INTELLECTUAL PROPERTY, INDEPENDENT CREATION, AND THE LOCKEAN COMMONS

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INTRODUCTION

Copyright and patent law – both lumped together under the phrase "intellectual property" – are predominantly regarded by scholars in the United States as having the same theoretical underpinnings.[1] This manifests in legal doctrine, as courts have ruled in a number of ways that aim to unify the two areas of law.[2] This is despite the fact that copyright and patent law have domains which are, not only different, but *disjoint.* A number of intellectual property doctrines – for example, copyright law's Useful Articles Doctrine[3] – exist to actualize the principle that no candidate subject of intellectual property protection is to be eligible for both copyright and patent protection; each may only fall within one domain or the other.[4] Scholars emphasize the importance of maintaining this division of domains, cautioning us against the dangers of backdoor patents or of creators holding different sorts of IP rights in the same entity.[5] Given the existing emphasis on the practical importance of this division, it is surprising that more have not seriously considered whether copyright and patent are *philosophically* distinct as well; whether they might be underwritten by very different theoretical principles, ones with implications for legal doctrine.

As an example of this tendency to unify copyright and patent doctrine, consider one of the most important contributions to the discussion of intellectual property's philosophical foundations. Seana Shiffrin's paper *Lockean Arguments for Private Intellectual Property* explores one alternative to the dominant utilitarian conception of intellectual property: namely, Lockean labor theory. Shiffrin argues that, due to the non-rivalrous nature of intellectual property, the granting of exclusive, private rights in IP cannot be justified under a Lockean theory of property. But Shiffrin's argument does not distinguish between copyright and patent law, nor does it speak to the important differences in the domains and doctrines of each. This is significant because Shiffrin's arguments against a Lockean theory of intellectual property are convincing in the context of patent law, but *not* in the context of copyright – or, so I will argue in the present paper.

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[1] *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

[2] See Section IV.

[3] 17 U.S.C. 101.

[4] *E.g.,* Mala Chatterjee, *Conceptual Separability as Conceivability: A Philosophical Analysis of the Useful Articles Doctrine*, Note, 93 NYU L. REV. 558 (2018) (arguing for an analysis of the useful articles doctrine that assures that no functional elements receive copyright protection); Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection,* 19 BERKELEY TECH. L.J. 1473, 1500 (2004) (noting that the useful articles doctrine is a "channeling doctrine" that directs functional works to the patent realm in order to "maintain the distinction between the two regimes").

[5] *E.g.* Moffat, *supra* note 4 (arguing that the availability of overlapping protection threatens the intellectual property system by undermining the goals of intellectual property law and disrupting the balance struck by Congress in fashioning the copyright and patent systems).

Legal systems are designed to actualize principles – to bring about a particular state of affairs – and so it is important that we get right the prior question of *which* principles the systems should actualize. This paper thus aims to show how the assumption that copyright and patent are theoretically unified might lead us astray, assessing Shiffrin's argument as an example of this tendency. Section I provides the relevant background: an overview of copyright and patent law, an account of the Lockean theory of property, and finally, a reconstruction of Shiffrin's argument in *Lockean Arguments for Private Intellectual Property.* Section II then argues that Shiffrin's argument is unsuccessful in the context of copyright in particular, due to the important limitations already existing in copyright doctrine: namely, that copyright only protects expression, and that independent creation is a complete defense to claims of infringement. Next, Section III argues that Shiffrin's argument is successful in the case of patent law, precisely because patent lacks the limitations that copyright possesses. Finally, Section IV outlines the normative questions this discussion raises regarding how copyright and patent *should* be understood, and what implications the answer to these questions will have for our choice and understanding of legal doctrine. It discusses a number of recent significant court decisions which have also made the mistake of hastily treating copyright and patent as theoretically unified, and notes further ways in which our theoretical findings might demand modifications of existing copyright and patent rules, thereby illustrating the practical importance of answering these normative questions carefully.

I. INTELLECTUAL PROPERTY, LOCKE, AND SHIFFRIN

The focus of this paper is copyright and patent, and the significant differences between the two that become obscured by our habit of indelicately lumping them together as intellectual property. Of course, "intellectual property" does not *just* refer to copyrights and patents: it also includes trademarks, trade secrets, rights of publicity, and perhaps more. Though these systems of law also possess distinctions worthy of exploration and with potential theoretical significance, they have been set aside for the purposes of this paper.

a. Copyright vs. Patent Law

By way of background, copyright and patent law are distinct in their areas of application, their requirements, and the nature of the exclusive rights they grant. On the one hand, copyright is in the business of allocating rights in *expressive* creations, such as – but not limited to – songs, novels, paintings, and films.[6] In the US, copyright protection is granted automatically, as soon as the creative work has been fixed in a tangible medium of expression.[7] A grant of copyright only requires that the creative work in question be original, independently created, and made with a "modicum of creativity" in order to receive protection.[8] But copyright protection only extends to the *expressive* components of the work; it does not protect facts, functionality, ideas, or any stock

[6] *See* Christopher J. Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016).
[7] 17 U.S.C. § 102(a).
[8] *Id.*, Feist Pub'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

elements that these expressive components have been combined with.[9] Further, copyright recognizes an independent creation defense, which means that exclusive rights over works of authorship are only enforceable in instances involving actual copying of the author's work. Finally, copyrights also last significantly longer than patents: in the US, this term is typically the whole lifetime of the author plus an additional 70 years.[10]

Patent law, on the other hand, is the domain of functional innovations, including machinery, electronic devices, and pharmaceuticals.[11] Given this focus on utility, inventors seeking patent protection are required to demonstrate that their innovation is useful, as well as that it is a novel and nonobvious contribution. This is to say that the subject matter of patent law must meet a much higher bar than that of copyright law in order for the inventor to receive exclusive rights.[12] In exchange for meeting this higher bar, patent law grants inventors a *total* monopoly in the technology, such that even independent inventors are not permitted to utilize it and are defenseless against an infringement claim. This enables the owner of the patent to charge monopoly-high prices, thereby maximizing returns on their innovation for the duration of the 20-year patent term.[13]

Scholars emphasize the importance of this division of labor between copyright and patent. They caution against overlapping intellectual property protection, which risks rights-holders receiving more than they are due, thereby depriving the rest of society from value to which it is entitled.[14] The division of labor is heavily doctrinally enforced; for instance, one mechanism whereby copyright law screens out functional elements of candidate subject matter – including elements that are *both* functional and expressive[15] – is the useful articles doctrine, which funnels such elements into patent's regime. The doctrine states that copyright law only protects the pictorial, graphic, or sculptural features of a useful article to the extent that these features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[16] If a design element does not meet this requirement, then it falls outside copyright's jurisdiction and into the domain of utility patents, where – if it meets those higher bars of utility, novelty, and non-obviousness – it will be eligible for patent

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[9] Baker v. Selden, 101 U.S. 99 (1879) (copyright law protects expressions, not ideas); Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (noting that copyright permits free communication of facts).
[10] 17 U.S.C. § 302(a).
[11] *See* Jeanne C. Fromer, *A Psychology of Intellectual Property,* 104 NW. U. L. REV. 1441 (2010).
[12] *See* 35 U.S.C. §§ 101-103, 131.
[13] Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 996 (1997).
[14] *E.g.* Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L. J. 1473 (2004) (arguing that the availability of overlapping protection threatens the intellectual property system by undermining the goals of intellectual property law and disrupting the balance struck by Congress in fashioning the copyright and patent systems).
[15] *Cf.* Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir.1967) (holding that copyright does not protect expression when said expression "merges" with the idea, in that the idea can only be expressed in a small number of ways).
[16] 17 U.S.C. § 101.

protection. This doctrine is thus an important safeguard in intellectual property's treasured separation of powers, preventing the circumvention of copyright's purpose and quelling attempts at backdoor patents.

b. Lockean Property Theory

Now turning away from law and towards property theory, we find John Locke's labor theory of property explicated in Chapter 5 of *Second Treatise of Civil Government.*[17] Locke's theory is grounded on egalitarian principles, in particular the belief that all men are equal in the state of nature. This is in contrast to Robert Filmer's patriarchal theory of authority and property ownership, which *The Two Treatises* explicitly push back against. In Locke's explication of the right to private property, he begins by articulating his *common ownership thesis*: namely, that the world is initially owned by all of mankind in *common*, with no man having any more entitlement to it than any other. [18] Locke's view is that God gave the world to mankind in common in order for it to be *used* by us, "to the best advantage of life, and convenience…the support and comfort of their being."[19]

However, as Locke tells us, the earth – the common stock – cannot actually be utilized to our advantage unless we have some some procedure for *appropriating* the stock's components, or for transforming them from publically held to privately owned. This is because the elements of the common stock are *rivalrous:* or, their use by one necessarily precludes such use by another. So, for example, I cannot consume a commonly held apple, thereby utilizing it for my advantage and preventing others from doing the same, unless there is some mechanism whereby it becomes my own; nor can I build my home on a patch of land without some way to claim it as mine, thus removing said land from the common stock. This is to say that, since private appropriation is necessary in order for the commons to be used to our advantage, we also need a *mechanism* for permissible private appropriation.

Locke therefore deduces a means for such appropriation: one derived from his *self-ownership thesis.* In § 27 of his chapter on property, he explains the following:

> Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person:* this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*…for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.[20]

As Locke explains, although the *earth* is owned in common, there is an important limitation on the common ownership thesis: namely, the principle of self-ownership. Locke emphasizes that each individual has a right – or, in Lockean terms, a property – in *himself*, and it

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[17] JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT, § 25 (Hollis ed. 1764).
[18] *Id.*
[19] *Id.*
[20] *Id.* at § 27 (Hollis ed. 1764).

is an *exclusive* right, shared by no one else. The self is therefore not a part of the common stock; it is already privately one's own. It follows from this, Locke says, that we each also have an exclusive right in the *labor* of our own bodies, and that this labor can serve as our mechanism for appropriation.[21] Locke thus concludes that we may privately appropriate elements from the common stock when we mix those elements with our own labor.[22] So, by way of example, if I pick an apple, I then gain a right to nourish myself with it exclusively, because I have mixed it with my labor through the very act of picking it.[23] The thought is that laboring on components of the common stock imbues it with something of one's own, thereby creating a unique entitlement, and a justification for excluding others from what has been imbued.

Locke articulates two important limitations on our ability to use our labor to appropriate from the commons. The first limitation, known as the Lockean proviso, maintains that one can only appropriate from the common stock if doing so will still leave *enough and as good* for the rest of mankind.[24] Given that the common stock is a finite resource, Locke says, components of it can be privatized by one individual *only* to the extent that leaves plenty behind to be utilized by all others. Locke's second limitation is concerned with avoiding the *spoilage* of resources.[25] In particular, he says that one can only appropriate from the common stock to the extent that such appropriations can fully utilized by oneself. Thus, an acquisition of property is not legitimate if that acquisition will ultimately go to waste. These limitations on private appropriation are underpinned by Locke's emphasis on the common stock being equally held by all, and for the purpose of sustaining *all* individuals' lives and livelihoods, rather than some at the expense of others.

c. Shiffrin's Challenge to Lockean Intellectual Property

In her paper *Lockean Arguments for Private Intellectual Property*, Shiffrin argues against the view that Lockean property theory can support the assertion of exclusive rights over intellectual property.[26] But Shiffrin's paper does not distinguish between the contexts of copyright and patent law; and, as I argue below, when her arguments are applied against a Lockean theory of copyright in particular, they are ultimately unconvincing.

First, let us examine Shiffrin's challenge. By Shiffrin's own lights, her interpretation of Lockean property theory places a particular emphasis on the *common ownership thesis:* again, the view that the world is initially owned in common, by all individuals equally.[27] Shiffrin also emphasizes that it is *only* because this common stock *cannot* be utilized without exclusive, private ownership, that Locke introduces labor as a mechanism for justified appropriation in the first place. The idea here is that, if the common stock *could* be utilized by all without such a mechanism – or, in other words, if private appropriation was *unnecessary* for the common stock to be used – then there would be no need to introduce labor as a mechanism for private

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[21] *Id.* at § 27.
[22] *Id.*
[23] *Id.* at § 28.
[24] *Id.* at § 27, 33.
[25] *Id.* at § 31.
[26] 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).
[27] *Id.*

appropriation in the first place. The notion that necessity is a precondition on appropriation for private use is central to her challenge against the Lockean case for private intellectual property.

In order for a person to be justified in appropriating a certain element under the Lockean framework, Shiffrin explains, two conditions must be met: 1) the element must be *of the kind* susceptible to justified private ownership, and 2) the person must satisfy the conditions necessary to appropriate that specific element (namely, appropriation via labor).[28] However, she argues, intellectual property does not fulfill the first of these two conditions, as this is where the analogy between real or physical property and intellectual property breaks down. Recall that real and physical property has the feature of being *rivalrous*, as one's consumption of an apple or fencing in of a patch of land *precludes* anyone else from using that same apple or patch of land in the same way. It is on this basis that Locke argues that elements of the common stock must be privately appropriated to be utilized: since such elements can only be fully used by *one* individual, private appropriation is a necessary precondition on the elements of the common stock being used at all.

However, Shiffrin says, this is not true in the case of intellectual property elements. As she explains, "one's consumption of an idea, proposition, concept, expression, method, and so forth, is fully compatible with others' use, even their simultaneous use."[29] In fact, she notes, intellectual objects are more fully utilized when they are shared, as this allows *more* people to enjoy their various benefits, who are able to do so without thereby detracting from the enjoyment of others. This is to say that ideas, propositions, concepts, expressions, and so on are undoubtedly *usable* if they are left to be shared in the commons, and are also not at the risk of being depleted. Given this non-rivalrous nature of intellectual items, Shiffrin concludes that their private appropriation simply cannot be justified under the Lockean picture. Locke only permits removal from the commons when such private appropriation is necessary for use, and in the case intellectual property, this condition will never be met.

d. The Nature of the Commons

Before turning our attention to the specifics of copyright and patent doctrine, it's worth noting that Shiffrin presupposes a particular conception of the nature of the initial common stock: namely, that it is also an *intellectual* commons, and not merely a commons of land and physical objects. Jonathan Peterson – who takes on Shiffrin's challenge in his own paper *Lockean Property and Literary Works* – notes that her argument is not convincing if we embrace a conception of authors and inventors as creating and innovating *ex nihilo,* or from scratch, according to which they take nothing from the common stock and instead bring about something wholly new.[30] This was the view of William Enfield, for example, who stated that "the work which [the author] possesses was never in any other hands, nor was ever a part of the common stock on which all men had a general claim."[31] As Peterson explains, if this *ex nihilo* conception of creation is the correct way to understand it, then Shiffrin's presumption of common ownership

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[28] *Id*. at 6.
[29] *Id.* at 20.
[30] Jonathan Peterson, *Lockean Property in Literary Works*, 14 LEGAL THEORY 257, 265 (2008).
[31] William Enfield, OBSERVATIONS ON LITERARY PROPERTY (1774), at 19. Facsimile in THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774–1775 (Garland Publishing, 1974).

is entirely inapplicable to creations and innovations, as they would come from *nothing,* and certainly *not* from the original common stock. After all, Shiffrin's "necessity for use" requirement for private appropriation is specifically regarding appropriation of what is initially commonly owned, thus inapplicable to anything that did not even initially *exist*, let alone exist as a part of the commons. This is to say that, under the *ex nihilo* conception of creation, Shiffrin's challenge would not get off the ground.

My own view is that the *ex nihilo* conception of creation is implausible. Jeremy Waldron has discussed a post-modern challenge to the idea of original authorship, emphasizing that the right way to understand authors' creations is as "fragmented *pastiches*"[32] rather than as genuinely created from scratch. Helpfully, Waldron explains:

> If one just reflects a little on what it really means to write a book, compose a song or conceive an image in a modern world saturated with culture, one will hardly be surprised, let alone outraged, to hear that a given author's work incorporates or makes use of elements that are familiar to us already. In a world dominated by television, in a physical environment over-borne by advertising, in conversation increasingly loaded with, like, catch-phrases, it is the idea of *the totally new* that should surprise us. That an author's work should be completely original rather than derivative, so far from being a moral or legal requirement, would strike most sensible observers as supererogatory.[33]

Shiffrin herself favors a conception of the common stock as containing all ideas, propositions, concepts, expressions, et al, such that every act of creation or innovation is an act of constructing a *composition* of some subset these pre-existing materials. Indeed, such creations and innovations might be *novel compositions*, unlike any of the creations or innovations that have come before, but they are nonetheless constructed out of pre-existing, common stock materials. Under this view, the construction of intellectual objects is analogous to that of physical objects: although we humans are not capable of genuinely creating new matter, we can separate, combine, and transform existing matter such that it has become something new and different from what it formerly was. This understanding of the intellectual commons, and the processes of innovation and creation, is the one I also take to be the most plausible.

But it is worth noting that a third possible conception of the intellectual commons is offered by a more robust form of Platonism. According to such a view, it is not merely the case that discrete ideas, expressions, concepts, and so on exist in the common stock; it is *also* the case that *all possible combinations* of these elements – or, in other words, *all possible creations and innovations* – are a part of the original intellectual commons. Such a view would embrace a robust ontology of abstract entities, and would understand the work of creators and innovators as something akin to *discovering* creations and innovations – to *actualizing* these abstracta – rather than genuinely making anything new. Shiffrin herself dismisses Platonistic conceptions of creation and innovation as implausible.[34] Nonetheless, for our purposes, it is worth having this view of the common stock on the table, because the claim of this paper – that Shiffrin's

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[32] Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 881 (1993).

[33] *Id.*

[34] Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, site to where she says this.

challenge fails in the context of copyright but succeeds in the context of patent law – holds true *even if* we are Platonists about all creations and innovations.

II. COPYRIGHT'S LIMITS AND INDEPENDENT CREATION

We are now equipped to evaluate Shiffrin's argument and to see that it does not hold up in the context of copyright law, because it mischaracterizes the contents of the original common stock and what exactly copyright privately appropriates. In particular, Shiffrin under-appreciates the significance of copyright's central limitations: that it *only* extends to expression and not ideas or facts, and that independent creation is a complete defense. In fact, these doctrinal limitations exist in copyright law precisely to accommodate Shiffrin's concerns, and – it trivially follows – they further accord with the Lockean proviso. Therefore, we can see that a Lockean theory of copyright cannot be ruled out for the reasons that Shiffrin has articulated.

a. Expression vs. Ideas, Facts, and Functions

Let us more closely examine copyright's limitations. Recall Shiffrin's favored conception of the common stock and the process of creation: that the commons includes all intellectual elements – ideas, concepts, expressions, processes, methods – and that the creative and innovative process involves combining some number of these into a distinct, original, and potentially novel composition. Shiffrin's concern is that, even if the creative works themselves are compositions which were not formerly existing in the common stock, granting a copyright in such compositions amounts to restricting the common stock elements from which the compositions are made up. It is therefore a private appropriation of these *elements* under Shiffrin's view, and one that cannot be justified under the Lockean framework.

The problem, though, is that this argument fails to appreciate what precisely copyright protects. Copyright is limited to the works' expressive elements: the ideas, facts, functionality, and stock elements embodied in such works are not entitled protection. These doctrinal limitations exist precisely in order to safeguard the commons. For instance, the idea/expression dichotomy – a central tenant of copyright according to which only *expressive* elements receive copyright protection, whereas the ideas being expressed do not – is premised on the very principle that it would be unacceptable to grant easy monopolies in ideas and thereby prevent all others from enjoying their benefits.[35] Copyright's merger doctrine – according to which expressions that *merge* with an idea are not entitled to copyright protection – also exists to assure that ideas which can only be expressed in a small number of ways do not become privately appropriated at the expense of others' use.[36] The useful articles doctrine, which requires that expressive elements embodied in functional objects only receive copyright protection to the extent that they are *separable* from the article's functionality, operates to guarantee that copyright law not grant monopolies on functionality and thereby deprive the commons of functional benefits.[37] And the rule that *factual* content is not entitled to copyright protection – no matter how much effort or difficulty might have gone into obtaining it – is premised on the idea that it is ludicrious to think any one person can privately own a fact, when facts are a part of the

[35] Baker v. Selden, 101 U.S. 99 (1879).
[36] Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967).
[37] 17 U.S.C. § 101.

world we all share, and all have an equal interest in.[38] This is all to say that, as a matter of positive copyright doctrine, Shiffrin's fears of misappropriation do not even *apply* to the work's non-expressive elements, as such elements are not appropriated by copyright at all.

It is also worth noting that many of the aforementioned limitations on copyright protection – in addition to the fair use defense to copyright infringement[39] – are regarded by the Supreme Court as necessary in order to assure that grants of copyright do not undermine First Amendment liberties.[40] This understanding of copyright's limitations and their relationship to freedom of speech is wholly compatible with the view that such limitations preserve the Lockean common stock from impermissible private appropriations; in fact, the two ideas fit together perfectly. After all, it is *precisely because* copyright's limitations safeguard against the private appropriation of non-expressive elements that the limitations also promote freedom of expression, as these elements then remain in the commons to be used freely by all, in their own expressive speech.

b. Independent Creation & the Common Stock

If the non-expressive elements encoded in a work are *not* protected, then what remains is only the question of the expressive elements. No doubt, these *are* the subject of copyright. But Shiffrin's argument nonetheless still does not succeed, for granting protection in such elements *also* does not appropriate anything from the intellectual commons. To see this, recall again that copyright violations only occur if the violator has *actually copied* from the work in question: an author who independently creates a work identical to a copyrighted one has done nothing infringing. When we reflect on the fact that independent creation is a complete defense to infringement, we can immediately see that an author's copyright in her expressive elements does not appropriate the expressive elements *themselves,* abstractly construed, from the common stock. The elements are *still in there,* available to be used by other authors, in whatever other creative works they might choose to make. What the author *does* own is simply the *particular instantiations* of the expressive elements as they appear within her own creative work*,* a work which *itself* was not taken from the original common stock (even if composed of things that were).[41] In other words, what copyright restricts is specifically the act of lifting expressive elements from the work of another, but it does not restrict the free use of the very same elements when no such lifting has occurred. In light of this, we can see that even though the author's

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[38] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (copyright "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression").

[39] 17 U.S.C. § 107.

[40] *See, e.g.*, Golan v. Holder, 132 S.Ct. 873, 878 (2012) (holding that fair use prevents conflicts with the First Amendment); Eldred v. Ashcroft, 537 U.S. 186, 219-21 (2003) (holding that the idea/expression dichotomy is a "traditional contour" of copyright that prevents conflict with First Amendment).

[41] Because, again, the "creative works" themselves – even if they are mere compositions of elements – are not a part of the original common stock under Shiffrin's view. It is only the *elements* that are.

copyright does appropriate the expressive elements as they exist in the protected work, this cabined appropriation cannot be regarded as depleting the commons.[42]

The above argument assumes Shiffrin's own conception of the intellectual commons and creative works as compositions. But even if we are instead strong Platonists, believing that all *possible* creations, innovations, and combinations of elements, exist – *prior* to their "creation" (read: discovery) – as members of the intellectual commons, Shiffrin's argument would still not succeed against copyright. Again, because independent creation is a complete defense to infringement, it cannot be claimed that my copyright in my own Novel X actually privately appropriates *the Platonic form of Novel X* from the common stock. A second-in-time author remains free to independently write an identical novel – their own *version* of the Platonic Novel X, exactly like mine in all ways except the author's identity – without thereby infringing on my copyright, and whilst gaining a copyright of their own in their own version. In other words, even under the Platonic conception of creation according to which the original intellectual commons is more metaphysically dense, Shiffrin's challenge does not apply to copyrighted subject matter.

Since we now see that a grant of copyright protection does not actually remove anything from the commons, we can also see that it trivially follows that copyright accords with the Lockean proviso, assuring that enough and as good remains in the commons for the rest of mankind. This point is obvious in light of the preceding discussion, but it is nonetheless something to keep in mind when we turn to the case of patent law. For I will argue that grants of patents *not only* appropriate from the common stock (thereby falling prey to Shiffrin's argument), but that they might *also* fail to leave enough and as good, thus violating the proviso, and falling short for a Lockean understanding on two grounds.

c. Clarifying a Lockean Ambiguity

Whether the aforementioned challenge against Shiffrin's argument in the copyright context succeeds will depend on how we interpret one significant ambiguity in Lockean labor theory. The question at hand is the following: does Lockean labor theory entail that *only* that which we *remove* from the common stock is eligible for private appropriation in the first place

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[42] The task of proving independent creation could, of course, turn out to be challenging. In particular, difficulties arise in cases in which the allegedly infringed work is popular. *See, e.g.,* Three Boys Music Corp. v. Michael Bolton, 212 F.3d 477 (9th Cir. 2000) (holding that, absent direct evidence that a defendant copied the protected work, a plaintiff can use circumstantial facts to prove infringement by showing the defendant had access to the protected musical work and can show access through circumstances linking the two artists specifically or by showing the protected work was widely available and that a defendant was likely to have heard it. The court also held that, if access and substantial similarity are established, then even subconscious copying is infringement, and that access to the work therefore need not have been in the recent past); Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984) (holding that if the two works are strikingly similar, then the proof-of-access requirement is considerably lowered, as striking similarities are extremely unlikely to have occurred in the absence of actual copying). These cases highlight evidentiary difficulties with the independent creation defense in the context of popular works, but they of course should not lead us to conclude that independent creation is not genuinely a complete defense. Practical difficulties in proving independent creation do not undercut the theoretical point.

(and moreover, that labor is the mechanism for such appropriation)? Or, alternatively, does Lockean labor theory permit the private ownership of things which do *not* deplete the common stock, but which are nonetheless also the product of one's labor?

This ambiguity must be resolved for us to proceed. If we interpret Lockean labor theory in the first way – the way that Shiffrin herself would presumably endorse – then Shiffrin's challenge against a Lockean copyright theory will survive, for she can easily reframe it. Shiffrin can now say that, although it's not the case that copyright removes anything from the commons, Lockean labor theory only *applies* to that which is taken from the commons to begin with. In other words, only elements removed from the commons are even candidates for private appropriation via labor. This is to say that Shiffrin might argue that copyrightable subject matter is not eligible for Lockean private appropriation precisely because copyright does not deplete the common stock. Accordingly, under the first interpretation, Shiffrin's general conclusion would not be undermined.

However, this is not the right way to understand the Lockean theory. For one thing, although the relevant passages of Locke speak specifically about rights in physical land and objects – which *do* deplete the original common stock – Locke says nothing to rule out private ownership of things which aren't removed from the commons in this way. Moreover, and more importantly, there's no *normative* reason for thinking that such things can't be privately appropriated via labor. After all, Locke's self-ownership thesis is unconditional: we absolutely own ourselves and our own labor, leaving no basis for thinking that we're only entitled to the fruits of our labor when we are laboring to deplete the commons. In fact, private appropriation is only *more* justifiable in cases that don't actually deplete the commons, precisely because the commons is originally commonly owned. In other words, given that copyright does not take anything from the common stock, it's not the case that *anyone* possessed a claim to the subject of copyrights prior to the author's labor, let alone that *everyone* did, as is true of what is removed from the commons. This is to say that the private appropriation of what is commonly owned is in fact harder to justify than the private appropriation of what simply *uses* what was commonly owned (e.g., the ideas, expressions, facts, and so on which combine to constitute the creative work), but which is itself otherwise unowned.

In summary, we can now see that my disagreement with Shiffrin has two dimensions. The first is interpretive. Shiffrin is right to emphasize the common ownership thesis, and to remind us that *taking* from the commons is only justifiable under the Lockean picture when doing so is necessary for use. But we still cannot *ignore* Locke's self-ownership thesis: after all, if labor had no independent normative significance for Locke, then we would lack an explanation for why he regards it as the appropriate mechanism for taking from the commons in the first place. Thus, under the Lockean theory properly understood, we can see that one is entitled to the fruits of one's labor A) when appropriating these fruits does not remove anything from the commons, and B) *even if* such appropriation is unnecessary for use, because no else has a claim on fruits which are not removed from the common stock to begin with.

Of course, the second dimension to my disagreement with Shiffrin is in the application of Locke to intellectual property. Shiffrin does not note any theoretically significant differences between copyright and patent law; but we have now seen that copyright's limitations entail that it does not appropriate from the commons. Thus, given the aforementioned interpretive point, we can conclude that Shiffrin's argument does not apply to copyright.

d. Creative Works and the Growth of the Commons

Before turning our attention to patent law, it is worth briefly noting that – at least under the non-Platonist views of the original intellectual commons – one could plausibly argue that the existence of copyrights actually *adds* to the commons (rather than removing from it). To see why, note that the presently dominant theory of copyright law in the U.S. is utilitarian. The standard utilitarian argument for copyright tells us that we must grant authors exclusive rights in their creative works in order to incentivize valuable cultural progress. Without such rights, the argument goes, authors will not be motivated to make the investments necessary in order to actually produce creative works, for they will not be able to reap the rewards of said investment. Granting authors the monopoly thus assures that the benefits of their creative work flow to and are controlled by them, thereby moving them to produce the creative work in the first place.[43]

It is an empirical question whether copyright protection is actually a necessary incentive for creation. Some scholars dispute this claim, arguing that, at least in some industries, copyright protection is wholly unnecessary for creative productivity (and might even be counterproductive).[44] But if it *is* the case that *any* acts of creative authorship have in fact been directly incentivized by the existence of copyright – such that, but for the availability of copyright protection, said authors would not have produced these works – then it will turn out that the existence of copyright ultimately expands the common stock. In part, this is because copyrights don't last forever. Once they do expire, the works which they formerly protected enter into the public domain, *falling into* the common stock and enriching it, so that the works can produce enjoyment, insight, or even sparks of inspiration for new creative works. But this enrichment also occurs in a more general sense, as creative works have the capacity to influence and expand the common culture in substantial and lasting ways. For just one of nearly countless examples, we can see that the the idea of inter-galactic battles in space, fought on ships with the capacity to zip around at the speed of light, was a fresh and novel proposal at the time of the first *Star Wars*' films; but because of it and its progeny, the trope is now a familiar, comfortable, even significant one in our collective conscience. This is all to say that, if the pro-copyright utilitarians are right as an *empirical* matter – or, that it's true that copyright has the effect of incentivizing creative work that would otherwise fail to take place – then the existence of copyright protection ultimately results in an even richer common culture, far from a more depleted one.

III. PATENT MONOPOLIES AND THE COMMON STOCK

Shiffrin's argument against a Lockean picture of intellectual property is far more convincing in the context of patent law. This will ultimately be unsurprising in light of the discussion above, as patent law lacks precisely those limitations which copyright possesses, and which lends copyright to a Lockean understanding. In particular, the lack of an independent creation defense in patent law entails that grants of patents prevent even independent inventors from utilizing the fruits of their labor. A patent right thus restricts the free availability of inventive ideas in a way that a grant of copyright does not, and in a manner that genuinely removes something from the common stock. However, as Shiffrin argues, given the non-

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[43] *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

[44] Kal Raustiala & Chris Sprigman, THE KNOCK-OFF ECONOMY: HOW IMITATION SPARKS INNOVATION, 2012.

rivalrous nature of these ideas, such grants are unjustifiable under the Lockean picture. This is to say that the patent system can only be justified on non-Lockean grounds. These arguments will be unpacked in the following section.

a. Patentable Subject Matter

As a preliminary matter, it is worth noting that certain existing limitations on patent law already contain flavors of Shiffrin's concerns regarding impermissible appropriations from the commons. In particular, 35 U.S.C. § 101 states that laws of nature, abstract ideas, and natural phenomena are subject matter ineligible for patent protection.[45] The principle behind this exclusion is discussed in the landmark case *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* where the Supreme Court explained its following concerns:

> The Court has repeatedly emphasized [the] concern that patent law not inhibit further discovery by improperly tying up the future use of laws of nature…even though rewarding with patents those who discover new laws of nature and the like might well encourage their discovery, those laws and principles, considered generally, are "the basic tools of scientific and technological work." Benson, supra, at 67, 93 S.Ct. 253. And so there is a danger that the grant of patents that tie up their use will inhibit future innovation premised upon them, a danger that becomes acute when a patented process amounts to no more than an instruction to "apply the natural law," or otherwise forecloses more future invention than the underlying discovery could reasonably justify.[46]

The *Mayo* opinion also cites the following passage from *O'Reilly v. Morse,* a case in which the Supreme Court set aside the patent for Samuel Morse's general claim for the use of the motive power of the electric or galvanic current, however developed, for making or printing intelligible characters, letters, or signs, at a distance, on the grounds that it constituted an abstract idea[47]:

> For aught that we now know some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. His invention may be less complicated—less liable to get out of order—less expensive in construction, and in its operation. But yet if it is covered by this patent the inventor could not use it, nor the public have the benefit of it without the permission of this patentee.[48]

Under existing patent law, the labor that an individual puts into discovering some law of nature or developing some abstract idea is not sufficient to justify its removal from the common

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[45] 35 U.S.C. § 101.

[46] Mayo Collaborative Services v. Prometheus Laboratories, Inc., 566 U.S. 66, 86 (2012) (holding that the patents in question effectively claimed the underlying laws of nature themselves, and were thus invalid).

[47] O'Reilly v. Morse, 56 U.S. 62, 86 (1854).

[48] *Id.* at 113.

stock, as this removal would prevent free – and potentially beneficial – uses by others. The background assumption at play thus seems to be Locke's very own common ownership thesis: that laws of nature, abstract objects, and natural phenomena all, in the first instance, belong equally to everyone, and – as Shiffrin argues – labor is not a justification for their private appropriation when such appropriation is by no means necessary for their use, and would instead *restrict* their use. These important limitations on patent eligibility thus instantiate precisely Shiffrin's worries.

The problem, however, is that Shiffrin's concern does *not* merely apply to laws of nature, abstract ideas, and natural phenomena; it extends to all *patentable* subject matter as well. After all, granting patent protection over processes, machines, articles of manufacture, and compositions of matter *also* removes them from the commons. Such removal is not necessary for such innovations to be utilized, and in fact forecloses others' abilities to utilize them or even develop them further in a beneficial way. As Shiffrin would argue, the grant of a patent is antithetical to the Lockean common ownership thesis and what is required in order for this common ownership to be overridden.

b. Independent Inventors, the Commons, and the Proviso

At this point, the theoretical significance of the differences between patent and copyright becomes clear. Why does a patent grant constitute the removal of something from the commons, when I have argued that a copyright grant does not? For one thing, I noted that Shiffrin's objection to the private appropriation of ideas is a nonstarter in copyright because copyright is not in the business of granting exclusive rights in ideas at all. Patent law, on the other hand, is in precisely this business. It is in the business of *useful* ideas, in fact, such that a patent grant by definition preclude others from freely benefitting from the innovation's utility.

Moreover, unlike copyright, patent law does not offer an independent creation defense. A patent is not merely a protection against the "copying" of others; it *really does* remove the patented material from the commons, such that the patent owner may prevent others from utilizing his idea *even if* they came up with it entirely on their own. This is to say that the patent owner has genuinely, privately appropriated the relevant innovative idea, despite this idea's non-rivalrous nature. This follows regardless of which of the two aforementioned conceptions of the initial intellectual commons we choose to adopt. If we are Platonists about innovations, holding the view that *all possible innovations* are abstract entities in the intellectual commons prior to being actually invented – i.e., that invention is really a sort of discovery – then patent grants straightforwardly remove those abstract innovations from the intellectual commons. On the other hand, if we adopt Shiffrin's conception according to which innovations are *compositions of ideas* – compositions which might themselves be genuinely novel, but which are nonetheless constituted by ideas originating from the commons – then patent grants *still* appropriate by disallowing said ideas to be freely utilized within certain compositions (namely, those which have been patented). It follows that patent grants fall prey to Shiffrin's objection, that they deplete the commons despite appropriation being unnecessary for use, and that they therefore cannot be justified on Lockean grounds.

The lack of an independent creation defense also pushes against a Lockean picture in a further sense: namely, that it recognizes the labor-grounded natural rights for *some* individuals but not others, for reasons wholly extrinsic to the individuals themselves, thereby undermining

Locke's commitment to the equality of all.[49] Consider the 2nd inventor of some patented innovation, who is entirely unaware of the fact that the 1st inventor has already patented said innovation. We have no reason to think that this 2nd inventor put any less labor into the innovation than he would have had the 1st inventor not already patented it himself; indeed, we can stipulate that the 2nd inventor's actual innovative efforts were identical to what they would have been had the 1st inventor never even existed. Nonetheless, under patent law, the 2nd inventor's labor does not entitle him to the right to even *use* the invention, let alone to a patent of his own. Thus, the 2nd inventor's labor – unlike the 1st inventor's – is unable to ground a patent right for reasons extrinsic to himself and his work: namely, the fact that someone else claimed the idea first.

Finally, the lack of an independent creation defense might pose a further problem for a Lockean conception of patent law because it potentially violates the Lockean proviso. This is to say that, not only does a patent remove something from the common stock (thereby falling prey to Shiffrin's objection), but this removal might *fail to leave enough and as good*, particularly for those inventors who are not first in time. This latter argument was briefly articulated by Nozick in *Anarchy, State, and Utopia.* Nozick's discussion begins by putting forth a particular interpretation of the Lockean proviso[50] – a term he coined himself – according to which one's private appropriation is only permissible as long as it does not make anyone "worse off" than they would have otherwise been, by depriving them of something they could otherwise possess.[51] He then turns his attention specifically to the example of patents, applying the Lockean proviso to this context:

> An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others).…Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.[52]

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[49] Locke, *supra* 21.

[50] It is important to note that Nozick's interpretation of the Lockean proviso is not uncontroversial. *See, e.g.*, Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 PHILOSOPHY & PUBLIC AFFAIRS 226, 232 (1995) (noting that Nozick's "weak" version of the Lockean proviso allows first-comers to appropriate land and other natural resources provided they leave others (later-comers) as well off as they would have been in a world without private appropriation "in effect permits first-comers to appropriate the surplus value inherent in soon-to-be scarce resources"); Jeremy Waldron, *Enough and as Good Left for Others*, 29 THE PHILOSOPHICAL QUARTERLY 319 (1979) (arguing that interpreters are mistaken in understanding the "enough and as good" clause as a restriction on acquisition). Nonetheless, Nozick's interpretation is both important and influential, and therefore worth discussing.

[51] Robert Nozick, ANARCHY, STATE, AND UTOPIA, 178.

[52] *Id.* at 181.

As Nozick argues, if his welfarist understanding of the Lockean proviso is correct, then a truly Lockean system of patents would need to acknowledge an independent creation defense. Otherwise, a grant of a patent *would in fact* leave later inventors worse off than they otherwise would have been. This is because, but for the existence of the patent, these other inventors would have been able to utilize their independently created inventions. However, given that the existing system of patent rights offers no such defense for independent inventors – instead prioritizing the ability of first inventors to charge monopoly-high prices for the full duration of their patent term – it cannot be plausibly characterized as a Lockean system of patents.

IV. NORMATIVE QUESTIONS AND IMPLICATIONS

I have argued on the basis of copyright and patent doctrine *as they stand* that Shiffrin's anti-Lockean arguments are convincing in the context of the former, but not in the context of the latter. But this also raises a number of further normative questions, to be explored in future work, but which I will briefly outline here.

a. Intellectual Property Rules and the Is/Ought Gap

First, are the above-discussed copyright and patent rules actually getting things normatively right? The mere fact that the rules have been designed a certain way does not itself tell us whether these rules are justified, or whether they are tracking the correct theoretical grounds for the area of law in question. Consider Liam Murphy's following passage from *The Practice of Promise and Contract,* discussing the normative and descriptive gap as it arises in theorizing about contract law:

> One's beliefs about promissory rights and obligations-beliefs embedded in a social practice-are the initial data from which any theory of promise is constructed. There is nowhere else to start. But in most philosophical reflection about substantive moral issues the prospect of revisionary conclusions is part of the point of engaging in the inquiry. Few philosophers believe that pre-theoretical moral commitment or 'intuition' should be treated as sacrosanct…[however,] though the main point of normative legal theory as most see it is evaluative, aiming at least to produce criteria by which particular legal doctrines and practice can be judged, it would obviously be a waste of time to try to design an ideal system of contract law…in ignorance of how societies have been thinking about the topic over the centuries. Though it is possible that all actual contract law is all wrong, it is very unlikely to be so, and so any theory claiming this has the burden of explaining how we all went astray.[53]

As Murphy explains, while any normative theorist of law must treat existing rules as *evidence* in favor of a particular correct conception of that area of law, and would moreover take on a significant explanatory burden if she were to claim that *all* of existing contract law (or copyright, or patent) is completely mistaken, we nonetheless cannot pursue our normative legal

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[53] Liam Murphy, "The Practice of Promise and Contract" (2014), *New York University Public Law and Legal Theory Working Papers*. Paper 458.

theorizing with the assumption that every existing choice of law is already aligned with the correct normative theory. For our purposes, this bears on the particular copyright and patent doctrines which the argument in this paper has utilized. I differentiate copyright from patent on the basis of its doctrinal limitations: that protection extends only to expressions and not ideas or facts, and that independent creation is a complete defense to a claim of infringement. But it's a further normative question whether copyright *should* be limited in this way, or whether patent is itself getting things right by lacking these limitations. The purpose of this paper has been to critically evaluate the success of Shiffrin's arguments as applied to existing copyright and patent systems, but a normative inquiry would need to address the questions of whether these existing systems are *themselves* justifiable.

b. The Positive Case for Lockean Copyright Theory

Thus, the first normative question sparked by the preceding discussion is whether the *positive* case for a Lockean theory of copyright can really be made. I have shown that Shiffrin's anti-Lockean arguments do not apply to copyright law, and that we should therefore not rule out Lockean theories of copyright for the reasons she suggests. But this alone should not move us to embrace a Lockean theory of copyright, for there are numerous other considerations that could still rule out such a theory. To name a few of such considerations: it might be that there are *other* anti-Lockean arguments worthy of consideration; or, that a full-blooded, positive theory of Lockean copyright cannot be developed; or, that more general normative commitments (such as a commitment to the view that *all* law is to be justified on purely utilitarian grounds, or a rejection of Lockean rights more generally) rule out the plausibility of a Lockean theory of copyright; or, that an alternative deontic framework is a better fit for copyright; or, that over-riding instrumentalist considerations should ultimately push in favor of understanding copyright just as we already do; or, that copyright should itself be abolished. This is to say that there remain a number of ways in which a Lockean theory of copyright could fall short. Anyone who hopes to seriously defend such an account must contend with each of these hurdles in the process. I intend to do so in my own future work, in which I will articulate a full defense of the claim that there exists a Lockean natural right to one's expression.

c. A Lockean Revision of Patent?

Similarly, although patent law as it stands does not lend itself to a Lockean theory for the reasons Shiffrin has raised (and, indeed, for the further reasons I put forth above), we might wonder whether the patent system should be revised to align with such a theory. Recall Nozick's argument that a truly Lockean patent system would adopt an independent creation defense.[54] Should such a defense *in fact* be adopted? A number of scholars have already considered and even defended the idea of adopting such a defense,[55] whereas others will emphasize that the

[54] Robert Nozick, ANARCHY, STATE, AND UTOPIA, 178.

[55] A number of scholars have raised the question of whether an independent creation defense should be added to patent law. See, e.g., Samson Vermont, *Independent Invention As a Defense to Patent Infringement*, 105 MICH. L. REV. 475 (2006); Oskar Liivak, *Rethinking The Concept of Exclusion in Patent Law*, 98 Geo. L.J. 1643 (2010); Roger Milgrim, *An Independent Invention Defense to Patent Infringement: The Academy Talking to Itself: Should Anyone Listen,* 90 PAT &

instrumentalist goals of the patent system – namely, optimally incentivizing valuable innovation – could not be sufficiently realized unless inventors are able to capitalize on their innovation without the threat of an independent inventor entering the market during their patents' terms. But should these instrumentalist considerations be overridden by a Lockean natural right in patent? Or are there any further reasons for thinking that a Lockean theory is not well-suited for the context of a patent system? An inquiry into the normative basis for patent law – even one which ultimately only defends the status quo view – would need to contend with these questions, rather than beginning with the assumption that the existing system is already ideal as a normative matter.

I set aside the preceding normative questions for future work. But it is worth emphasizing that these questions are of great importance: for, if a theorist *is* able to successfully argue that copyright and patent have different theoretical underpinnings – and, in particular, that we ought to adopt a Lockean theory of the former but not the latter – then this is likely to have numerous practical implications for intellectual property doctrine. I consider some such implications in the final section below.

d. Potential Doctrinal Implications

If copyright and patent law have distinct theoretical underpinnings, then recent attempts to *unify* copyright and patent doctrine might be inadequately thought out, or even mistaken. For instance, consider a number of Supreme Court and Federal Circuit decisions which have had the aim and effect of unifying the rules regarding injunctions, secondary liability, and latches in copyright and patent. Prior to 2006, the received view was that a finding of infringement was sufficient for issuing an injunction in both copyright and patent, as the plaintiff was regarded as having an *entitlement* to the injunction. But *eBay v. MercExchange* changed this in the patent context. The Supreme Court held that injunctions should not be automatically issued, instead proposing a four-factor test for when they are appropriate.[56] This test asked plaintiffs to demonstrate 1) that they have suffered an irreparable injury, 2) that remedies available at law are inadequate to compensate the injury, 3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted, and 4) that the public interest would not be disserved by an injunction.[57] Shortly thereafter, courts began applying the *same* four-factor test for injunctions in the context of copyright law, thereby unifying the doctrines on the matter of injunctions. [58] In doing so, such courts did not raise the question of whether the

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TRADEMARK OFF. SOC'Y 295 (2008); Michelle Armond, *Introducing the Defense of Independent Invention to Patent Preliminary Injunctions,* 91 CAL. L. REV. 117 (2003); John S. Leibovitz, *Inventing a Nonexclusive Patent System,* 111 YALE L. J. 2251 (2002).

[56] eBay v. MercExchange, 547 U.S. 388 (2006).

[57] *Id.*

[58] *See, e.g.*, Flexible Lifeline Systems, Inc. v. Precision Lift, Inc., 654 F.3d 989, 998 (9th Cir. 2011) (arguing that, after eBay, plaintiffs who have successfully shown infringement do not receive a presumption of irreparable harm in the copyright context); *See also* Mark A. Lemley, *Did eBay Irreparably Injure Trademark Law?*, Stanford Public Law Working Paper No. 2808677 (2016) (discussing the exportation of the *eBay* factors into trademark law, and noting that use of these factors in trademark must involve sensitivity to the important differences between trademark and patent law).

aforementioned differences between copyright and patent could potentially bear on our choice of their respective tests.

The Supreme Court again pulled from patent law in *Sony Corp. of America v. Universal City Studios* in order to define secondary liability in copyright. In its opinion, the Court noted that the Copyright Act does not expressly render anyone liable for infringement committed by another. This is unlike the Patent Act, which explicitly brands anyone who "actively induces infringement of a patent" as an infringer[59] and further imposes liability on a certain class of "contributory" infringers.[60] Nonetheless, concluding that the absence of such express language in the copyright statute does not preclude the imposition of secondary liability, the Court went on to pluck from patent law the idea that a provider of a product cannot be deemed a contributory infringer if the product in question is capable of commercially significant non-infringing uses.[61] The Court briefly justified this conceptual importation on the basis of the *historic* kinship between patent and copyright, but it again did not to explore whether any theoretical differences should give them pause.[62]

Such importation of patent principles occurred again in *MGM Studios, Inc. v. Grokster, Ltd.*, which raised the issue of *inducement*-based liability in copyright law. Here, the Supreme Court carved out an exception to the *Sony* rule, concluding that a defendant bears secondary liability for an infringement – even if their product is capable of significant, non-infringing uses – if said defendant *induces* the infringement.[63] The court acknowledged that this holding, like the holding in *Sony,* took cues from patent law in employing the concept of inducement liability. [64] The *Grokster* court *also* put forth a novel definition of inducement in the copyright context, specifically holding that one who distributes a "a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement [such as advertising the infringing use or providing instructions on how to engage in it], is liable for the resulting acts of infringement by third parties."[65] But the cross-pollination of inducement rules did not stop here, as *Grokster's* novel definition of inducement has since been used in the patent context, in particular by the Federal Circuit.[66] In one such case – *Takeda*

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[59] 35 U.S.C. § 271(b).
[60] *Id.* at § 271(c).
[61] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).
[62] *Id.* at 439.
[63] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005).
[64] 35 U.S.C. § 271(b). *See, e.g.*, Water Technologies Corp. v. Calco, Ltd., 850 F.2d 660, 668 (C.A.Fed. 988) (finding liability for inducement where one "actively and knowingly aid[s] and abet[s] another's direct infringement" (emphasis deleted)); Fromberg, Inc. v. Thornhill, 315 F.2d 407, 412 (C.A. 1963) (holding that demonstrations by sales staff of infringing uses supported inducement liability); Haworth Inc. v. Herman Miller Inc., 37U.S.P.Q.2d 1080,1090, 1994 WL 875931 (W.D. Mich. 1994) (finding that evidence the defendant had demonstrated and recommended infringing configurations of its product could support liability); Sims v. Mack Trucks, Inc., 459 F.Supp. 1198,1215 (E.D. Pa. 1978) (finding inducement where the use depicted by the defendant in its promotional film and brochures infringes on the patent), overruled on other grounds, 608 F.2d 87 (C.A.3 1979).
[65] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005).
[66] *See, e.g.*, Takeda Pharmeceuticals U.S.A., Inc. v. West-Ward Pharmaceuticals, 785 F.3d 625 (Fed. Cir. 2015) (applying the *Grokster* definition of inducement in the patent context in holding

Pharmeceuticals U.S.A., Inc. v. West-Ward Pharmaceuticals – Judge Newman dissented, objecting to to the court's application of *Grokster* with the following poignant remarks:

> *Grokster* is a copyright case, and although there is common law commonality in the word "inducement," questions of intent and scienter are as fact-specific in the copyright field as in connection with patents. An oversimplified analogy between copyright and patent causes does not aid understanding of these complex issues.[67]

Finally, consider the equitable defense of laches in both copyright and patent law. In *Petrella v. Metro-Gold-Mayer, Inc., et al.*, the Supreme Court tackled the question of whether the laches defense – which claims unreasonable and prejudicial delay in commencing suit – may bar relief on a copyright infringement claim brought within 17 U.S.C. § 507(b)'s three-year statute of limitations period.[68] The Court analyzed the text of the Copyright Act in great detail before concluding that the Act leaves "little place" for a doctrine that further limits the timelines of a copyright owner's suit, and therefore, that the defense of laches may not bar relief in copyright law.[69] Then, a few years later – in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC* – the Court held the same with respect to patent law.[70] The *SCA* opinion cites to *Petrella* in constructing its arguments, and once again, the Court does not at all explore whether the important differences between copyright and patent should push against the appropriation of this rule.[71]

It is clear that courts are presently happy to take cues from patent law in developing copyright doctrine and vice versa. They might even see value in the doctrinal harmony and relative convenience that this results in. But the answers to the aforementioned normative questions might move us to be cautious of this impulse. The problem with unreflective unification of copyright and patent is that it fails to appreciate how the division of labor and differences in rights could be tied to a more fundamental distinction in theoretical grounds. Even if certain *particular* copyright and patent rules ought to be aligned, we should nonetheless always ask how each rule fits with the unique natures of copyright and patent respectively, so as to assure that each instance of cross-pollination is justifiable. The discussion of the present paper suggests that there might be reason to take seriously the view that copyright and patent are

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that the district court did not abuse its discretion in denying a preliminary injunction on the ground that Takeda had failed to meet its burden to show a likelihood of success on the merits); Ricoh Co., Ltd. v. Quanta Computer Inc., 550 F.3d 1325, 1341 (Fed. Cir. 2008) (examining *Grokster*'s discussion of what evidence is required for a showing of inducement and applying this analysis to a patent infringement case); DSU Medical Corp. v. JMS Co., Ltd., 471 F.3d 1293, 1305 (Fed. Cir. 2006) (patent case citing Grokster in holding that, for inducement liability, the alleged infringer must be shown to have knowingly induced *infringement*, such that it is insufficient to merely show he knowingly induced the *acts* that constituted infringement).

[67] *See, e.g.*, Takeda Pharmaceuticals U.S.A., Inc. v. West-Ward Pharmaceuticals, 785 F.3d 625, 638 (Newman, J., dissenting).

[68] Petrella v. Metro-Gold-Mayer, Inc., et al., 134 S.Ct. 1962, 1967 (2014).

[69] *Id.* at 1977.

[70] SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S.Ct. 954, 957 (2017).

[71] *Id.*

theoretically dissociated, and therefore, that efforts to unify their doctrines – particularly if grounded in a desire for unity itself – are misguided.

Finally, if our normative inquiries tell us that the correct way of understanding copyright is different from our existing understanding, then this is liable to have more general implications for our choice of rules. Suppose we determine that copyright ought to be in the business of vindicating authors' Lockean rights in their works. In that case, it might be that it is permissible for authors to utilize copyrights in order to promote interests which some existing courts and scholars have thus far been hesitant to embrace: for example, non-commercial interests like privacy.[72] After all, one's Lockean right in their creative work is grounded in their act of creation, *not* in whether – or how much – they choose to share it with the world.[73] Thus, the decision to keep one's expression private should not bare on the extent to which that author can exercise her Lockean right.

On the other hand, if there are no Lockean rights in innovation and if patent systems can only be justified on the basis of welfarism (such as utilitarianism), then it is important that our patent system gives the inventors' interests *no more weight* than the interest of anyone else in the world. This must be kept firmly in mind as we design particular legal rules, such as those regarding some of the unique and challenging normative puzzles arising in the context of pharmaceutical patents.[74] Moreover, we should be skeptical of those who champion universal allegiance to the inventors' rights, for instance, by opposing compulsory licenses. Such individuals might argue that the generalized *rules* of the patent system are designed to maximize welfare, and should therefore never be broken, even in cases where it is *demonstrable* that breaking the rules will result in more welfare than failing to do so. But such an argument falls prey to the problem of *rule fetishism* – a charge similarly faced by rule utilitarianism – in that it prioritizes adherence to the rules at the expense of genuinely maximizing welfare, when welfare is precisely what the rules were introduced to maximize in the first place.[75] This is all simply in order to illustrate that answering the aforementioned normative questions is not merely a matter of theoretical interest, but one of pressing practical significance.

CONCLUSION

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[72] *See, e.g.*, Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 32 HOUS. L. REV. 549, 554 (2015).

[73] Notably, the primary examples of property discussed by Locke himself are ones that individuals use to sustain themselves, not to commercially gain from them. LOCKE, *supra* note 20, aast § 28.

[74] *See, e.g.*, Shubha Ghosh, *When Property is Something Else: Understanding Intellectual Property through the Lens of Regulatory Justice*, in INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE (2008); Thomas W. Pogge, *Human Rights and Global Health: A Research Program*, 36 METAPHILOSOPHY 182 (January 2005) (arguing for a global health-system reform that would make medical knowledge freely available as a global public good); John Sonderholm, *Ethical Issues Surrounding Intellectual Property Rights*, 5 PHILOSOPHY COMPASS 1107 (2010) (explicating the various ethical problems, proposed solutions, and further challenges that arise in the context of pharmaceutical patents).

[75] J. J. C. Smart, *An Outline of a System of Utilitarian Ethics,* in UTILITARIANISM: FOR AND AGAINST (Cambridge University Press).

Shiffrin's *Lockean Arguments for Private Intellectual Property* is an invaluable contribution to our understanding of the philosophical underpinnings of intellectual property. The present paper has highlighted that, once we appreciate the significant doctrinal differences between copyright and patent law, we can see that Shiffrin's arguments are convincing in the context of the former but not the latter. Her paper thus manifests an example of the phenomenon of U.S. IP scholars assuming that copyright and patent are to be understood in a theoretically unified way, an assumption that – as this paper shows – might lead us to mistaken conclusions. The present paper has also raised a number of further normative questions regarding the theoretical underpinnings of intellectual property, and the answers to which will have practical implications for how we should construct doctrine. No doubt, these inquiries are also to be approached with an eye to the differences between these two intellectual property regimes, rather than towards the allure of theoretical unity.