bill nor the renewal of the Licensing Act made any progress,[28] resulting in the disappearance of pre-publication censorship disappeared in Britain in 1695. And, as Lord Macaulay asserts, with the expiration of the Licensing Act, "English literature was emancipated, and emancipated for ever, from the control of the government."[29] These words of satisfaction, and especially the term "emancipation," aptly characterize Locke's agenda. He elaborates the reasons for abolishing the Company's monopoly: enabling readers free access to literature and scholarship, and encouraging study and dissemination of

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26. 5 LORD MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 2482 (Charles H. Firth ed., 1913).

27. Locke, *Liberty of the Press*, *supra* note 24, at 329. Locke's influence on the Bill is undeniable. Siebert tells us that Locke's comments had a great impact on the House of Commons, which "followed Locke's reasoning if not his exact words by emphasizing the commercial restraints contained in the Act." SIEBERT, *supra* note 25, at 261.

28. *See* MACAULAY, *supra* note 26, at 2483.

29. *Id.*

information. He also puts forth his view about the kinds of authorial rights that should be granted, and distinguishes between these rights and the general right to property.

B. The Public Interest, the Stationers' Company, and the Limits of Perpetual Copyright

Liberty of the Press is composed of three papers: Locke's criticism of the Licensing Act of 1662; a draft Bill for Regulating Printing;[30] and Locke's comments on the bill.[31] Locke's critique of the 1662 Act is an attack on the monopoly of the "dull wretches"[32] of the Stationers' Company, and on pre-publication censorship and licensing policy. In his letter, Locke combines arguments for freedom of expression and social exchange, economic equality, common equity, and recognition of authors' rights. Raymond Astbury explains:

> In his *Memorandum*, though Locke spelt out in detail the ill-effects on the book trade, and on authors and readers, of the monopoly system and the powers, and the abuse of power, of the Stationers' Company, most of his complaints reveal directly or by implication his concern for the intellectual, economic, and social freedoms of the individual . . . . and he linked [his] statement to an implied defence of the right to communicate new philosophical and scientific truths.[33]

Explicitly referring to authorial freedom and criticizing pre-printing censorship, Locke remarks, "I know not why a man should not have liberty to print whatever he would speak."[34] Locke himself had a personal interest in scrapping the 1662 Act. His project to publish a new edition of *Aesop's Fables* as a Latin-English primer was rejected by the Company. The project was not published until 1703, although Locke worked on it during 1691.[35]

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30. Locke, *Liberty of the Press*, *supra* note 24, at 329.

31. *See id.* at 329–39; Astbury, *supra* note 25, at 297. It is important to note that *Liberty of the Press* predated the first Copyright Act, An Act for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies, during the Times therein mentioned, 1709, 8 Ann., c. 19 (Eng.) [hereinafter Statute of Anne]. Locke had a clear view on the underlying ideals behind the Statute of Anne with regard to encouraging learning and controlling duration of authorial rights.

32. Locke, *Liberty of the Press*, *supra* note 24, at 333.

33. Astbury, *supra* note 25, at 308.

34. Locke, *Liberty of the Press*, *supra* note 24, at 331.

35. *Id.* at 332; *see also* Astbury, *supra* note 25, at 304. In fact, if Locke had published his edition six years later, the year the Statute of Anne entered into force, his project would have been protected for at least fourteen years, renewable for

The idea of a limited-in-time property right in authorial works has a central part in Locke's vision of authorial rights. In his critique of the 1662 Act he rejects the perpetual right the Stationers' Company enjoyed, and remarks,

> Upon occasion of this instance of the classic authors I demand whether if another Act for printing should be made it be not reasonable that nobody 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.[36]

Locke concludes:

> That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning. And for those who purchase copies from authors that now live and write it may be reasonable to limit their property to a certain number of years after the death of the author or the first printing of the book as suppose 50 or 70 years. This I am sure, 'tis very absurd and ridiculous that anyone now living should pretend to have a property in or a power to dispose of the property of any copies or writings of authors who lived before printing was known and used in Europe.[37]

One may find two lines of argument in these remarks: an economic one and a social one. Locke emphasizes the economic side of his argument because his letter was mainly an attack on the monopolistic power of the Stationers' Company. For example, he declares that "the Company of Stationers have a monopoly of all the classic authors and scholars cannot but at excessive rates have the fair and correct editions of these books and the [commentaries] on them printed";[38] that "whatever

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another fourteen years. The Statute of Anne severely curtailed the duration of copyright protection: perpetuity in copyright was eliminated; existing works received twenty-one years of copyright protection; and new works were protected for an initial term of fourteen years, conditional upon registration with the Stationers' Company. The right was renewed for a further term of fourteen years provided the author was still living at the expiry of the initial term. Works which were already published were subject to a fixed term protection of twenty-one years. Statute of Anne, *supra* note 31, c. 21, §§ 1, 11.

36. Locke, *Liberty of the Press*, *supra* note 24, at 333.

37. *Id.* at 337; *see also* Astbury, *supra* note 25, at 309.

38. Locke, *Liberty of the Press*, *supra* note 24, at 332 (alteration in original). Elsewhere Locke writes that this is the "great oppression on scholars." Letter from John Locke to Edward Clark (Jan. 2, 1692), *in* THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366, 367 (Benjamin Rand ed., 1927).

money by virtue of this clause they have levied . . . I am apt to believe not one farthing of it has ever been accounted for to the king or brought into the Exchequer";[39] and that the Act creates a situation in which "[t]he nation loses by the Act, for our books are so dear and ill printed that they have very little vent amongst foreigners."[40]

As an author himself, Locke was sensitive to securing "the author's property right in his copy, or his to whom he has transferred it."[41] He "complained about the Act as a scholar and book buyer."[42] In his amendments to the draft bill he adds "author" to the text so that is reads "no printer shall print the name of any person as author or publisher of any book, pamphlet, portraiture, or paper without authority given in writing."[43] A copyright lawyer of our times might associate this statement with the right of reproduction as well as with the Continental approach to the moral right of attribution. However, Locke clearly refers to the "penalty of forfeiting the sum" of money that should reach the actual rightholder, be it the author or the publisher.[44] To make sure that his commentary on the bill is not misunderstood, and that the property of the author is assured, the letter ends with this proposal:

> [The act] shall vest a privilege in the author of the said book, his executors, administrators, and assigns, of solely reprinting and publishing the said book for [blank] years from the first edition thereof, with a power to seize on all copies of the said book reprinted by any other person which by virtue of this Act shall be forfeited to the said author, his executors, administrators and assigns.[45]

The social aspect is demonstrated by Locke's observation that the "patent" (copyright-like) clauses in the 1662 Act cause a loss to everyone. Locke identifies a triangle of beneficiaries: the government and its peers[46] or the private enterprise that

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39. Locke, *Liberty of the Press*, *supra* note 24, at 333. Locke also asks "whether it be . . . contrary to common equity" to restrict individuals from establishing a trade. *Id.* at 334.

40. *Id.* at 335.

41. *Id.* at 338.

42. Astbury, *supra* note 25, at 304.

43. Locke, *Liberty of the Press*, *supra* note 24, at 338.

44. *Id.*

45. *Id.* at 339 (second alteration in original).

46. Locke launched a great attack on the peers whose houses have in "every corner and coffer in them, under pretence of unlicensed books, a mark of slavery which I think their ancestors would never have submitted to." *Id.* at 335–36.

enjoys exclusive powers; scholars and authors; and the public at large. He remarks that "[b]y this Act England loses in general, scholars in particular are ground [down] and nobody gets [anything] but a lazy ignorant Company of Stationers."[47] Locke contends that the monopoly and excessive powers of the Company adversely affect the dissemination of knowledge and availability of classic authorial works, a policy that brings one to "starve for printing Dr. Bury's case or the history of Tom Thumb unlicensed."[48] The latter is further evidence that Locke was sensitive to the general public good: *Tom Thumb* was a popular "penny merriment," illustrated for the illiterate.

The fact that Locke's arguments have a social dimension is decisively demonstrated by his concern over two other issues: encouraging learning and limits to authorial rights. Under section 17 of the 1662 Act, "[t]hree copies of every book are to be reserved, whereof two to be sent to the two universities [Oxford and Cambridge] by the master of the Stationers' Company."[49] Locke is very skeptical about the application of this requirement, and writes,

> This clause upon examination I suppose will be found to be mightily if not wholly neglected, as all things that are good in this Act, the Company of Stationers minding nothing in it but what makes for their monopoly. I believe that if the public libraries of both universities be looked into (which this will give a fit occasion to do) there will not be found in them half, perhaps not one in ten, of the copies of books printed since this Act.[50]

For Locke, encouraging education and dissemination of knowledge is fundamental. He appends to the section of the bill reading "[f]or the use of the public libraries of the said universities" language he believes will provide "for the better encouragement thereof."[51] Locke also views limiting the duration of an author's right as vital. Locke claims that the 1662 Act violates the three basic rights of "trade, liberty, and property,"[52] because a perpetual right vested in the Company denies the author his property rights and violates his liberty to exchange

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47. *Id.* at 335 (second and third alterations in original).

48. *Id.* at 336. Dr. Bury, who published Oxford's *The Naked Gospel* in 1690, "was charged with heresy, condemned and burnt by the University." *Id.* at 336 n.97.

49. *Id.* at 336.

50. *Id.*

51. *Id.* at 338.

52. *Id.* at 336.

and trade his property. In response Locke suggests a limited in time property right.[53] As Astbury explains,

> Locke was especially concerned about authors' rights and he advocated the inclusion of a clause which stipulated either that anyone who printed an author's name on a publication without his permission should be liable to forfeit to the author all the copies he had printed, or that when copies of new books were delivered to the libraries, the King's Librarian and the Vice-Chancellors of the universities should issue certificates which in effect vested in the authors the sole right to reprint these books for a certain number of years after the publication of the first edition. In making this recommendation that authors should have the power to control the publication of reprints Locke anticipated the terms of the Copyright Act of 1709.[54]

It seems that when one reads *Liberty of the Press* one is tempted to crown Locke "the inventor of modern copyright." Scholars have praised Locke for being forward-looking and appreciating "that the world was changing."[55] Ian Shapiro, for example, remarks that Locke's works "are remarkable historical documents addressed to the turbulent political conflicts of Locke's day, yet at the same time they transcend that and many another particular context to which they have been deemed relevant."[56] Modern copyright systems are clear evidence that these remarks are accurate.

Locke's ideal of a limited authorial right addresses the public interest, property, and economic ambitions of authors and private undertakings; generally mirrors the social and moral dimensions enshrined in contemporary copyright laws, which limit the right for educational purposes and research; and resembles contemporary remedies allowing seizure of infringing copies.[57] Perhaps the most striking point is that in 1694 Locke predicted that which, allowing for some differences, over 300 years later has become the formula and the internationally ac-

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53. *Id.* at 339.

54. Astbury, *supra* note 25, at 313.

55. Gordon Schochet, *"Guards and Fences": Property and Obligation in Locke's Political Thought*, 21 HIST. POL. THOUGHT 365, 388 (2000).

56. Ian Shapiro, *Introduction* to JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERANCE, at ix (Ian Shapiro ed., 2003).

57. An author's property right in his copy includes not only the right for remuneration but also the "power to seize on all copies" reprinted by others. Locke, *Liberty of the Press*, *supra* note 24, at 339; *see* Astbury, *supra* note 25, at 296–97, 308–09.

cepted standard for the duration of copyright. Locke remarks that "nobody should have any peculiar right in any book which has been in print fifty years."[58] He supports a term of years copyright followed by a lapse into the public domain, because it would "be reasonable to limit [an author's] property to a certain number of years after the death of the author or the first printing of the book as suppose 50 or 70 years."[59]

An American copyright currently lasts seventy years after the death of the author.[60] Locke provides two alternatives: either fifty years after publication or fifty or seventy years post-mortem. Although it sometimes has been said that Locke "is not a philosopher noted for his consistency,"[61] his conception of author's right—which we now call "copyright"—is striking, clear, and certainly consistent with his general view on property and its limits.[62] Locke is attentive to the danger in perpetual copyright and offers an alternative to the present copyright duration, which can extend over a century. Those who reject Lockean justifications of contemporary copyright should read Locke's conception of authors' rights before rejecting the legitimacy of these justifications. Defenders of a weaker form of copyright should read Locke because he advocates a more reasonable time frame for copyright and directs us to think about when we should stop extending copyright duration and reviving works in which protection has lapsed. That is the first, and most obvious, way in which Locke's theory can be reimagined.

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58. Locke, *Liberty of the Press*, *supra* note 24, at 333.

59. *Id.* at 337.

60. 17 U.S.C. § 302(a) (2000); *see also* Eldred v. Ashcroft, 537 U.S. 183 (2003). One of the reasons for the change in the duration of copyright from fifty to seventy years post-mortem was the extension of the copyright term by a European Directive. *See* Council Directive 93/98, art. 1, 1993 O.J. (L 290) 9 (EC); *see also* Berne Convention for the Protection of Literary and Artistic Works art. 7, opened for signature Sept. 9, 1886, as last revised, 25 U.S.T. 1341, 828 U.N.T.S. 221; *see generally* Michael Jones, Eldred v. Ashcroft*: The Constitutionality of the Copyright Term Extension Act*, 19 BERKELEY TECH. L.J. 85 (2004); Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003); Catherine Seville, *Copyright's Bargain—Defining Our Terms*, 2003 INTELL. PROP. Q. 312; Caren L. Stanley, *A Dangerous Step Toward the Over Protection of Intellectual Property: Rethinking* Eldred v. Ashcroft, 26 HAMLINE L. REV. 679 (2003).

61. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 213 (1988).

62. That the duration of copyright has been only recently extended from the previous standard of fifty years post-mortem attests to the coherency of Locke's ideal of authors' rights. In Canada, the duration of copyright is still fifty years after the death of the author. Copyright Act, R.S.C., ch. C-42, § 6 (1985).

III. NATURAL RIGHTS, LABOR, AND COPYRIGHT

A. Definitions

Locke's ideal of copyright should be examined not only in light of the *Second Treatise* but also in relation to his earlier *Essay Concerning Human Understanding*. It would also be wrong to separate his property theory from his ideal of authors' rights merely because he refers to intellectual property in the *Second Treatise*, albeit somewhat vaguely. However, the proximity between publication of the *Second Treatise* and *Liberty of the Press* clears the way for arguing that, for Locke, the terms "property" and "labor" do not refer solely to tangibles or the physical realm.

1. "Property"

Although copyright scholars tend to take Locke's definition of "property" to mean physical possessions, the issue is not that straightforward. Locke has several definitions of property,[63] many of which are organized in trinities. For example, he refers to "Lives, Liberties and Possessions"[64] and to "Lives, Liberties and Estates, which I call by the general name, Property."[65] These trinities appear in the *Second Treatise*, the *Essay* and other sources. Each of these works has its own agenda: The *Second Treatise* discusses the establishment of a stable political order, while the *Essay* focuses on Locke's theory of knowledge and philosophy of mind. The fact that Locke refers to property at different junctures in his political philosophy indicates that there may be more than one Lockean definition of property, or that Locke had in mind a general conception of property referring to a bundle of rights that includes both physical and intangible assets. In fact, Locke's references to lives and liberties reaffirm the general application of his definition of property, which includes, in that sense, various rights and privileges.

In the *Second Treatise*, Locke provides many examples of conventional property, including fields, acorns, and apples;[66] moss

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63. There is some support in literature for the idea that Locke had a "conventional" meaning of property. Cherno, for example, suggests that in Chapter V "we may take Locke to mean 'property' as we ordinarily use the term." Melvin Cherno, *Locke on Property: A Reappraisal*, 68 ETHICS 51 (1957).

64. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. xxviii, § 9, at 352.

65. LOCKE, SECOND TREATISE, *supra* note 2, § 123, at 368.

66. *Id.* § 46, at 318.

and leaves[67] "gathered from the Trees in the Wood";[68] timber cut in the wood;[69] water drawn from a fountain[70] or drunk from a river;[71] deer killed;[72] fish caught in the ocean;[73] land that is cultivated;[74] bread, wine, cloth, bricks, masts, ropes, and tar that people make;[75] and shells, sparkling pebbles, and diamonds that people pick up.[76] Yet he then remarks that this does not represent the entire institution of property. For example, property is "*all* the Materials made use of in the Ship that brought *any* of the Commodities made use of by any of the Workmen to any part of the Work."[77] Accordingly, Gordon Schochet remarks,

> What appears to tie [Locke's] differing usages together is that property refers to personal ownership that either comprehends or emanates from the self, be it the necessary goods, land—especially land—and money of the state of nature or the life, liberty and estate of civil society. As Locke said: "By *Property* I must be understood here, as in other places, to mean that Property which Men have in their Persons as well as Goods."[78]

Locke's remark that property encompasses what "Men have in their Persons as well as Goods"[79] provides additional support for the claim that intellectual expressions are not clearly excluded from his vision of what the concept of property covers and that personality is an important ingredient in any creative activity. In Chapter V, Locke seems to draw a distinction between persons in the natural, or biological sense, and an evolving person that includes the self. This is illustrated in his remark that "every Man has a *Property* in his own *Person*. This

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67. *Id.* § 42, at 315.
68. *Id.* § 28, at 306.
69. *Id.* § 43, at 316.
70. *Id.* § 29, at 307.
71. *Id.* § 38, at 309.
72. *Id.* § 37, at 312.
73. *Id.* § 30, at 307.
74. *Id.* § 32, at 308.
75. *Id.* §§ 42–43, at 315–16.
76. *Id.* § 46, at 318.
77. *Id.* § 43, at 316 (emphasis added).
78. Schochet, *supra* note 55, at 379 (quoting LOCKE, SECOND TREATISE, *supra* note 2, § 173, at 401); *see generally id.* at 376–81.
79. LOCKE, SECOND TREATISE, *supra* note 2, § 173, at 401.

no Body has any Right to but Himself."[80] A copyrighted work is a good but it is also a manifestation of the *person*—of oneself.

Property, then, in the *Second Treatise*, should be read as a general term regulating ownership and control of different kinds of things that are not necessarily confined to the physical realm. Further support for this conclusion is provided by Locke's frequent references to the term "property" in the *Essay*.[81] As a document that deals with man's self-constitution and the accumulation of knowledge, these references testify to the fact that Locke did not merely associate commodities with tangibility but also with their social context and with ownership of language and knowledge.

2. "Labor"

In the jurisprudence of rights, the assumption that one has the right to the product of one's creative labor is probably the most intuitive basis for arguing in favor of a natural private property right. Courts apply natural law and the principle of labor to signify intellectual efforts, creative input, personal contribution, and personal judgment. For example, in the early case of *Sayre v. Moore*,[82] Lord Mansfield stated that "men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor."[83] Other landmark cases applied the Lockean rationale of labor, and developed the rule "as you sow, so shall you reap."[84]

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80. *Id.* § 27, at 305–06; *see also id.* § 44, at 316. These remarks by Locke brought scholars to claim that, in Chapter V, Locke had subscribed to a personality theory. *See* Hughes, *supra* note 1, at 329. Karl Olivecrona supports this view and writes: "The acorn becomes the property of the collector when he picks it from the ground. This is the moment when something of his personality is infused into the acorn." Karl Olivecrona, *Appropriation in the State of Nature: Locke on the Origin of Property*, 35 J. HIST. IDEAS 211, 225 (1974). Walter Hamilton also asserts that "Locke never disassociates property from the personality of which it is an expression; because it is the creation of man it has the sacredness which he attaches to human life itself." Walter H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 868 (1932); *see also* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 114 (Harvard Univ. Press 1994).

81. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. xxxi, § 6, at 379; *id.* bk. III, ch. vi, § 50, at 470; *id.* bk. III, ch. ix, § 17, at 486; *id.* bk. IV, ch. iii, § 18, at 549.

82. (1785) 1 East 360 n.b, 102 Eng. Rep. 139 n.b (K.B.).

83. *Id.*

84. *See, e.g.*, Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 546 (1985); Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918); *see also* Millar v. Taylor, (1769) 98 Eng. Rep. 201, 252 (K.B.). Locke's writings not only influenced

Moreover, in different cases that have a continuing effect on the evolution of modern copyright laws, the Supreme Court has explicitly referred to John Locke's labor theory and natural property rights. In 1984, the Supreme Court cited Locke's *Second Treatise* in *Ruckelshaus v. Monsanto Co.*,[85] holding that the "general perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention.'"[86] Two decades later, the Federal Court of Canada referred to Locke's labor theory to support its redefinition of "originality" in contemporary copyright.[87] However, before using Locke as a point of reference in contemporary copyright disputes, judges and academics did not explore what Locke had in mind regarding labor when he wrote on property in the *Second Treatise*. Did Locke refer to intangibles *and* tangibles? An answer to this question would not only support the place of Lockean property in copyright but also explain why other largely ignored segments of his philosophy should be brought into current copyright dialogue.

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the development of copyright and other fields of law and policy but also inspired the Framers of the Constitution. *See generally* MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 11 (Oxford Univ. Press 1978). The Supreme Court held, however, that trivial or mechanical labor is an insufficient ground on which to base a legitimate claim for authorship and copyright entitlement. Sufficient labor requires investment of creative labor. *See* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). In fact, as this Article will show, the very existence of the requirement of a modicum of creativity legitimizes additional limitations on owners of copyrighted materials on the basis of Locke's theories of property, labor, authors' rights, and knowledge. According to Locke, creativity is a variation on experience. It is, on the basis of his theory of knowledge, a collective enterprise. However, mere physical labor invested on picking an acorn or cultivating land can, one may argue, be more easily treated as the exclusive property of the laborer. *See infra* Part IV.

85. 467 U.S. 986 (1984).

86. *Id.* at 1002–03.

87. CCH Can. Ltd. v. Law Soc'y of Upper Can., [2004] S.C.R. 339, ¶ 15. The Court held:

> There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality which is premised on a natural rights or Lockean theory of "just desserts [sic]," namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection.

Id. (citations omitted).

Published only a year before *Liberty of the Press* and five years after the *Second Treatise*, Locke's essay *Labour* clarifies and strengthens the argument that when he uses the term "property" in Chapter V he is well aware of intellectual property.[88] In *Labour*, Locke highlights the advantages of labor, its moral value, and its importance for human happiness, good health and the better use of power and control. The key issue is directing the distribution of labor in the world for the sake of "more knowledge, peace, health and plenty."[89]

In his attempt to reaffirm his great support for a property right in the laborious and industrious, Locke explicitly refers to "labour in useful and mechanical art,"[90] and draws a clear distinction between manual labor performed by the "country man," "the working artisan," and the "man of manual labour," and intellectual labor carried out by the "gentlemen and scholar."[91] For Locke, man should be engaged in labor for twelve hours a day.[92] His ideal of "honest labour," however, differs for the manual laborer and the scholar. Locke provides guidelines for a favorable distribution of labor in the day and remarks that six hours of study for "improvement of his mind" should suffice the scholar.[93] He then modifies his stand, writing,

> If this distribution of the twelve hours seem not fair nor sufficiently to keep up the distinction that ought to be in the ranks of men let us change it a little. Let the gentlemen and scholar employ nine of the twelve on his mind in thought and reading and the other three in some honest labour. And the man of manual labour nine in work and three in knowledge.[94]

The concept of labor in Locke's language, then, is not limited to physical labor only, nor solely associated with tangibles. Locke's reference to the labor of the "gentlemen and scholar," the scholar's work of mind in "thought and reading," and study for matters of "improvement of his mind,"[95] all support

88. John Locke, *Labour* (1693), *reprinted in* LOCKE: POLITICAL ESSAYS, *supra* note 24, at 326–28 [hereinafter Locke, *Labour*].

89. *Id.* at 328.

90. *Id.* at 326.

91. *Id.* at 327–28.

92. Locke asserts, "Half the day employed in useful labour would supply the inhabitants of the earth with the necessities and conveniences of life, in full plenty." *Id.* at 326.

93. *Id.* at 327.

94. *Id.* at 327–28.

95. *Id.*

the view that labor is also an activity associated with accumulation and expression of knowledge by scholars and artists, such that intellectual products were not segregated from other commodities when he wrote his property theory.

3. *"Conveniences of Life"*

In *Labour*, Locke makes several references to the "conveniences of life."[96] The term appears also in Section 44 of Chapter V, where Locke writes,

> From all which it is evident, that though the things of Nature are given in common, yet Man (by being Master of himself, and *Proprietor of his own person*, and the Actions or *Labour* of it) had still in himself *the great Foundation of Property*; and that which made up the great part of what he applied to the Support or Comfort of his being, *when Invention and Arts had improved the conveniences of Life*, was perfectly his own, and did not belong in common to others.[97]

Many analogies can be drawn between Section 44 and *Labour* that signify the generality and flexibility of the way Locke understands the term property. For example, "support and comfort" and "conveniences of life" in Chapter V are analogous to Locke's references in *Labour* to "necessaries and conveniences of life," to books and "pleasures," and to "arts and instruments of luxury."[98] In addition, in the *Essay* Locke also refers to "Conveniences of Life," discussing them in the context of useful arts.[99] When Locke refers to the terms "invention" and "arts" in the *Essay*, he often means natural faculties. However, the many combinations he makes of the terms and the many uses he makes of other terms that relate to "invention and arts" suggest that when writing Chapter V, Locke does not limit "invention and arts" to the employment of natural faculties and abilities in the making of traditional properties. Rather, "invention and arts" also refers to laborious intellectual achievements capable of private title, as long as they advance the "conveniences of life."

When read together with his remarks in the *Essay*, with his note *Labour*, and coupled with his approach to property as a general concept, Section 44 highlights the fact that Locke was

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96. *Id.* at 326.

97. LOCKE, SECOND TREATISE, *supra* note 2, § 44, at 340–41 (emphasis added).

98. *See* Locke, *Labour*, *supra* note 88, at 328.

99. *See, e.g.*, LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. IV, ch. xii, § 11, at 646.

thinking of intellectual property when he wrote Chapter V. Perhaps Locke's reference to intellectual property in the *Second Treatise* is not very clear or explicit. His mistake was that he did not draw a clear distinction between physical and cultural property. In other words, his mistake is his belief that even when "*Invention and Arts had improved the conveniences of Life*," it is perfectly permissible to treat all kinds of works as the exclusive private property of an individual creator, because such works now do "not belong in common to others."[100] A few years later, however, he compensates for this error in *Liberty of the Press* and clearly defines the limits of exclusive ownership when works of authorship are at stake.

B. A Natural-Right Justification

1. Collective and Individual Rights Through Labor-Mixing

a. Collective Labor

Locke's attitude toward authorial rights is based on his understanding of the very idea of property as emanating from a person's right to his labor. His philosophy regarding both property and authorial rights illustrates how his ideal of ownership opposes dogmatic justifications for the classic political status quo. As discussed above, some copyright scholars go astray after Locke's incantation, while other scholars criticize his philosophy for being too individualistic in nature. Scholars that belong to the latter group sometimes claim that intellectual properties are collective creations. Advocating a Foucault-like social approach to copyright and supporting the role of the creative collectivity in the making of authorship and art, they claim that copyrighted materials should be collectively owned. Locke's theory of property, they argue, cannot accommodate the social and cultural concerns raised by contemporary copyright affairs and certainly cannot lend support to their radical social view of copyrighted entities as collectively produced and collectively owned properties.

For example, Tom Palmer once noted that if rights are to be recognized in works of art and authorship anywhere, "they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist."[101] Rosemary Coombe argues that the

100. LOCKE, SECOND TREATISE, *supra* note 2, § 44, at 340–41 (emphasis added).
101. Palmer, *supra* note 1, at 848.

creation of cultural commodities is an essential process that involves the collective as much as it involves the individual author.[102] Margaret Chon claims that "the production of a 'work' that is subject to protection by copyright is an activity undertaken by both author and audience."[103] Carys Craig observes that because "the interdependent nature of human culture means that intellectual works are necessarily the products of collective labour" they "ought to be owned collectively."[104] Susan Scafidi remarks that as members of a cultural unit we "already share the same culture and jointly 'own' its cultural products."[105] And Steven Wilf takes the collective argument one step further, defending a public regulatory power in trademarks based on the fact that the "[t]rademark doctrine demonstrates a notable reliance upon public perception."[106] Wilf recognizes the dynamics of author-public interaction and concludes that "[a] trademark is not authored by the production/marketing of an object in its package, but by a joint interpretive enterprise between author and public."[107] On the basis of this collaboration between public and authors he defends a joint property title to the public in intellectual creations. In other words, these scholars argue that the public's contribution to the creative process amounts to labor. This Article also argues that the public is a Lockean laborer just as the individual author is,[108] and will defend the proposition that Locke's theories of property, knowledge, and author's rights not only support a collectivist approach to copyright but define the nature of the public's contribution.

b. Lockean Labor

In Chapter V of the *Second Treatise*, Locke crafts a theory of original appropriation to justify private enclosure of commonly owned objects. In doing so, Locke provides the framework for any property argument, including intellectual properties.

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102. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991).

103. Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet, Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 264 (1996).

104. Craig, *supra* note 1, at 36.

105. Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 810 (2001).

106. Wilf, *supra* note 1, at 32.

107. *Id.* at 45–46.

108. The collaboration between the public and authors is further explored in Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. (forthcoming 2006).

Chapter V is a "skillful bit of dialectic"[109] permitting private enclosures through mixing labor with commonly owned properties and guaranteeing a natural private property right in an original object.[110] Through the expenditure of laborious efforts, the laborer, be he a peasant, a hunter, or an author, secures himself a private dominion embedded with properties of many kinds. Locke does not include in this formula Kings or their agents,[111] which, in light of *Liberty of the Press*, includes the Stationers' Company.

The setting in Chapter V is that of the state of nature—the pre-political state of mankind in which "*everyone has the Executive Power* of the Law of Nature,"[112] a "*State of Liberty*, yet it is not a *State of Licence*, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions."[113] Our copyright regime is embedded with conceptual elements from the state of nature. Copyright law stipulates that ideas are not protected. Rather, they are allegedly infinitely inexhaustible, in that ideas are "free as the air to common use" and not at risk of depletion.[114] The only rule that regulates their consumption is that there is no limit to the amount of ideas one can use. Copyright laws, however, distinguish ideas from their expression, circling the latter with fences that prohibit others from using and consuming what is not their own.[115]

The Lockean labor theory can be regarded as the union of two basic, complementary theses. The first is that everyone has a natural property right in the labor of his body. The second thesis argues that a property right is limited by specific social norms. In Locke's words,

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This

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109. Hamilton, *supra* note 80, at 867.

110. In *Millar v. Taylor*, the court applies a natural law theory to copyright alongside the economic approach taken by the Statute of Anne. *See* Millar v. Taylor, 98 Eng. Rep. 201, 252 (1769). The court's decision was overruled by the House of Lords in *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.).

111. *See generally* Richard Ashcraft, *Locke's Political Philosophy*, *in* THE CAMBRIDGE COMPANION TO LOCKE, *supra* note 20, at 226.

112. LOCKE, SECOND TREATISE, *supra* note 2, § 13, at 316.

113. *Id.* § 6, at 311.

114. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

115. *See, e.g.*, 17 U.S.C. § 102(b) (1976) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

> no Body has any Right to but him. The *Labour* of his Body and the *Work* of his Hands, we may say, are properly his. Whatsoever, then, he removes from 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 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 once joyned to, at least where there is enough, and as good left in common for others.[116]

Locke introduces labor as a tool to overcome the consent difficulty. He rejects the theory of universal compact as a necessary condition of legitimate appropriation, as held by Grotius and Pufendorf.[117] He writes that if commoners were not able to enclose common properties via labor, appropriation would require a worldwide compact: man would starve "notwithstanding the Plenty God had given him."[118] To overcome this, Locke shows "how *labour* could make Men distinct titles to several parcels of [the world], for their private uses"[119] and that "Man (by being Master of himself, and *Proprietor of his own Person*, and the actions or *Labour* of it) [has] . . . in himself *the great Foundation of Property*."[120] Once a property right has been established in an item, the item cannot be taken from its owner without his consent.[121]

By mixing his labor with a commonly owned object, the laborer becomes the owner of the object.[122] He has annexed something to it "more than Nature, the common Mother of all, had done."[123] Labor justifies the integration of a physical object into

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116. LOCKE, SECOND TREATISE, *supra* note 2, § 27, at 328–29.

117. *See generally* STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 125–90 (Clarendon Press 1999).

118. LOCKE, SECOND TREATISE, *supra* note 2, § 28, at 330.

119. *Id.* § 39, at 338. Locke invokes "inequality, because he is convinced that equality is a source of conflict, as the transformation of the state of nature into a state of war shows." DANIELA GOBETTI, PRIVATE AND PUBLIC: INDIVIDUALS, HOUSEHOLDS, AND BODY POLITIC IN LOCKE AND HUTCHESON 97 (Routledge 1992).

120. LOCKE, SECOND TREATISE, *supra* note 2, § 44, at 340–41.

121. *Id.* §§ 138, 140, 193. For further analysis of the compact theory as applied to Locke, see JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 236–41 (Princeton Univ. Press 1992).

122. LOCKE, SECOND TREATISE, *supra* note 2, § 45, at 341.

123. *Id.* § 28, at 330.

the laborer's realm, the *suum*,[124] and the result is ownership.[125] For example, the deer that the Indian has killed is his in the sense that it is a part of himself, and a completed plan for a tulip garden in the center of Brussels is the planner's own, as it constitutes part of himself.[126]

Some criticisms of Lockean approaches to copyright fail to appreciate that Locke's theory of property may expand the boundaries of copyright control.[127] Hettinger, however, once wrote,

> Given this vital dependence of a person's thoughts on the idea of those who came before her, intellectual products are fundamentally social products. Thus, even if one assumes that the value of these products is entirely the result of human labour, this value is not entirely attributed to *any particular labourer* (or small group of labourers).[128]

In addition to the above-mentioned collective approaches to copyright, this remark gives further support to the argument that copyrighted entities represent a collective social enterprise; they are created by the contributions of many different laborers.

If, according to Locke, only labor justifies entitlement to property, then the collective's contribution must satisfy the requirement of labor for purposes of ownership. Labor is a core element in the assessment of creativity and copyright subsistence, and a copyrighted work as a collective enterprise requires physical, creative, and mental labor. That is, laborious contribution cannot be limited to the contribution of the person who pushed the pen onto paper.[129] Contributions that qualify

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124. The *suum* means "what belongs to a person is what is one's own." *See* Olivecrona, *supra* note 80, at 225; BUCKLE, *supra* note 116, at 169–74.

125. Day challenges the idea of ownership through labor and argues that one cannot talk of "owning labour" because labor is an activity that can be performed, but cannot be owned. *See* J.P. Day, *Locke on Property*, 16 PHIL. Q. 207, 211–12 (1966).

126. Denicola argues that "the act of aggregating isolated pieces of information" should be a ground for copyright protection in part because of considerations of "a natural right to the fruits of one's labor" and unjust enrichment. Robert Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 519–20, 528, 530 (1981); *see also* Gordon 1992, *supra* note 1, at 166–67, 266–73.

127. *See* Craig, *supra* note 1, at 22–60.

128. Hettinger, *supra* note 1, at 38.

129. If the public and authors jointly contribute to the creative process and should hold a joint title in copyrighted entities on the basis of their collaboration and contribution, we should also ask what the law recognizes as sufficient authorial contribution to merit a joint title in copyrighted endeavors. It should be noted

as Lockean labor include physical contributions of members of the public as well as general social and cultural input. Locke forcefully advocates that any violation of the individual's right amounts to unlawful intrusion into the individual's realm. The same should hold for the collective: any violation of the collective right by virtue of disproportionate enclosures of cultural and social portions of the public domain violates the public's

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that there is a disagreement as to the definition of what constitutes sufficient contribution for matters of joint authorship. There exist two different approaches to this question: One is that of Nimmer, the other is that of Goldstein. Nimmer argues that each contribution should be "more than *de minimis*" or that "more than a word or line . . . be added." MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07(a)(1) (2005). Goldstein asserts that each contribution must be independently copyrightable. PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 4.2.1.2 (1989). Although the joint authorship rules under section 101 of the Copyright Act of 1976, 17 U.S.C. § 101 (2000), do not embrace a Goldstein-like condition, common law has created the rule that in order to qualify as a joint author, the contribution must be copyrightable. Section 101 defines joint authorship work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* Section 201(a) addresses initial authorship by stating, "The authors of a joint work are co-owners of copyright in the work." *Id.* § 201(a); *cf.* Copyright Designs and Patents Act, 1988, c. 48, § 10, (Eng.) ("a work of joint authorship is a work where the contribution of each author is not distinct from the other"). Goldstein's approach attempts, as the Court noted in *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991), to "carefully draw the bounds of joint authorship so as to protect the legitimate claims of both sole authors and co-authors." *Id.* at 504. In contrast, Judge Laddie in the English authority of *Cala Homes* followed a similar line of argument to that of Nimmer and remarked that we should not confine our definition of authorship to the person "who pushed the pen" onto paper. *See* Cala Homes (S.) Ltd. v Alfred McAlpine Homes E. Ltd., [1995] F.S.R. 818, 835 (Ch.). David Vaver criticizes the restrictive application of the requirement of contribution and remarks that "what contribution warrants co-authorship may be contentious." *See* DAVID VAVER, INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENTS, TRADE-MARKS 52–53 (1997). Emphasizing the requirement of intent to co-author under section 101 of the Copyright Act of 1976, the Second Circuit applied the *Childress* formula in *Thomson v. Larson* and found that Thomson's and Larson's creative contributions did not rise to the level of joint authorship. *See* Thomson v. Larson, 147 F.3d 195, 202–07 (2d Cir. 1994); *see generally* Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193 (2001); Nancy P. Spyke, *The Joint Work Dilemma: The Separately Copyrightable Contribution Requirement and Co-ownership Principles*, 40 J. COPYRIGHT SOC'Y 463 (1993); Jane C. Lee, Comment, *Upstaging the Playwright: The Joint Authorship Entanglement Between Dramaturgs and Playwrights*, 19 LOY. L.A. ENT. L. REV. 75 (1998). The scholarship discussed above on the collective role of the public in the making of copyrighted entities confirms the role of the public in this process. It is therefore not necessary to question the exact contribution of the public simply because its contribution controls the realization of the creative process and the capacity of this process to generate copyrighted properties. The public clearly qualifies for the Goldstein requirement of copyrightable contribution since no work would exist without its contribution. In fact, on the basis of Locke's approach to knowledge, every copyrighted work is an inseparable entity composed of contributions made by both authors and public.

property right in its labor. As Gordon observes, "Natural rights theory . . . is necessarily concerned with the rights of the public as well as with the rights of those whose labors create intellectual products."[130] Locke did not account for the role of collective labor and this is perhaps one of the greatest difficulties in applying Chapter V to intellectual property, which many copyright scholars argue is essentially a collective phenomenon. Before critiquing Lockean approaches to copyright, this Article examines whether Locke treated the public interest in Chapter V in the same way he treated it in *Liberty of the Press*.

2. The No-Harm Principle

The concept of ownership should be distinguished from the moral justifiability of owning a particular thing. It is one thing to ask what powers over *X* are normally connoted by the statement that "*A* owns *X*," but quite another thing to ask under what conditions *A* is morally entitled to exercise these powers and to be regarded as the owner of *X*. Locke's strategy is to argue that under certain conditions, individual acquisition does not violate anyone's right to property in the common. If, however, a person has within himself the "*Foundation of Property*,"[131] and if labor creates property entitlement, what limits a person's right to appropriate from the common? Locke invokes the no-harm principle to address this issue. This principle ensures that a person's natural property right is protected only when it is balanced against and regulated by certain social norms, so that it does not conflict with the "common good."[132] As Gordon explains,

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130. Gordon 1993, *supra* note 1, at 1535.

131. LOCKE, SECOND TREATISE, *supra* note 2, § 44, at 316–17.

132. In that respect, Zuckert writes that there are limitations on what human beings may do; for example, "they may not indirectly harm each other through taking more than their fair share of goods of the external world." Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL'Y 695, 724 (1997). Interestingly, the Irish Constitution recognizes property rights as natural rights, but provides that one's natural property rights will be protected as long as they are balanced and regulated by the principles of "social justice" and do not conflict with the "common good." Ir. CONST., 1937, art. 43, *available at* http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf (last visited Mar. 15, 2006). This is a powerful statement of two crucial propositions. First, there is an inherently social dimension to private property. Second, where conflicts between individual self-interest and the public good exist, the public good has priority. The open language of such provisions highlights the fundamental nature of social obligations. Yet the social balance these provisions aim to protect depends on the way they are interpreted.

> The essential logic is simple: Labor is mine and when I appropriate objects from the common I join my labor to them. If you take the objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore I have property in the objects. Similarly, if I use the public domain to create a new intangible work of authorship or invention, you should not harm me by copying it and interfering with my plans for it. I therefore have property in the intangible as well.[133]

Locke's no-harm principle as envisioned in Chapter V is composed of two immediate conditions set upon private property and an additional condition securing minimum sustenance in extreme circumstances. First, Locke argues that the laborer may appropriate only the amount that he can use: "Nothing was made by God for Man to spoil or destroy."[134] This is the "no-spoliation proviso." Second is the "enough and as good proviso," under which a man has a right to appropriate from the common as long as there is "enough, and as good left in common for others."[135] In addition, Locke articulates a charity principle by which in extreme circumstances commoners have a right to take and consume the private resources of others.[136]

Using Hohfeldian terms,[137] every commoner has a privilege—a liberty—to use the common. No one has, in Locke's state of nature, a right or claim to the common. After a commoner has exercised the privilege which others also have, by laboring on a commonly owned object, he deserves a reward

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133. Gordon 1993, *supra* note 1, at 1544–45; *see also* Gordon 2004, *supra* note 1, at 80–81.

134. LOCKE, SECOND TREATISE, *supra* note 2, § 31, at 308.

135. *Id.* § 27, at 305–06.

136. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, FIRST TREATISE, § 42, at 188 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) [hereinafter LOCKE, FIRST TREATISE]. Locke's theory informs Harris's definition of natural rights: "Natural rights are such rights as follow from the interaction between the formal and substantive requirements of *just treatment* and the *fact of the world*." JAMES W. HARRIS, PROPERTY AND JUSTICE 183, 213 (1996) (emphasis added). Harris suggests a three-step principle applicable to Locke's entitlement paradigm, which he calls the "creation-without-wrong" argument for a natural property right: "If a person (1) creates a new item of social wealth, and (2) wrongs no-one in doing so, it follows that (3) he ought to be accorded ownership of that new item." *Id.* at 197. Harris strongly criticizes the validity of Locke's property theory to tangibles and intangibles alike. *Id.* at 202–12.

137. *See generally* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–44 (1913).

for his efforts and he may become the owner of that object. Once the laborer has complied with the two provisos, he has become the owner of the object and he has a right to that object, while every other commoner has the correlative duty to refrain from interfering with his right. In other words, labor and compliance with the provisos transform a commoner's privilege to a duty and a laborer's privilege to a right. A laborer that does not leave "enough and as good" for others remains a commoner-privilege-holder and not a laborer-right-holder. His right to the product of his labor did not mature.[138]

The idea-expression dichotomy dictates that, in copyright, the labor and the no-harm principle bear different meanings. For example, if I surreptitiously wax somebody's car, I own neither the car nor the wax. Similarly, when I labor on an idea to film a documentary movie on the atrocities in the Second World War, I own neither the idea nor the expression of it, if it were already expressed by someone else. As Abraham Drassinower argues, "All that is copyrightable originates in the author's labour, but not everything originating in the author's labour is subject to copyright protection."[139] Although under Locke's account, encroachment into another's realm might lead to injury, copyright law justifies such an injury to account for the public interest. It creates moral injury under the idea-expression dichotomy, and in the form of the fair use doctrine.[140] These "injuries" can, however, be looked at as a benefit for authors and artists. Gordon writes,

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138. It can be argued that Locke distinguishes between de jure property and de facto property. A laborer will never become a de facto owner of a previously commonly owned object unless he complies with certain social limitations. He will always be the de jure owner of the object because the labor he expended on it is his "unquestionable Property." LOCKE, SECOND TREATISE, *supra* note 2, § 27, at 305–06. Viewed in this way, it might be that a Lockean laborer would have to comply with the conditions in a set time. The fact that he has a de jure property right will secure for him the first-in-time right, as long as he meets the social conditions in time.

139. Drassinower, *supra* note 1, at 18. Simmons writes that, "[m]ixing labor is not a way of losing our labor . . . . Our labor extends our selves . . . into the natural world. Our purposive activities are inseparable from our selves." A. John Simmons, *Makers' Rights*, 2 J. ETHICS 197, 211 (1998).

140. Damstedt, for example, argues that "[t]he functional application of the fair use doctrine in copyright law mirrors Lockean principles. The scope of an owner's copyright is limited by section 107, which establishes a four-factor test to determine whether a use is a fair use." Damstedt, *supra* note 1, at 1213–14. The four factors are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the

> Some limitations on authors' rights may benefit the consuming public without harming authors. Since authors are part of the public—and in fact may constitute the part of the public most in need of using prior works as bricks when building new works—it is likely that some privileges to copy will aid authors more than harm them.[141]

In fact, in *Liberty of the Press*, Locke justifies the imposition of involuntary harm on authors' property rights for matters of public interest and advocates a weaker version of a natural right for authors—one that is limited in time and available for purposes of education and learning.[142]

3. Copyright and the No-Spoliation Proviso

Locke maintains that a laborer who, for instance, appropriates more apples than he can use and allows them to perish commits an injury against others and violates the "the common Law of Nature."[143] He is "liable to be punished; he invaded his Neighbour's share, for he had *no Right, farther than his Use* called for any of them."[144] This law of nature, the no-spoliation proviso, is an absolute condition set on appropriation and ensures that "*Nothing*" was made by God to spoil or be destroyed.[145]

Copyright scholars disagree on the relevance of the no-spoliation proviso as it pertains to intellectual property. Gordon hardly mentions it.[146] Hughes does not think it is a key element and argues that it is absent in intellectual property systems.[147] Craig provides a thorough criticism of this pro-

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potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2000). In Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985), the Court noted that fair use is a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." *Id.* at 549 (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)). For a recent critique of the fair use doctrine, see, for example, Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004), and Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1665–76 (2004).

141. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1461 (1989).

142. Shiffrin, *supra* note 1, at 155.

143. LOCKE, SECOND TREATISE, *supra* note 2, §§ 31, 37.

144. *Id.*

145. *Id.* § 31, at 332.

146. *See* Gordon 1993, *supra* note 1, at 1543, 1551.

147. Some argued that perhaps a requirement of publication for copyright subsistence could have manifested a strong proviso in intellectual property. *See*

viso,[148] and Damstedt advocates its fundamental importance. The latter defines spoliation as occurring "where a unit of a product of labor is not put to any use."[149] He asserts that non-use violates the condition and that the proviso therefore justifies the claim underlying the fair use doctrine: "justified taking can be seen as a natural way to police the waste prohibition."[150]

It is a mistake to ignore the no-spoliation condition when discussing copyright. We may easily see that the no-spoliation proviso leaves the allocation of strong private copyrights intact. In and of themselves, ideas are non-rivalrous:[151] they do not perish, and the law allows us to consume as many ideas as we wish.[152] Even if we consume more than we can use, we cannot

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Hughes, *supra* note 1, at 328–29; *cf.* Hettinger, *supra* note 1, at 44–45; Damstedt, *supra* note 1.

148. *See* Craig, *supra* note 1, at 31–34.

149. Damstedt, *supra* note 1, at 1182.

150. *Id.* at 1196.

151. This is what accounts for the non-rivalrous nature of the consumption of ideational entities: works of art and authorship are non-rivalrous goods which are "more like inexhaustible 'public goods' that are ordinarily un-owned" and thereby eliminate the scarcity problem. Gordon 2003, *supra* note 1, at 621; *see also* Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S73–S74 (1990). In other words, it is argued that, as non-rivalrous goods, works of art and authorship "can be used by an infinite number of people in an infinite number of ways without harming the use value of any other person, including the initial producer." Damstedt, *supra* note 1, at 1182. Music, for example, more than any other form of modern culture, collapses the gap between what separates idea from expression. Is the string of six notes that begins "Happy Birthday to You" an idea, an expression, or both? Landes and Posner describe a copyrighted work as "the joint output of two types of input, only one of which is protected by copyright law." William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 349 (1989). For matters of argumentative clarity, it is important to note that, by their nature, expressions are also non-rivalrous. Copyright law secures an exclusive right in expressions notwithstanding that they are non-rivalrous, thereby creating *false* scarcity and rendering their benefits excludable. As Harris explained, "[S]ociety's laws have been extended to include those trespassory rules which create artificial scarcity in unpublished and published ideas." HARRIS, *supra* note 135, at 46.

152. *See* Baker v. Selden, 101 U.S. 99 (1879); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977). As Judge Frankfurter remarked in *Marconi Wireless Telegraph Co. of America v. United States*, great inventions and copyrighted works "have always been parts of an evolution, the culmination at a particular moment of an antecedent process. . . . [T]he history of thought records striking coincidental discoveries—showing that the new insight first declared to the world by a particular individual was 'in the air.'" Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 62 (1943). Similarly in *Millar v. Taylor*, Judge Yates put the matter this way: "Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion." Millar v. Taylor, (1769) 98 Eng. Rep. 201, 252 (K.B.).

prevent anyone else from doing the same—ideas are free as the air. The success of this argument depends, however, on two issues: the ability of our judges to separate ideas from their expressions, and the spoliation of the latter.

Scholars connect the proviso to copyright in a perplexing way. Drahos, for example, observes that "ideas can spoil in the sense that, once appropriated, their time span of useful application in many cases is limited. Those who appropriate ideas with a view to do nothing with them arguably infringe Locke's spoilage proviso."[153] Craig illustrates a situation where "the intellectual property owner wasted the idea by preventing its communication and development."[154] How can copyright owners violate the proviso if ideas are not protected and "they almost always retain future value"?[155] Moreover, in a society that sanctifies principles of freedom and democratic discourse, can we force people to talk? Can I, after a discussion with my friend, force him to communicate the ideas we discussed to other people? No matter how socially valuable these ideas are, I cannot force him either to communicate them or to develop them in any possible way. It seems that the connection between Craig's example and violation of the proviso and copyright depends on a viable separation of an idea from its expression. But the distinction between ideas and expressions is blurred and is based on instinct and subjective interpretations.[156] Ideas inter-

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153. DRAHOS, *supra* note 1, at 51.

154. Craig, *supra* note 1, at 33.

155. Hughes, *supra* note 1, at 328.

156. Amy Cohen writes, "There may be no way for the new artist to extract the 'idea' without the 'expression.'" Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 231 (1990). It is simply a subjective test. Similarly, Alfred Yen asserts,

> Problems connected with separating idea from expression have caused many copyright decisions to rest upon the courts' ad hoc sense of what is permissible copying rather than upon any tangible principles. Such unprincipled decision making is constitutionally suspect because it leaves courts and citizens uncertain about the contours of constitutionally significant doctrine. This uncertainty ultimately causes copyright's unacceptable chilling effect.

Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 397 (1989) (internal citations omitted). He continues, remarking on the risk,

> On the one hand, if courts adopt a narrow view of idea and a broad view of expression, more and more similarities will be similarities of expression and will therefore support claims of infringement. In turn, this implies a broad scope of copyright. Conversely, if courts adopt a broad view of idea and a narrow view of expression, few similarities will qualify as

mingle with expressions and enclosures of "universal truths or transcendent essence that cannot and should not be captured or controlled by one artist" become subject to copyright.[157] Because of the inability to successfully separate the two constituents of a copyright work—ideas from their expressions—current copyright laws not only deplete the common of its cultural and social elements but also permit virtually uncontrolled appropriation of ideas. This may trigger severe violation of the no-spoliation condition, "[a]s abstract objects ideas cannot spoil, but the opportunities that they confer may."[158] That is why it is important to ensure that the separation of ideas from their expression is viable in order to maintain some social sense of copyright: namely, that ideas cannot be protected and cannot be appropriated as private property.

Intellectual goods are perishable,[159] but the proviso becomes relevant only once an idea has been expressed and attracts copyright protection.[160] Hughes distinguishes between spoilage in the "social context" and for the "individual organism."[161] Access to the social value is dependent on the duration of the right. In many cases, once protection has expired, the work no longer has the same social value and therefore has been "spoiled," even if it surprises us with a sudden revival and yields value at a later date. Novels become "old," architectural styles fall in and out of fashion, and computer programs lose their social value and become obsolete, sometimes long before expiration of the right.[162] Furthermore, Hughes is mistaken to assume that there is no loss to the "individual organism" be-

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similarities of expression. This will result in a relatively limited scope of copyright.

Id. at 400. *See generally id.* at 398–407. The House of Lords in England also frequently emphasizes the difficulties inherent in the idea-expression dichotomy. The distinction is so ridiculously subjective that Lord Hoffmann in the *Designers Guild* case ironically remarked that "copyright law protects foxes better than hedgehogs." Designers Guild Ltd. v. Russell Williams Textiles Ltd., [2000] 1 W.L.R. 2416, 2423 (H.L.). In a later case, Justice Lewison adds to the confusion and remarks, "It is sometimes said that there is no copyright in ideas; only in the expression of ideas. Like many beguilingly simple propositions, this one needs to be treated with caution." Ultra Mktg. (UK) v. Universal Components Ltd., [2004] EWHC 468, [20] (Ch.).

157. Cohen, *supra* note 155, at 231.

158. DRAHOS, *supra* note 1, at 51.

159. *But see* Hughes, *supra* note 1, at 328.

160. According to Hughes, the proviso is less relevant for intellectual property due to the absence of a publication requirement. *Id.* at 328–29.

161. *Id.* at 327.

162. *See* Craig, *supra* note 1, at 31–32. *But see* Hughes, *supra* note 1, at 328.

cause for the owner, the internal value remains constant. The individual organism clearly loses by virtue of not communicating and sharing the creation with others. For example, the owner deprives himself of the true value of the creation in light of the potential that someone will generate a derivative idea and then the owner would develop his initial creation even further.[163]

Locke applies a tacit no-spoliation proviso in *Liberty of the Press*. He is aware that in situations of perpetual right in works of authorship, spoilage of social value is inevitable. His copyright ideal proves that any system of authors' rights must incorporate the no-spoliation condition as part of its moral applicability. His suggestion of a limited-in-time property right given to authors and the requirement of public access to authorial works for educational and learning purposes limits the possible violations of the proviso. That is, Locke's ideal of a system of authorial rights respects that some items have "certain natural and proper uses, such that it would be perverse to use them otherwise,"[164] and prohibiting proper use violates the proviso.

4. Copyright and the "Enough and as Good" Proviso

a. The Role of the Proviso

Every laborer is under an obligation to leave in the common "enough and as good" for other commoners to appropriate.[165] The credibility of Locke's property theory depends on the realization of this second proviso.[166] It appears both before and

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163. This is one of the reasons why, as Damstedt argues, we should invoke a fair use right against an owner of an intellectual property who is letting the good spoil and waste. *See* Damstedt, *supra* note 1.

164. ALAN RYAN, PROPERTY AND POLITICAL THEORY 37 (1984).

165. LOCKE, SECOND TREATISE, *supra* note 2, §§ 27, 33–34, at 328–29, 333.

166. Waldron challenges those who insist on the proviso's importance. He is concerned with the operation of the proviso in the age of scarcity and claims that the "enough and as good" requirement is merely "a fact about acquisition in the early ages of man." Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. 319, 322 (1979); *see* WALDRON, *supra* note 20, at 172; WALDRON, *supra* note 61, at 209–18, 280–83. Waldron then concludes that the proviso indicates that "men would have a *general* right to private property, in the sense that they would have a right, enforceable against others, not to be left in a situation where appropriation was impossible for them." WALDRON, *supra* note 61, at 217. For criticism of Waldron's approach, see GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY 37–41, 47–58 (1995). Waldron also rejects Nozick's argument for a "weak Lockean Proviso." For Nozick the "crucial point is whether appropriation of an unowned object worsens the situation of others." ROBERT NOZICK, ANAR-

after the no-spoliation condition and before the introduction of the money economy. Its prevalence can lead one to believe that Locke intends the proviso to affect every scenario of appropriation. As Gordon puts it, "*It is the Proviso therefore that gives Locke's theory much of its moral force.*"[167]

This proviso is attractive for several reasons. Morally, it respects the right of every fellow commoner to appropriate from the common. Practically, it does not require the consent of all commoners prior to appropriation. At the same time, it ensures that the common is not devalued and provides the public with a moral right to encroach into their members' private dominion. In intellectual property terms, it ensures that a "grant of property does no harm to other persons' equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage"[168] as it restricts the ownership of intellectual creations and widens the doorway to new creators.

Some scholars take the view that this proviso applies seamlessly to intellectual property. For example, Hughes observes,

> Intellectual property systems . . . do seem to accord with Locke's labor condition and the "enough and as good" requirement. In fact, the "enough and as good" condition seems to hold true only in intellectual property. That may mean that Locke's unique theoretical edifice finds its firmest bedrock in the common of ideas.[169]

Similarly, Moore remarks, "The individual who takes a good drink from a river does as much as to take nothing at all. The same may be said of those who acquire intellectual property . . . . [T]he case for Locke's water-drinker and the author or

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CHY, STATE AND UTOPIA 175 (Basic Books 1974). This means that "someone whose appropriation otherwise would violate the Proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened." *Id.* at 178; *see also* SREENIVASAN, *supra*, at 123. Waldron asserts, in response, that Nozick's formula "is too weak for Locke; it does not even live up to the demands of the minimal Lockean requirement of charity." WALDRON, *supra* note 61, at 216. The problem and the danger are that, as Bogart argues, in scarcity situations, "every acquisition worsens the lot of others—and worsens their lot in relevant ways." J.H. Bogarts, *Lockean Provisos and the State of Nature*, 95 ETHICS 828, 834 (1985). Sanders offers an alternative interpretation according to which we should drop the "leaving" constituent of the proviso. "Since this part is the very heart of Locke's Proviso," however, "it seems plain that the Proviso should . . . simply be abandoned." John T. Sanders, *Projects and Property*, *in* ROBERT NOZICK 34, 39–41 (David Schmidtz ed., 2002).

167. Gordon 1993, *supra* note 1, at 1565.

168. *Id.* at 1563–64.

169. Hughes, *supra* note 1, at 329.

inventor are quite alike."[170] These statements use Locke's proviso in order to reinforce the status quo: the proviso is easily satisfied because ideas are non-rivalrous and infinitely consumable, hence "enough and as good" ideas are always available.

b. A Literal Proviso for Intellectual Property

Some questions pertaining to copyright and the "enough and as good" proviso must be addressed. First, for whom must "enough and as good" be left, and whose condition does the proviso intend to affect? It is evident that Locke sought the public good, remarking that everything is done for "the good of every particular Member of that Society."[171] Gordon observes that, in introducing the proviso, Locke intended to defend the welfare of everyone, in particular the non-propertied.[172] This is also evident in the way Locke advocates limits to authors' rights in *Liberty of the Press*, where he mentions that man should not "starve for printing" of classic

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170. Moore 2001, *supra* note 1, at 98.

171. LOCKE, FIRST TREATISE, *supra* note 136, § 92. The inclusion of the charity principle in Locke's political philosophy further grounds support for its moral force and Locke's consideration of the public good. Locke applies the principle in situations where there is "extreme want." He considers charity a matter of natural right, not of supererogation. However, the right to charity should be carefully demarcated because "upon a very moderate computation, it may be concluded that above one half of those who receive relief from the parishes are able to get their livelihood." H.R. FOX BOURNE, 2 THE LIFE OF JOHN LOCKE 378 (1876) (quoting JOHN LOCKE, REPORT ON THE BOARD OF TRADE ON THE REFORM OF THE POOR LAW (1697)); *see also* John C. Winfrey, *Charity Versus Justice in Locke's Theory of Property*, 42 J. HIST. IDEAS 423, 436 (1981). Waldron emphasizes the centrality of the charity principle and observes that "[a] man in need has 'a Right' to another's surplus goods: indeed Locke twice talks of his having 'a Title' in a way that suggests that this too is to be regarded as a property entitlement." WALDRON, *supra* note 20, at 180. Gordon examines the charity principle in the context of intellectual property. She distinguishes "unearned rights" from other rights. The latter relates to rights that are "fundamental human entitlements." They are defined as such since we possess them by "virtue of our humanity." Gordon 1993, *supra* note 1, at 1543. According to Gordon, a laborer does not have an absolute right to the product of his labor when he faces others in great need. The right to charity then, is an "unearned" right. Gordon rightly argues that in copyright terms, this implies that one has a restricted right to the creative expressions of one's labor if the public or a specific user are "in need." *Id.*

172. Gordon 1993, *supra* note 1, at 1570. Gordon also asserts that "although the natural-rights approach is usually thought to be inconsistent with a public-benefits approach to intellectual property, it in fact supports a demand that significant components of intellectual property law be crafted to serve the public benefit." *Id.* at 1609; *cf.* E.J. Hundret, *Market, Society and Meaning in Locke's Political Philosophy*, 15 J. HIST. PHIL. 15, 44 (1977) (arguing that Locke and his successors "sought their own rather than the public interest").

books.[173] This shows that for Locke, basic sustenance cannot start and end with conventional properties but includes elements necessary for the stable evolution of the self. To claim that Locke did not intend the public good is to discredit the social pattern enshrined in his ideals of property and authors' rights and to deny his concern for the social condition of the general public and its members.[174]

The next question to ask is whether Locke's proviso is needed in copyright. Appreciating the difficulty inherent in applying Locke's enough and as good proviso to intellectual property constitutes a first step in answering this question. Locke applies the proviso specifically to raw materials and excludes its applicability to the products which result from mixing raw materials and labor. William Fisher observes that there are seven categories of raw materials with which a Lockean laborer would mix his labor:

> a. the universe of "facts"; b. languages—the vocabularies and grammars we use to communicate and from which we fashion novel intellectual products; c. our cultural heritage—the set of artifacts (novels, paintings, musical compositions, movies, etc.) that we "share" and that gives our culture meaning and coherence; d. the set of ideas currently apprehended by at least one person but not owned by anyone; e. the set of ideas currently apprehended by at least one person; f. the set of all "reachable" ideas—that is, all ideas that lie within the grasp of people today; [and] g. the set of all "possible ideas"—that is, all ideas that someone might think of.[175]

Fisher finds anomalies in these categories where, for example, certain components of our cultural heritage, which should remain accessible to all, are brought under copyright protection (such as Mickey Mouse).[176] The danger, as Drahos observes, is that

> [E]ven where the stock of abstract objects is infinite, the human capacity to exploit that stock at any given moment is conditioned by the state of cultural and scientific knowledge which exists at that historical moment . . . . The set of usable abstract objects may also be further reduced because some

173. Locke, *Liberty of the Press*, *supra* note 24, at 336.

174. For example, Locke asserts that one who injures another has "declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger." LOCKE, SECOND TREATISE, *supra* note 2, § 11, at 314.

175. Fisher, *supra* note 1, at 186.

176. *Id.*

> ideas or knowledge may be necessary gateways to others. . . . Contrary to the view that societies are awash with information, it may be that, at various points in history, societies may face a shortage of supply of abstract objects. Under such conditions of shortage, those who claim property rights in abstract objects may well fail to leave enough and as good for others.[177]

To deny that we are worse off because of our strong copyright regime "is to ignore the nature of cultural development and the human drive to participate in the social conversation."[178] It ignores the implications of the sociality of the creative act, detrimentally affects our ability to build on our predecessors, and impedes our ability to preserve cultural dialogue, collective identity, and social realities. A situation where there remains not "enough and as good" runs the risk of stripping the common of materials necessary for the maintenance of the creative society, a situation which would ultimately lead to an empty copyright regime.

Another problem engendered by Locke's theory of property is his claim that the mixing of labor with collectively owned objects entitles the owner to the whole product. Locke fails to explain why an individual laborer should retain rights to the whole product. As Horacio Spector remarks, "If the labour employed by a person does not offer an explanation for the total value of a commodity—and only explains the added value—then Locke's theory does not justify ownership over the whole commodity."[179] In the case of authorial collectivity, even if isolating the added value is possible, it is still not the sole creation of the individual laborer. True, a creator deserves a property reward since the fruits of his labor add to social wealth. However, difficulties may arise when culturally and socially constructed properties are at stake. Why does a laborer come to own the whole object? Locke is often thought to hold a desert-based labor theory. Labor warrants appropriation because it creates social value.[180] This is evident in his assertion that it is "*Labour* indeed that *puts the difference of value* on every thing."[181]

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177. DRAHOS, *supra* note 1, at 51; *see also* Craig, *supra* note 1, at 23–31.

178. Craig, *supra* note 1, at 27.

179. Spector, *supra* note 1, at 272.

180. As Buckle observes, for some "[t]he doctrine of the origin of property through labour will not properly be understood if it is not recognized that Locke thinks of labour as a rational (or purposeful), value-creating activity." BUCKLE, *supra* note 117, at 151.

181. LOCKE, SECOND TREATISE, *supra* note 2, § 40, at 296.

The laborer's right, then, is based on the principle of "public reciprocation":[182] he introduces public benefit and deserves "a fitting and proportional benefit from the public for doing so."[183]

Hughes claims that the value added constitutes a contribution that warrants the conferment of property rights.[184] Does that mean that every piece of intellectual property created should receive the full market value it generates?[185] Coombe distinguishes publicity rights from rights granted under copyright, patent, and trademark laws, as "none of these doctrines provides a degree of protection against unauthorised appropriation equal to that afforded to celebrities."[186] Coombe claims that the Lockean argument is inadequate to justify full realization of the value created where a celebrity's image is concerned:

> A Lockean labor theory justifying property rights in the celebrity image is inadequate to establish a right to receive the full market value of the star persona or to establish exclusive rights to control its circulation and reproduction in society. . . . Liberal values protecting individual freedom guarantee the possession and personal use of the product of one's labors only insofar as the exercise of this right does not harm the rights of others. As Wendy Gordon argues, deprivation of public domain and loss of access to cultural heritage are forms of harm that might be contemplated. Moreover, rights to possess and personally use the fruits of one's labor do not necessarily entail the imposition of full property rights or rights to perpetually garner the full profits that such a product would yield in the market.[187]

Existing intellectual property systems, Gordon argues,

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182. Becker, *supra* note 1, at 624. Becker observes that the value the laborer creates and the reward he claims should be determined by the principle of proportionality. However, there is a difficulty: the vagueness of "proportionality" is a potential stumbling block. *Id.* at 625–26. In that respect Waldron writes that "Locke makes no assumption about the proportions in which goods will exchange in the market place, and indeed his views about the arbitrariness and conventionality of exchange indicate a scepticism about the possibility of any quantitative theory in this area." WALDRON, *supra* note 61, at 192.

183. Becker, *supra* note 1, at 624.

184. Hughes, *supra* note 1, at 305–10.

185. *See* James W. Child, *The Moral Foundation of Intangible Property*, 73 MONIST 578, 580 (1990).

186. ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW 99 (1998). Coombe writes that publicity rights can be only "loosely analogized to rights granted by copyright, patent, and trademark laws." *Id.*

187. *Id.*

> give rights in excess of what a Lockean model would justify. . . . [C]opyright law gives authors rights over the 'derivative works' that others make by building on their creations. . . . [T]he public is owed compensation if courts or legislatures violate the proviso by creating private rights that impair the public's access to the common.[188]

Therefore, copyright, "at least in its present form, does not appear to leave enough and as good."[189] What, then, would be an ideal proviso for copyright?

Taken literally, the proviso is unworkable.[190] If I throw three containers of white paint to a river to celebrate the success of the Adidas three-stripes design, does that mean I own the river or that I lost the color and with it the labor I mixed with throwing the paint?[191] The proviso eliminates such an absurd hypothesis. Propertizing the river's water violates the proviso. A literal reading of the proviso directs me to ask whether Locke thought that everyone is entitled to exactly the same.[192] Considering the limited amount of resources we have, does that mean that the proviso is unable to accommodate more than one generation?[193] This depends on the way the proviso is interpreted.

If I pick strawberries from a wild field, it is obvious that the amount of strawberries available for others has been reduced, and no one will be able to pick *exactly* the same strawberry. But in the next season there will be more strawberries because I did not destroy the field. In this way I avoided violating the proviso, as others have the potential to use exactly the same re-

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188. Gordon 1993, *supra* note 1, at 1608 (footnotes omitted).

189. Craig, *supra* note 1, at 30. Gordon suggests that where one fails to satisfy the proviso he "would be entitled to a lesser degree of control, such as a right to a monetary benefit." Gordon 1993, *supra* note 1, at 1575.

190. Rolf Sartorius remarks, "Understood as an original limitation upon the right to appropriate natural resources, the condition . . . could not of course be literally satisfied by any system of private property rights." Rolf Sartorius, *Persons and Property*, *in* UTILITY AND RIGHTS 196, 210 (R.G. Frey ed., Univ. of Minn. Press 1984).

191. Nozick's famous example demonstrates, "If I own a can of tomato juice and spill it in the sea so that its molecules mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" NOZICK, *supra* note 166, at 175; *see also* WALDRON, *supra* note 20, at 159; WALDRON, *supra* note 61, at 188; Gordon 1993, *supra* note 1, at 1565.

192. Sanders argues that if the proviso requires us to leave "enough and as good" for all future generations, "then it is hard to imagine that the Proviso would allow you to mix your labor with much more than an infinitesimal slice of land." John T. Sanders, *Justice and the Initial Acquisition of Private Property*, 10 HARV. J.L. & PUB. POL'Y 367, 377 (1987).

193. Harris asks, "[W]hat possible application could it have today in an overpopulated and under-resourced world?" HARRIS, *supra* note 136, at 200.

source, but not the same amount at the same time.[194] I may even pick up all the strawberries in that particular field, but unless I uproot the strawberry bushes and leave no potential for future growth, I did not violate the condition. In fact, leaving goods in the commons fails to satisfy the proviso since it "ensures their ruin."[195] Temporary violation of the proviso is justified as a matter of necessity in everyday life, and, as such, is a basic right of every commoner. Gordon observes that "[p]ersons whose rights in the common are not adversely affected by the creator's property right would have no grounds of complaint, and the creator could assert property rights against them unimpeded."[196] To argue that by picking strawberries I adversely worsen the situation of other generations is a mistake. It renders the proviso totally unworkable, something Locke did not intend.[197] The question now is whether such examples are applicable to intellectual property.

This Article argues that an author-laborer must leave enough *and* as good in the common. First, as already stated, many believe that with respect to ideas, the proviso is satisfied and leaves other commoners no ground for complaint. That is, the proviso ensures that, since ideas are an infinite resource, the same quantity (enough) and quality (and as good) is always left for others. Thus regarded, the "consumability" of ideas is potentially infinite, as they are not scarce in the sense that a

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194. In the words of Carol Rose,

> To be sure, *any* appropriation diminishes to some tiny degree the amount of a resource that is available to others. But up to some point, it just doesn't matter—no one is damaged in any way that she or anyone else can perceive or care about. . . . At some point, however, the appropriation of resources from a common pool will begin to matter. If appropriation goes on long enough and if the pool is not replenished, the diminution of opportunities for others becomes important or perceptible to them.

Carol M. Rose, *"Enough, and as Good" of What?*, 81 NW. U. L. REV. 417, 426 (1987).

195. David Schmidtz, *When is Original Appropriation* Required*?*, 73 MONIST 504, 508 (1990). Schmitz articulates a use proviso: "It is not true that appropriation of land inevitably decreases the amount of land available to others. It only inevitably decreases what is available for *original appropriation* by others, which is not the same thing at all. Thus, appropriation of land is . . . permitted by the Proviso." *Id.* at 512.

196. Gordon 1993, *supra* note 1, at 1564.

197. In the words of Waldron, "Locke could not possibly have meant that *no one* should appropriate any resources if there were not enough for everyone," and therefore "the sufficiency proviso is better understood as a *sufficient* condition . . . highlighting the point that there is certainly no difficulty with unilateral acquisition in circumstances of plenty, but leaving open the possibility that some other basis might have to be found to regulate acquisition in circumstances of scarcity." WALDRON, *supra* note 20, at 172.

tangible entity can be.[198] But this interpretation is somewhat hypothetical: because of the vague distinction between ideas and expressions, our copyright system cannot fully absorb the benefit of the proviso.

Therefore, granting an unconditional monopoly-type right for one's copyright works resembles a situation where one destroys the strawberry field. The exclusive ownership of a copyrighted work, which can last over a century—be it a computer program, a parody, or a picture—is synonymous with uprooting a strawberry bush, as it will have a prohibitive effect on the possibility of making derivative works. It is not enough to allow only the copying of the idea behind the work.[199] Withholding optimal public access to copyrighted materials always adversely affects the public interest. For example, if a particular work is "out there," restricting access to that creation amounts to a violation of the no-harm principle. Furthermore, if the public is restricted from complete use and consumption of items of social and cultural wealth to which it has contributed, the risk to the integrity of the collective and to the cultural identity of the public is at risk.

For example, Waldron takes the Mickey Mouse image and argues that once a cultural object is "thrust out into the cultural world to impinge on the consciousness of all of us,"[200] we cannot ignore it; "it has become . . . part of our lives."[201] Hence, it should be treated as now part of the public domain. Gordon concurs with this position and argues that the grant of a patent for a food additive enzyme violates Locke's "enough and as good" proviso:

> [O]nce a creator exposes her intellectual product to the public, and that product influences the stream of culture and events, excluding the public from access to it can harm. . . . Thus, the mere presence of abundant raw materials would not suffice to give *A* a right to exclude *B* and other strangers from the enzyme or from learning how it can be made. . . . This is essentially a reliance argument: having changed peo-

198. Waldron divides objects of property into two classes: "crowdable objects" and "non-crowdable objects." Waldron, *supra* note 1, at 871. "An object is 'crowdable' if one person's use of it is an obstacle to at least one other's use of it." *Id.* Ideas, then, are "non-crowdable." *Id.* at 872.

199. *Cf.* Richard A. Spinello, *The Future of Intellectual Property*, 5 ETHICS & INFO. TECH. 1, 10–11 (2003).

200. Waldron, *supra* note 1, at 883.

201. *Id.*

> ple's position, the inventor cannot then refuse them the tools they need for surviving under their new condition.[202]

In a later essay Gordon further develops this reasoning and advocates a self-help remedy under the proviso: the proviso empowers authors to use prior works by a "self-defense privilege based on a kind of reliance."[203] A generous interpretation of the proviso guarantees that in such cases where the components of our cultural and social realities are at risk of being propertized, members of the public will have a right to the creation. Abundance of raw materials will not suffice. Thus, in the realm of copyright, the proviso is to be interpreted literally: an author has to leave *exactly* "enough and as good."

Locke thought of the public good, and he was aware that property must be limited in order to maintain a stable social order, that an author is not like any other laborer, and that authorial rights should be carefully scrutinized and balanced against certain social norms. Gordon correctly asserts that "[w]hat is true for private property should be true for public property as well."[204] Locke directs readers of the *Second Treatise* to reach a conclusion not too different from Gordon's observation. It is wrong to portray Locke as a defender of a robust system of natural property right, unencroachable by norms of equality and public good. Copyright scholars cannot ignore *Liberty of the Press* as evidence of Locke's commitment to the public interest. He not only advocates strictly limiting the duration of authorial rights, but also raises the importance of encouraging learning and dissemination of information. That does not mean that *Liberty of the Press* presents a clear utilitarian argument and transgresses the outer boundary of natural law. It provides for authorial rights based on labor and subjects them to restrictions similar to those Locke recognizes in Chapter V.

Indeed, Locke's remarks in *Liberty of the Press*, as Shiffrin observes, are not easily reconciled with the view that Locke's theory endorses strong natural rights to intellectual property. In this essay he "contends that there is no 'reason in *nature*' to preclude a freer system of use."[205] For Locke, a natural right does not require perpetuity. In certain situations, such as where

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202. Gordon 1993, *supra* note 1, at 1567–68.
203. Gordon 2004, *supra* note 1, at 83.
204. Gordon 1993, *supra* note 1, at 1608.
205. Shiffrin, *supra* note 1, at 155.

authorial entities are concerned, perpetuity violates the provisos he introduces in the *Second Treatise* as limits to every property right; perpetuity may even violate the laws of nature. It is clear that a natural right for Locke is a dynamic rather than static guarantee, changing to meet the needs of the particular situation. This is the second way in which Locke's property theory can be reimagined.

Still, Locke's labor or authors' right theories cannot adequately accommodate all of the social and cultural concerns scholars identify in the discussion on the limits of authorship and copyright or account for the role of the authorial collectivity and the implications emanating from treating copyrighted commodities as collective creations and authors as socially constructed entities. Remarkably, however, Locke's *Essay Concerning Human Understanding* does address these concerns. The next part discusses the third way in which Locke's property theory can be reimagined.

IV. LOCKE, SOCIAL CONSTRUCTION, AND THE AUTHORIAL COLLECTIVITY

A. Against Innateness

Arguments defending the authorial collectivity and the sociality of the creative act will find great support in Locke's *Essay Concerning Human Understanding*. The *Essay*, in which Locke examines the nature of knowledge and the ability of man to absorb and understand it, is considered his masterpiece.[206] In the *Essay*'s four books Locke argues that realizing the extent of human understanding will enable people to make better use of their powers.[207] At the heart of Locke's epistemology is the definition and role of ideas for the formation of knowledge.

Although no copyright scholar would argue that a musical composition is an original work only if it is inborn in its composer, there are, as already shown, scholars, authors, and artists who advocate a robust copyright system, embracing a concept of authorial originality associated with the notion of the Romantic author. It appears that they support the idea that an author is an entity capable of creating something which is al-

206. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. I, ch. i, § 1, at 43.

207. *Id.* § 5, at 45.

most equivalent to creation *ex nihilo*. For example, Child writes on patents,

> The most interesting thing about my friend's ideas as property,—indeed, I consider it amazing—is that he created them *ex nihilo*. Property was created out of nothing but mental labor. He didn't even need raw materials—as the farmer needs land and seed, or the potter needs clay. Of course, he needed a pencil, paper, a drafting board, and a slide rule . . . . But these are more like tools. He needed no "stuff" with which to mix his labor.[208]

Although new *value* can certainly be created, it does not follow that it can be created in a vacuum, without any mental or intellectual raw materials. In copyright, while an author can write a new poem or an artist initiate a new style, these are not original creations *ex nihilo*; they have not exclusively originated with their creators. Authors merely mix their labor with preexisting ideas and collectively owned objects. If some authors and artists, as well as the law as it stands today, favor the idea of the Romantic author and ignore the sociality of copyright creation, then their argument would require something close to innateness. Locke forcefully rejects the idea of innateness and with it that one can create something *ex nihilo*. We can only improve what we already know.

B. Improvement or Creation ex nihilo*?*

Philosophers have devoted considerable attention to the question of whether Locke's metaphor of labor mixing means that a laborer simply mixes his labor or creates something totally new. James Tully introduces the worksmanship model, which regards God as a maker and man as his workmanship,[209] and remarks that it is "a common theme uniting the *Essay* and the *Second Treatise*."[210] The thrust of Tully's model is that

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208. Child, *supra* note 185, at 588 (footnote omitted).

209. TULLY, *supra* note 20, at 35–50; *see also* RYAN, *supra* note 164, at 14–48; SREENIVASAN, *supra* note 166, at 59–92; WALDRON, *supra* note 61, at 198–201 (discussing the problems with Tully's analysis); Simmons, *supra* note 139. Shapiro, for example, names the model the "workmanship ideal" and argues that it concerns man's ownership over his productive capacities and the subsequent right to own that which he produces. Ian Shapiro, *Resources, Capacities, and Ownership: The Workmanship Ideal and Distributive Justice*, 19 POL. THEORY 47 (1991); *see also* IAN SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 96 (Cambridge Univ. Press 1986).

210. TULLY, *supra* note 20, at 4.

> [d]ue to the analogy between God and man as makers, anything true of one will be, *ceteris paribus*, true of the other. Since [the doctrine of maker's rights] is the explanation of God's dominion over man and of why man is God's "property," it also explains man's dominion over and property in the products of his making.[211]

On this account, making is an activity associated with bringing something into being *ex nihilo* and a laborer thus possesses God-like, absolute rights.[212] Rejecting this view, John Simmons writes,

> Locke would be claiming that God's dominion over the earth and man's property in the products of his labor have no common foundation. God's dominion is based in God's self-evident right of creation; man's property is based in man's mixing of his labor with unowned nature. God's property is based on his having created new things; man's property is based on extending his property in his person by acts of labor, which may or may not "make" new things, but which never make them in a way sufficiently like God's *ex nihilo* creations to bring the two kinds of "making" under a common principle.[213]

Waldron also criticizes Tully's model, contending that there are serious difficulties with its interpretation of property rights as creators' rights because the conclusion "is far too strong."[214] He rejects the workmanship model and observes that it would be difficult to defend the two provisos if property rights are absolute.[215] Indeed, in Locke's writings we are led to assume that only God has the ability to create and that men are his workmanship.[216] Men thus do not have divine powers of creation. A laborer cannot create something totally new; he cannot bring into being something *ex nihilo*. As Locke asserts,

> The Dominion of Man . . . in the great World of visible things . . . however managed by Art and Skill, reaches no

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211. *Id.* at 37.

212. *Id.*

213. Simmons, *supra* note 139, at 200–01.

214. WALDRON, *supra* note 61, at 198.

215. *Id.* at 198–99. Simmons also rejects Tully's model as too broad in scope. He calls it the "full workmanship model" and advocates his own version of a "minimal workmanship model." Simmons, *supra* note 139, at 199–201 (italics omitted).

216. *See, e.g.*, LOCKE, SECOND TREATISE, *supra* note 2, § 6, at 311; LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. IV, ch. iii, § 18, at 548–50; *see also* John Locke, *Essays on the Law of Nature* (1664), *reprinted in* LOCKE: POLITICAL ESSAYS, *supra* note 24, at 100, 116.

> farther, than to compound and divide the Materials, that are made to his Hand; but can do nothing towards the making the least Particle of new Matter, or destroying one Atome of what is already in Being.[217]

Indeed, "[n]owhere does Locke say or imply that labor grounds property because by our labor we make new things."[218] Is this inconsistent with Locke's view of how ideas are formed? Locke argues that complex ideas come into being in three ways:

> 1. By Experience and *Observation* of things themselves. Thus by seeing two Men wrestle, or fence, we get the *Idea* of wrestling or fencing. 2. By *Invention*, or voluntary putting together of several simple *Ideas* in our own Minds: So he that first invented Printing, or Etching, had an *Idea* of it in his Mind, before it ever existed. 3. Which is the most usual way, by *explaining the names* of Actions we never saw, or Notions we cannot see; and by enumerating, and thereby, as it were, setting before our Imaginations all those *Ideas* which go to the making them up, and are the constituent parts of them.[219]

In Chapter V Locke refers to mixture and annexation, in the *Essay* he talks about "experience" and "putting together" but also mentions "first invented." Although Locke's wording—"he that *first invented* Printing or Etching, had an Idea of it in his Mind before it ever existed"—raises the question whether he thinks a given person can be the first to invent, the phrase is qualified by the assertion that any "first inventor" *must* have a prior idea.[220] Only the combination of pre-existing ideas and templates makes a person the *first* inventor.

Therefore, although the laborer cannot be said to create something *ex nihilo* or totally original, he can be said to improve that which God gave us in common.[221] Waldron is right to reject Tully's argument and assert that "[n]owhere does Locke give any indication that he wants to connect this labour theory of use-value with any doctrine of creator's entitlement"; if he could, one would assume that the powers of God mirror

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217. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. ii, § 2, at 119–20.

218. Simmons, *supra* note 139, at 203.

219. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. xxii, § 9, at 291–92.

220. *Id.* (emphasis added).

221. *See* BUCKLE, *supra* note 117, at 151.

the abilities of a laborer.[222] How then can a laborer become an original owner? Gopal Sreenivasan explains:

> [E]ven though [man] cannot create, man as a maker can still bring new things into being and is therefore entitled to a property in them. Still, there will be an important difference in the logic of the entitlement in the two cases. This difference reflects the fact that making, in the technical sense, always begins from pre-existing materials. For with making, unlike with creation, there is always a prior question concerning the maker's entitlement to the materials from which she begins.[223]

C. The Collective Formation of Ideas and Authorial Knowledge

1. Experience and the Transformation of Blank Slates

In Book I of the *Essay* Locke launches his attack on the notion of innateness and claims that knowledge can never be innate or find its origin in divine imprinting. Ideas, without exception, are based on experience, and "all that we know about the world, is what the world cares to tell us."[224] The dismissal of innate ideas and principles from epistemology and the philosophy of mind is one of the most dramatic features of Locke's theories.[225] According to Locke, the only native features that one possesses are one's natural faculties. Since the human mind

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222. WALDRON, *supra* note 61, at 200. Support for this can also be found in Locke's statement that "[t]he original and foundation of all law is dependency. A dependent intelligent being is under the power and direction and dominion of him on whom he depends. . . . If man were independent he could have no law but his own will. . . . He would be a god to himself." Locke, *Labour*, *supra* note 88, at 328–29. Therefore, in order to maintain a stable order, man cannot try to act with God-like powers or character.

223. SREENIVASAN, *supra* note 166, at 75. Sreenivasan also makes a useful distinction between natural and artificial things (things that are "made in the technical sense"); we can come to own things from the latter category. *Id.* at 85.

224. *Empiricism*, *in* OXFORD COMPANION TO PHILOSOPHY 226 (T. Honderich ed., Oxford Univ. Press 1995). Hans Aarsleff explains empiricism in this way: "Empiricism is also a mode of philosophy that thrives on communication and discussion, does not expect that truth will come in a flash (if it ever comes), and has a low estimate of the claims of isolated genius and of a speculative brooding on deep matters." Hans Aarsleff, *Locke's Influence*, *in* THE CAMBRIDGE COMPANION TO LOCKE, *supra* note 20, at 261.

225. Even the idea of God, according to Locke, is not innate. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. I, ch. iv, § 9, at 89. On Locke's philosophy of ideas, see generally Halla Kim, *Locke on Innatism*, 3 LOCKE STUD. 15 (2003); Grenville Wall, *Locke's Attack on Innate Knowledge*, 49 PHILOSOPHY 414 (1974); S.J. Winchester, *Locke and the Innatists*, 2 HIST. PHIL. Q. 411 (1985); John W. Yolton, *Ideas and Knowledge in Seventeenth-Century Philosophy*, 13 J. HIST. PHIL. 145 (1975).

at birth is a blank slate, experience dominates the ability to think and create ideas.[226] In the words of Locke,

> Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From *Experience*: In that, all our Knowledge is founded; and from that it ultimately derives it self. Our Observation employ'd either about *external, sensible Objects; or about the internal Operations of our Minds, perceived and reflected on by our selves, is that, which supplies our Understandings with all the materials of thinking*. These two are the Fountains of Knowledge, from whence all the *Ideas* we have, or can naturally have, do spring.[227]

Many philosophers disagree with Locke's emphasis on experience, particularly Descartes. Locke asserts that none of our ideas are innate, while Descartes counters that ideas are part of our original constitution: "all our ideas are innate in us in the sense that we are born, not with a capacity to receive them from outside, but with a power to form each of them without receiving them from outside."[228] Another disagreement is between Locke and Leibniz. Ian Hacking places this dispute in the context of social constructionism and remarks that one can "cast historical debates between, for example, Locke and Leibniz in terms of external and internal. Leibniz thinks that the reasons underlying truths are internal to those truths, while Locke holds that (our confidence in) truths about the world is

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226. Stephen Stich contends that "[a]dvocates of the doctrines of innate ideas and innate knowledge commonly take the notion of *innateness* itself to be unproblematic. They explain it with a few near synonyms, 'inborn' or 'unlearned.'" Stephen P. Stich, *Introduction* to INNATE IDEAS 1 (S.P. Stich ed., Univ. of Cal. Press 1975).

227. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. i, § 2, at 104. Yet, in a draft version of the *Essay*, Locke claims that there is knowledge that does not derive from experience. *See* Roger Woolhouse, *Locke's Theory of Knowledge*, *in* THE CAMBRIDGE COMPANION TO LOCKE, *supra* note 20, at 146, 148–49.

228. Robert M. Adams, *Where Do Our Ideas Come From?—Descartes vs. Locke*, *in* INNATE IDEAS, *supra* note 226, at 78; *see also* G.A.J. Rogers, *Innate Ideas and the Infinite: The Case of Locke and Descartes*, 26 LOCKE NEWSLETTER 49 (1995). James Lowde also claims that there is knowledge, which is innate or "naturally inscribed." JAMES LOWDE, A DISCOURSE CONCERNING THE NATURE OF MAN 57 (London 1694).

always external, never grounded in more than our experience."[229]

In the *Essay* chapter entitled "No Innate Practical Principles," Locke does not deny that we possess natural inclinations as "there are natural tendencies imprinted on the Minds of Men. . . . But this makes nothing for innate Characters on the Mind, which are to be the Principles of Knowledge, regulating our Practice."[230] But, as Jeremy Waldron remarks, in order to be guided by innate inclinations, a need exists for "some assurance that it guides us as we ought to be guided, and that assurance can only come from the exercise of our *intellect*."[231] There can be no exercise of the intellect without experience. Douglas Greenlee also asserts that Locke "allows that there are innate capacities to know"[232]—innate "in the sense of being something that can be developed."[233] However, Locke forcefully rejects any idea that we have an innate capacity for knowledge because "if the Capacity of knowing be the natural Impression contended for, all the Truths a Man ever comes to know, will, by this Account, be, every one of them, innate; and this great Point will amount to no more, but only to a very improper way

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229. IAN HACKING, THE SOCIAL CONSTRUCTION OF WHAT? 91 (1999). For further discussion, see Robert M. Adams, *The Locke-Leibniz Debate*, *in* INNATE IDEAS, *supra* note 226, at 37; John Harris, *Leibniz and Locke on Innate Ideas*, 16 RATIO 226 (1974). In a recent attack on the "blank slate theory," Pinker follows the line of Leibniz and claims that the problem with blank slates is that they do nothing. He remarks,

> As long as people had only the haziest concept of what a mind was or how it might work, the metaphor of a blank slate inscribed by the environment did not seem too outrageous. But as soon as one starts to think seriously about what kind of computation enables a system to see, think, speak, and plan, the problem with blank slates becomes all too obvious: they don't do anything.

STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 34 (2003). Pinker also argues that the blank slate theory can no longer be valid because science proves that "the brain's basic architecture develops under genetic control" and that "brain systems show signs of innate specialization and cannot arbitrarily substitute for one another." *Id.* at 102.

230. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. I, ch. iii, § 3, at 67.

231. WALDRON, *supra* note 20, at 161 (emphasis added).

232. Douglas Greenlee, *Locke and the Controversy over Innate Ideas*, 33 J. HIST. IDEAS 251, 257 (1972). Greenlee also contends that Locke is not a true empiricist:

> It would be a mistake to see the Lockean attack on innateness as an expression of Locke's empiricism. . . . It is, instead, correct to ascribe to Locke a concern with a method of discovery, which, as characterized above, is designed to yield new knowledge (whether a posteriori or a priori) rather than to buttress old beliefs long accepted as knowledge.

Id. at 262.

233. *Id.* at 256.

of speaking."[234] The implication for copyright is that a person has innate inclinations capable of being transformed into ideas and knowledge that are later developed into an ability to create authorial and artistic works. This conclusion emphasizes the social and collective nature of the copyright-creation process: the social dependence on the collective, and the combination of contributions coming from the individual author, other fellow authors, as well as the general public.

2. Simple Ideas and Complex Ideas

In order to bolster his empiricism, in Book II of the *Essay* Locke launches into an account of ideas and the ways in which the mind acquires them. Locke differentiates between simple ideas and complex ideas, describing the latter category as ultimately operating on experience, mentally constructible out of simple ideas. Ideas are "the materials of Reason and Knowledge."[235] Locke confirms this in a later note where he writes, "The extent of knowledge cannot exceed the extent of our ideas."[236] Working out the connections between those ideas produces knowledge. Knowledge is a product of reason, and without reason, all that we have is a belief.[237]

A simple idea is an indefinable and unanalyzable idea that cannot be created by man. It is an idea that is "being each in it self uncompounded, contains in it nothing but *one uniform Appearance*, or Conception in the mind, and is not distinguishable into different *Ideas*."[238] Locke's examples of simple ideas include description of the physical attributes of objects: "*Yellow, White, Heat, Cold, Soft, Hard, Bitter, Sweet*."[239] In short, every simple idea, Locke says, owes its existence to experience. In the words of Locke,

> These *simple Ideas*, when offered to the mind, *the Understanding can* no more refuse to have, nor alter, when they are imprinted, nor blot them out, and make new ones in it self, than a mirror can refuse, alter, or obliterate the Images or

234. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. I, ch. ii, § 5, at 49–51.

235. *Id.* bk. II, ch. i, § 2, at 104.

236. John Locke, *Some Thoughts Concerning Reading and Study for a Gentleman* (1703), *reprinted in* LOCKE: POLITICAL ESSAYS, *supra* note 24, at 348, 349 [hereinafter Locke, *Some Thoughts*].

237. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. IV, ch. xix, § 14, at 704.

238. *Id.* bk. II, ch. ii, § 1, at 119.

239. *Id.* ch. i, § 3, at 105.

> *Ideas*, which, the Objects set before it, do therein produce. As the Bodies that surround us, do diversely affect our Organs, the mind is forced to receive the Impressions; and cannot avoid the Perception of those *Ideas* that are annexed to them.[240]

Complex ideas comprise Locke's second category of ideas. These ideas are compounds of two or more simple ideas. Locke includes in this category ideas which, although not created *ex nihilo* in the mind, are new. The potential to create new ideas lends further support to a claim for property in authorial works. Vere Chappell explains,

> But in addition to complex ideas of this kind, which experience imposes on our minds, Locke recognizes others which the mind itself creates. It does not create them *ex nihilo*, of course. What it does, Locke claims, is join together ideas that are already in its possession separately, so as to make a single new idea out of them: the former serve as raw material or data for the latter. . . . In this process of creating new complex ideas, the mind is no longer merely passive. Instead it actively exerts itself, operating upon the ideas it has to make the new ones. Furthermore, its action is voluntary; and the products thereof may be quite out of line with any preexistent reality, external-sensible or mental-operational: ideas of fantastic voyages and fabulous monsters.[241]

An author's ability to create complex ideas is what legitimates his claim to a right in his creative expressions. In this way he contributes something beyond what is already known. The mind in this situation transforms a passive capacity into an active power,[242] making combinations of pre-existing materials: "For, it being once furnished with simple *Ideas*, it can put them together in several Compositions, and so make variety of complex *Ideas*, without examining whether they exist so together in Nature."[243] For example, the "complex *Idea* call'd a *Tune*, which a Musician may have in his mind, when he hears or makes no Sound at all, by reflecting on the *Ideas* of those Sounds, so put together silently in his own Fancy."[244]

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240. *Id.* ch. i, § 25, at 118.

241. Chappell, *supra* note 20, at 26, 37–38.

242. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. xxiii, § 7, at 299–300.

243. *Id.* ch. xxii, § 2, at 288–89.

244. *Id.* ch. xviii, § 3, at 224.

3. Idea Formation, Knowledge, and Communication

The process of the Lockean version of idea formation confirms the inherent social constructivist dimension of his epistemology. Locke's discussion of language, to which he refers as "the great Instrument and the common Tye of Society," contains a similar point.[245] Furthermore, communication between members of society is vital for the success of his theory of ideas as such communication expands knowledge and allows each of us to experience another's ideas. Thus, Locke opens his note entitled *Study* with the assertion that "[t]he end of study is knowledge, and the end of knowledge practice or communication."[246]

Similarly, Locke opens a later essay with the following: "Reading is for the improvement of the understanding. The improvement of the understanding is for two ends: first, for our own increase of knowledge; secondly, to enable us to *deliver* and make out that *knowledge to others*."[247] This emphasis on communication supports the argument that we all depend on the efforts and labor of others and that copyrighted works are collectively produced and owned social entities. Communication necessitates access to external objects, without which the creation of any market of cultural products will not be viable.[248]

4. Authors as Lockean "Sociable Creatures"

In the opening to Book III of the *Essay* Locke asserts that each of us is a "sociable Creature."[249] As seen in the *Second Treatise* and the *Essay*, a Lockean author is an evolved being. Authorial and artistic knowledge are not innate; they are socially con-

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245. *Id.* bk. III, ch. i, § 1, at 402.

246. John Locke, *Study*, *reprinted in* JOHN LOCKE: POLITICAL ESSAYS, *supra* note 24, at 365, 366.

247. Locke, *Some Thoughts*, *supra* note 235, at 348, 349 (emphasis added).

248. Locke himself is a good example of this. His friendship with Molyneux resulted in the insertion into the second edition of the *Essay* of what has since become known as Molyneux's problem: whether a man born blind and newly restored to sight would be able by sight alone to distinguish between different shapes, such as sphere and a cube. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. II, ch. ix, § 8, at 145–46. "Apart from this, the most notable changes were a wholly new chapter, "Of Identity and Diversity," and the replacement of the central section of the chapter "Of Power" by a largely new and much longer discussion of human volition and freedom." John Milton, *Locke's Life and Times*, *in* THE CAMBRIDGE COMPANION TO LOCKE, *supra* note 20, at 5, 20 (citations omitted).

249. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. III, ch. i, § 1, at 402.

structed creatures of experience and social interaction. As mentioned above, it is arguable that in the *Second Treatise* Locke makes a distinction between "man" and "person." He remarks that "every Man has a *Property* in his own *Person*. This no Body has any Right to but Himself."[250] That is, while "man" is the situation before a person has the benefits of experience, "person" is a developed entity dependent on and shaped by experience. The distinction between a "man" and a "person" in his property theory shows that, for Locke, self-development requires property and this requires not only tangible assets, but also cultural and social properties. Both tangible and intangible properties improve the conveniences of life.[251] If a copyrighted work is an expressive embodiment of the author's personal identity, creative labor and efforts, ideas, abilities, powers, experiences, and knowledge, then in Lockean terms, an author and his creative expressions are socially constructed and collectively produced entities.

Book IV of the *Essay* culminates Locke's attempt to define what is knowledge and to describe its origins. Locke writes, "*Our Knowledge* therefore is *real*, only so far as there is a conformity between our *Ideas* and the reality of Things."[252] This recalls his insistence that knowledge is never innate, but rather socially constructed: a creature dependent on experience, on social and cultural exposure, and on communication. Locke's emphasis on experience and communication demonstrates the role the public plays in the process of idea formation, knowledge creation, and knowledge absorption. For example, to know the structure of a triangle is to perceive the *connection* between several *ideas* "that *the three Angles of a Triangle are equal to two right ones*" and "that Equality to two right ones, does necessarily agree to, and is inseparable from the three Angles of a Triangle."[253]

Copyrighted works are dependent on a similar connection between ideas. They are dependent on the capacity of an author to act as a "sociable Creature." They are dependent on the mind's exposure and its ability to internalize knowledge. Their essence is based on use of socially constructed and publicly produced and owned simple and complex ideas that, once ex-

250. LOCKE, SECOND TREATISE, *supra* note 2, § 27, at 287–88.

251. *Id.* § 44, at 298–99.

252. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 23, bk. IV, ch. iv, § 3, at 563.

253. *Id.* ch. i, § 2, at 525.

pressed, may satisfy the requirements for copyright protection. The notion of the Romantic author would not survive Locke's definition of knowledge and idea making. What authors, artists, and painters know about the world is what the world cares to tell them. Their works, like Lockean knowledge, are a variation on experience.

V. CONCLUSIONS

If Jeremy Waldron is correct in claiming that "Locke and his contemporaries were not much less sophisticated, hermeneutically, than we are,"[254] perhaps we can feel confident when we draw analogies between Locke's different writings and reach conclusions that, although not always explicitly stated by Locke, can be found in his philosophy. It would not be too much to say that Locke believed that, in order to preserve our identity as sociable creatures, we must be exposed to as many social events and cultural processes as possible, and we must consume collectively produced and owned properties. If this is true, a new copyright Lockean can confidently argue that Locke was fully aware of the importance of preserving a vibrant public domain to promote the formation of ideas and the evolution of authors. Perhaps that was one of the reasons why we cannot be said to "create" but simply to mix our labor with commonly owned objects. It also might not be too much for a new copyright Lockean to argue that Locke saw the limits on authors' rights that he advocated in *Liberty of the Press* as necessary for the successful creation of complex ideas. In these ways, Locke provides arguments on which to base a reexamination of the justifications we employ when we discuss copyright.

Some scholars argue that Locke possessed a better understanding than we have today of social and cultural processes that take place in the public domain, shaped by the collaboration and symbiotic relationship between the collective and its individual members.[255] Locke's ideals of property, idea formation, knowledge, and authors' rights are clear evidence that these remarks are accurate. On Locke's account, intellectual property, particularly copyright, more than any other form of property, is a social enterprise representing authorial and creative collectivity. Locke convinced us that traditional Romantic understandings of the author as the dominant creative force

254. WALDRON, *supra* note 20, at 9.
255. *See* Shapiro, *supra* note 56.

should be abandoned. Unlike land, acorns, or apples, copyright works are social, creative expressions of the collective. They cannot be held captive in traditional concepts of property and ownership. Indeed, these concepts should and must be challenged to meet new developments and the needs of society.