LOCKEAN COPYRIGHT VS. LOCKEAN PROPERTY

MALA CHATTERJEE

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INTRODUCTION

> "There has been no more widespread or enduring intuition about property rights than that labor in creating or improving a thing gives one special claim to it. We feel that those who innocently work to discover, make, or usefully employ some unowned good ought to be allowed to keep it (if in so doing they harm no others), that it would be wrong for others to take it away. It is the strength of this intuition that keeps alive the interest in Locke's labor theory of property acquisition, despite generations of criticism of Locke's arguments. However badly he defends his views, we might say, surely Locke is onto something." – A. John Simmons, The Lockean Theory of Rights

Locke's labor theory of property is both frustratingly untenable and frustratingly unshakeable. It has been challenged countless times by numerous compelling objections,[2] and yet the underlying intuition that we are *sometimes*, *in some sense* morally entitled to the fruits of our labor still persists among many. Within the law, we see pseudo-Lockean rhetoric – language evoking labor, desert, fairness, or free-riding – making appearances in judicial opinions both within and beyond the domain of property.[3] But it would nonetheless be safe to say that the majority of *philosophers* who have contemplated property in the hundreds of years since Locke's *Two Treatises of Government* have concluded, for countless reasons, that Locke's notorious theory of property simply cannot be right.[4]

Notwithstanding this conclusion among philosophers, however, a number

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of legal scholars in recent years have sought to connect the ideas of Locke's theory of property to the question of what justifies *intellectual* property, such as exclusive rights in creative works and innovations, taking the form of copyrights and patents.[5] Indeed, such scholars have likely been motivated by the persistent grip of a version of the original Lockean intuition, in combination with a view that the dominant utilitarian picture of intellectual property – which has fundamentally become an *economic* theory, one according to which the only value sought by intellectual property law is efficiency – either offers a defective normative vindication of intellectual property rights or at the very least cannot be the whole story. However, the legal scholars engaging in such Lockean explorations have largely done so while entirely ignoring the numerous *challenges* that philosophers have raised against them, and which many – like myself – have taken to be decisive against such a property theory.[6] Moreover, in so doing, said legal scholars have tended to entirely ignore the important *metaphysical* differences between intellectual and physical objects – and the resulting normative differences between exclusive rights in each – let alone examining whether these have implications for the applicability of the aforementioned objections to Locke.[7] In other words, then, such scholars seem to have made the mistake of taking it as settled that Locke's theory of property is itself defensible, thus building a theory that does not analyze the differences between copyrights and property and instead remains susceptible to the challenges faced by the latter. However, given the strength of these challenges, a theory of copyright that is only as defensible as Locke's theory of property will not turn out to be very defensible at all. The question, then, of how *plausible* a Lockean copyright could be remains entirely unanswered by the work of legal scholars.

This failure of Lockean intellectual property scholars to consider the problems with Lockean property – let alone their implications for such a theory of copyright – has also resulted in a misunderstanding regarding the *kind* of rights that the most plausible version of Lockean copyright would actually support, and thereby moving many to hastily reject the entire project as a non-starter. In other words, said efforts have lead to the promulgation of so-called Lockean copyright *skeptics*,[8] ones who believe that even the best version of such a theory a) cannot vindicate copyright's fundamental structure, including its defining limitations;[9] and thereby b) requires even *stronger* and *more expansive* copyright grants than the ones currently offered by American law, an implication they take to be independently normatively plausible.[10] But this widespread skepticism is also

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mistaken, in that it envisions a Lockean copyright theory that is *only as good as* Lockean property theory itself, one thus afflicted by the very problems that, perhaps unbeknownst to them, philosophers have opined for hundreds of years. Such Lockean copyright skeptics thereby *also* fail to address the question of whether – in light of the *metaphysical* differences between the subjects of copyright and property – there could be a version of Lockean copyright which nonetheless lacks every one of these damning shortcomings.

On the other hand, in the domain of philosophers, the normative questions surrounding intellectual property remain surprisingly under-explored. This is surprising because, of course, philosophical work has long focused on – and contributed profoundly to – our understanding of *property*,[11] and many of the very same normative questions and considerations arising in that context also arise for intellectual property. But moreover, intellectual property cannot simply be substituted into one's favored theory of property without reflection, and this is because of all the important ways in which the two are very different. Whereas property law concerns itself with rights in that which is concrete, intellectual property rights are in objects which are intangible and abstract, non-rivalrous and infinitely shareable, difficult to individuate or precisely define,[12] and – in the case of copyright – *expressive* in nature.[13] These metaphysically mysterious objects thus give rise to a class of considerations distinct from those in the simple case of physical property, ones which have largely yet to be grappled with by even the most property-theoretic of philosophers.

Moreover, with respect to the small class of theorists who *have* considered Lockean theories of intellectual property while analyzing some of the differences between physical and intellectual objects, such theorists have only concluded that these differences make Lockean intellectual property even *less* plausible than the property theory Locke himself had in mind. In other words, according to said arguments, even if we *do* embrace Lockean property – somehow devising solutions for the countless objections that have faced it – we still should *not* favor a Lockean conception of copyrights or patents. Most notably, this view was defended by Seana Shiffrin in her paper *Lockean Arguments for Private Intellectual Property,* one of the only efforts by the hands of a philosopher to examine the foundations of intellectual property rights.[14] But, as I have argued elsewhere, Shiffrin's challenge here falls short;[15] for it does not grapple with all of the *implications* of the

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[14] Seana Shiffrin, "Lockean Arguments for Private Intellectual Property" in *New Essays in the Legal and Political Theory of Property* 138-67 (edited by Stephen R. Munzer, Cambridge University Press, 2001).
[15] Mala Chatterjee, *intellectual Property, Independent Creation, and the Lockean*

metaphysical differences between intellectual and physical objects and with respect to what copyright owners actually own, ones which we will see bear – in a surprising manner – on the relative plausibility of Lockean copyright versus Lockean property.

Thus, going against each of the dominant perspectives, the present Article demonstrates the ways in which all existing scholarship surrounding Lockean rights and copyright theory has gone awry. Instead, this Article defends the view that – once the important metaphysical differences between the subjects of copyright versus property are correctly understood – a Lockean copyright theory is in fact *far more plausible* than Locke's theory of property, for said differences allow Lockean copyright to avoid the most devastating objections that Locke's property theory has been faced with. In other words, I defend a view that might be understood as the inverse of Shiffrin's: namely, that the frustratingly persistent Lockean intuition – though entirely hopeless in the property context that Locke himself intended – can be compellingly salvaged in the domain of copyright. This Article thus has the surprising implications that a) theorists who *do* embrace Lockean property theory but have never taken seriously Lockean copyright are mistaken, for they have failed to recognize that such a theory of copyright is in fact far more plausible than the original; and that b) theorists who have rejected Lockean property theory up until now (like myself) should nonetheless take Lockean copyright seriously, for it offers a way of making sense of a compelling intuition that has persisted in the face of criticism for hundreds of years, but while nonetheless avoiding the most challenging problems faced by the former. This Article then further demonstrates that, if – as a matter of theory – a Lockean copyright emerges as favorable, this has profound practical and doctrinal implications for our thinking about and designing of copyright law, ones entirely the opposite from what the aforementioned Lockean copyright skeptics assumed: namely, that copyrights should actually be far more *limited*, in a number of ways, than they presently are under U.S. law. The Article thereby demonstrates that, in order to determine the correct scope and structure of copyright law, we must tackle the philosophical questions surrounding copyright theory and Lockean rights far more carefully than they have yet been explored.

By way of roadmap, Part I provides the requisite background. It recounts Locke's theory of property, its three dominant interpretations, and the most compelling of the objections that the theory has been faced with, all of which I take to be decisive against it; and it then goes on to provide an overview of copyright law, the *prima facie* case for a Lockean copyright, and the state of scholarship with respect to Lockean theories of intellectual property thus far. Part II then analyzes the important metaphysical differences between copyrightable subject matter on the one hand and physical property on the other, identifying two defining properties of

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Commons.

the former: namely, 1) *non-rivalry* and 2) *transformability*. Part III demonstrates that these defining features of copyrightable subject matter allow a Lockean theory of copyright to entirely overcome the most devastating objection faced by Locke's property theory – namely, the so-called "first laborer" objection – so long as copyrights are sufficiently limited, and such that a version of Lockean copyright turns out to be far more plausible Locke's own theory of property. This argument thus yields two surprising and novel conclusions, ones with theoretical and doctrinal implications unpacked in Part IV: first, that – contrary to the views of both the philosophers and legal scholars who have considered the question – though Lockean *property* is unworkable, Lockean *copyright* ought to be taken seriously; and second, that – contrary to the view of most intellectual property scholars – a workable Lockean theory of copyright not only vindicates copyright's existing limitations but in fact requires that copyright be even more limited than it presently is, in order to fully assure that the problems of Lockean property are successfully avoided. In other words, this Article demonstrates that there is an important rights-based case for so-called "copyright minimalism", outlining three ways in which this Lockean theory actually requires doctrine to be revised. These are a) that transformative fair use must be regarded as a robust *limitation* on copyrights rather than an affirmative defense to claims of infringement; b) that the *derivative right* must be abolished; and c) that the *moral right of integrity* must be abolished. Finally, the Article concludes by outlining the practical significance of this theoretical discussion and the broader questions that it raises, particularly in light of the current dominance of the *utilitarian* theory of copyright among American intellectual property scholars. It thereby demonstrates the importance of the lessons herein – not just for those who antecedently take Lockean rights seriously – but for all those taking a stand on the justifications of intellectual property law.

I. LOCKEAN PROPERTY, THE "FIRST LABORER" PROBLEM, AND COPYRIGHT LAW

The present Part begins with an account of Locke's theory of property – in particular, its three dominant interpretations – as well as the numerous challenges faced by each; and it then articulates the infamous "first laborer" problem, which devastates *all* interpretations and which I take to be decisive against the theory itself. Next, it offers an overview of copyright law's basic structure, scope, and subject matter, followed by the *prima facie* case for a Lockean theory of copyright. Finally, it summarizes the state of legal scholarship applying Lockean theory to the context of copyright, in particular highlighting the failure of such efforts a) to engage with or respond to the numerous aforementioned objections to Lockean property, including the decisive "first laborer" objection; and b) to outline and analyze the metaphysical or normative differences between the *nature* and *subject*

matter of property versus copyright, ones which have important implications for the plausibility of Lockean theories of the latter, and for their ability to avoid these aforementioned objections.

a. INTERPRETING LOCKEAN PROPERTY THEORY

The most famous discussion of John Locke's labor theory of property is in Chapter 5 of his *Second Treatise of Civil Government.*[16] Locke's argument is put forth with the aim of establishing the existence of *moral* or *natural* property rights, in contrast to property rights which are wholly the product of existing legal institutions or other social conventions. In other words, Locke argues for a property right which is binding in the *state of nature,* or in a society which lacks any political or legal systems. This discussion of Locke's – though ultimately quite brief – has been astoundingly influential in all subsequent thinking about the grounds of property rights; but the discussion is also far from clear. Locke's argument has thus yielded three dominant and importantly distinct interpretations: 1) the *literal, labor-mixing* interpretation; 2) the *desert* interpretation; and 3) the *maker's right* doctrine. But each interpretation has also faced compelling objections to their plausibility, including certain objections which undermine them all, and such that countless philosophers have abandoned the theory as hopelessly unworkable. The present section outlines each interpretation and the most famous challenges faced by each, closing with the most devastating "first laborer" objection.

i. THE LABOR-MIXING ARGUMENT

Locke begins his discussion of property in Chapter 5 by articulating what we will call his *common ownership thesis*: namely, that the world is originally owned by all of mankind in common, and with no man having any more entitlement to it than any other.[17] In Locke's view, this is because God has given 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 [our] being."[18] However, this original common ownership leaves Locke with a puzzle: namely, how might individuals come to legitimately *take* any particular thing from the commons, or to turn what is commonly owned into their "private dominion"[19] so that mankind is

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[16] JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT, § 25 (Hollis ed.
1764).
[17] *Id.*
[18] *Id.*
[19] JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT, § 26 (Hollis ed. 1764).

able to actually put the commons to *use* towards its support and comfort? Locke sets aside one possible mechanism for such appropriation: namely, the unanimous consent of the commoners. He notes that because such consent would in fact be impossible to obtain, if it *were* required by all private appropriations of the commons, then mankind would be forced to starve, "not withstanding the plenty God had given him".[20] Thus, Locke endeavors to devise a way in which individuals can legitimately appropriate from the commonly owned stock *without* needing to obtain the consent of the community, grounded in what we will call his *self-ownership thesis*. In particular, Locke explains:

> 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.[21]

Locke's ideas in this passage can be unpacked as follows. Although it is true that the *earth* is commonly owned, an exception to this common ownership is mankind *itself:* and this is because we each individually own ourselves, to the exclusion of anyone else. From this principle of self-ownership, and by extension, Locke gets the idea that we also own our labor. Thus, the process of laboring onto the commons is a process of taking something *private,* and mixing it with something which is otherwise commonly owned. Locke concludes that we may privately appropriate elements from the common stock in this way – or, by mixing those elements with our own labor – because this act of mixing thereby *joins* the unowned thing with something one already owns (namely, one's labor), resulting in a unique entitlement in the formerly-commonly-held thing.[22] So, by way of example, if I reach up and pick an apple from a tree, then Locke's theory would tell us that I thereby *own* that apple – and have the right to nourish myself with it exclusively – because I have mixed it with my labor through the very act of picking it.[23]

This "labor mixing" argument for the right to property, when understood

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[20] *Id.* at § 28.
[21] JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT, at § 27 (Hollis ed. 1764).
[22] *Id.*
[23] *Id.* at § 28.

literally, is most charitably analyzed in the following way:

1) One who labors on an object mixes his labor with that object;
2) However, the laborer *owns* the labor which he has mixed with the object;
3) Thus, the object which has been labored on now contains something which the laborer owns;
4) Thus, to take the object in question out of the laborer's control without consent would constitute taking the laborer's *labor* from him as well, thereby violating his ownership right in his own labor;
5) Thus, in order to not violate the laborer's ownership of his labor, no one may take the object that the labor has been mixed with from the laborer without his consent;
6) Thus, the object is the laborer's property.[24]

Locke's labor-mixing argument is, notwithstanding Locke's more general theological commitments and motivations, an entirely secular argument for original property rights. In other words, whereas Locke's picture of the initial commons as *commonly owned* (as opposed to, say, *unowned*) might spring from his more fundamental and theological premise that God *gave* the earth to all of mankind in common, his *self-ownership thesis* does not rely on any claims about God's existence or actions, instead deriving from Locke's secular ideas of "our natural equality of jurisdiction".[25] Similarly, the idea of mixing is obviously secular, intended as a factual description of what occurs when an individual labors onto the commons.

Nonetheless, this literal interpretation of the labor-mixing argument has been compellingly challenged, most famously by Robert Nozick and Jeremy Waldron. In particular, both Nozick and Waldron have questioned whether the notion of *mixing* can actually do the normative work it is intended to be doing in Locke's theory. Nozick famously analogized to the idea of mixing labor with land to the mixing tomato juice with the ocean, asking:

> Why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?[26]

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[24] Jeremy Waldron, THE RIGHT TO PRIVATE PROPERTY 184 (1988).
[25] A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS, [] 254.
[26] Robert Nozick, ANARCHY, STATE, AND UTOPIA 174-5.

Waldron, on the other hand, has pointed out that the very idea of mixing labor with physical materials is fundamentally incoherent.[27] Though objects can be mixed with other objects, labor is not an object but an *action*; and actions are simply not the kind of thing which can be mixed with objects at all. Waldron has further argued that, even if we do suppose that labor can be mixed with the objects labored upon, it seems implausible to think that it *continues to be labor* once it has been mixed. After all, upon mixing, the labor has become absorbed into the object in question. Waldron thus disputes whether granting the laborer the product of his labor can even be regarded as a way of protecting his entitlement *in his labor*, let alone as the only way.

Finally, many theorists have rejected the literal interpretation of Locke's argument for property rights for the reason that they regard the *self-ownership thesis* to itself be implausible. Recall that a crucial premise in the labor-mixing argument is that we *own* our labor, which is derived from the more fundamental premise that we *own our persons.* Self-ownership is thus a central idea at play in the background of the argument, but some regard the idea of self-ownership to be a kind of category mistake. Such theorists argue that persons – even *selves* – are, in virtue of being free and autonomous, simply not the kind of thing that can be owned. One who makes this argument would is not overlooking the historical reality that people have undoubtedly been enslaved in the past, but would instead insist that such instances of enslavement constituted instances of treating individuals *as though* they were property, not actual person-ownership. Many other theorists reject the notion of self-ownership as normatively implausible, insisting that humans are beings with a *dignity* rather than a *price,*[28] and such that they cannot be reasonably regarded as *anyone's* property (even one's own). Thus, for all those who reject the self-ownership thesis, the literal labor-mixing argument will not even get off the ground.

ii. THE DESERT INTERPRETATION

Nonetheless, these objections to the literal interpretation of Locke's property theory do not devastate the Lockean project entirely; for there remain two distinct and important ways in which the theory has been interpreted. The first alternative reads Locke's argument as one grounded in *desert.* Under this interpretation, "mixing" is a mere metaphor. Instead, the underlying idea behind Locke's theory is that laborers are entitled to the fruits of their labor because they *deserve* them, in virtue of having performed the labor of bringing them about.

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[27] Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 THE PHILOSOPHICAL QUARTERLY []

[28] Cite to Kant

Though Locke himself does not seem to explicitly endorse this view, he does discuss the virtues of labor, noting at various points that God has *commanded* us to labor,[29] such that a laborer is acting dutifully. He also notes that labor produces value and thereby increases the stock for all,[30] such that those who do the work of laboring might be entitled to some reward in exchange. Further, Locke notes that anyone who meddles with the fruits of another's labor thereby seeks "the benefit of another's pains, which he had no right to"[31], thereby suggesting that he might think that the one who puts in the pains of laboring in fact exclusively deserves the fruits of those pains. Thus, although it might not be plausible to think Locke himself *intended* his labor-mixing argument to be understood as an argument about desert,[32] one might nonetheless claim that there's textual basis for thinking that Locke in fact believed that laborers deserve their labor's fruits. Moreover, given that the act of laboring often does produce societal value, it is *prima facie* plausible to think that laborers deserve to be rewarded for the value they produce.

However, this desert interpretation – like the literal, labor-mixing argument – has also faced compelling challenges to its plausibility as a normative basis for property. Most notably, Jeremy Waldron has questioned whether it makes sense for the reward that one receives in exchange for one's labor to take the form of a private property right *in the entire fruits of said laboring*. After all, such a "reward" allows the laborer to wholly absorb the value she has created, while also *taking* something from the rest of mankind in the process; and it is thus no longer clear why the laborer is being rewarded at all. As Waldron explains:

> "If the contribution that the laborer has made to the good of mankind just is the improved value of the resources he has worked on, then it seems odd to give him the whole of that value (plus the original raw materials) as a reward for his contribution. Mankind as a whole is still better off at the end of this process, *but men apart from the appropriator are worse off than they were before* [emphasis added]. He has added to the prosperity of society, but he gets to keep the extra he has added. Other men, who previously had rights in common over the unimproved resource, now sacrifice those to him as his reward. So he is much better off, and they are slightly worse off."[33]

This discussion brings out the strangeness in rewarding someone for doing

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[29] JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT, at § 32 (Hollis ed. 1764).
[30] *Id.* at § 37.
[31] *Id.* at § 34.
[32] See Simmons' discussion on why this is so. A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS, [] 246.
[33] Jeremy Waldron, THE RIGHT TO PRIVATE PROPERY 205.

some value-adding work when the reward itself constitutes the entirety of that added value, and in fact *takes* value away from the rest of the world that it would have retained if the work had never even been done. But, of course, this is exactly what is going on when a laborer consumes the physical fruits of her labor. Thus, Waldron convincingly shows that if – under Locke's theory – grants of property are understood as rewards for the value produced by one's work, they simply do not rest on a compelling justification.

iii. THE MAKER'S RIGHT DOCTRINE

A final interpretation of Locke's theory of property – one which has been embraced by some scholars of Locke whilst adamantly rejected by others – is the maker's right doctrine, also known as the workmanship model. According to this model, one's original property rights in something are grounded in the fact that they have *made* or *created* the thing in question. Consider the following passage from Locke:

> For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World on his order and about his business, they are his property, whose workmanship they are.[34]

The basic idea of this passage is that God has a property in all of mankind in virtue of mankind being the workmanship of God. The maker's right doctrine thus analogizes man – and all that which is made by man – to God himself, in order to thereby establish that man *also* has a property right in that which he makes. As James Tully explains:

> Due to the analogy between God and man as makers, anything true of one will be, *ceterus paribus,* true of the other. Since [the doctrine of maker's right] 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.[35]

In sum, the workmanship interpretation starts from Locke's assertion that all persons are (in addition to being their *own* property) the property of God,[36] in

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[34] JOHN LOCKE []

[35] JAMES TULLY, A DISCOURSE ON PROPERTY; JOHN LOCKE AND HIS ADVERSARIES 37 (1980).

[36] JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT, at § 6 (Hollis ed. 1764).

virtue of God being the creator of all of mankind. Thus, drawing an analogy to God's status as creator, mankind – which has been created in God's image – *also* has a property right in that which it makes through its own labor.[37] Of course, underlying this doctrine is a conception of laboring according to which it is a mechanism for making. In other words, since the process of laboring onto the world is a process of *changing* it, taking the world as raw materials and turning it into something new by (for instance) gathering, rearranging, or cultivating these materials, one's property rights in the fruits of their labor exists in virtue of the fact that they have *made* those fruits.

Nonetheless, the maker's right doctrine has also been challenged by numerous scholars, ones who have argued both that a) it is implausible to attribute the view to Locke himself and that b) it does not actually provide a workable theory of property.[38] On the interpretive point, some have said that Locke says nothing in the *Treatises* to indicate that he actually believed individuals make their selves, their labor, or their labor's fruits, let alone that such an act of "making" is what grounds our property in said selves, labor, or fruits.[39] But there are also normative reasons to worry that this analogy between God's and mankind's creative capacities cannot succeed. For instance, whereas God is capable of creating *ex nihilo,* or from nothing, mankind is only capable of making something *out of* that which has already been created (according to Locke, by God). Thus, even if it we accept it that God's role as *ex nihilo* creator is what grounds his property rights in what he makes, we are still left with the question of why mankind is *also* entitled to such rights, despite being incapable of *ex nihilo* creation in the vein of God.[40]

Further, one might wonder whether the argument for the maker's right doctrine succeeds in the context of a secular picture of the world, one which does not embrace Locke's theological premises that God actually exists, created mankind, and has a property right in mankind. Some have argued that the analogy underlying the doctrine does not actually rely on any theological premises for the reason that its point of departure takes the form of a conditional: *if* God exists and he in fact created mankind, then it is also the case that God possesses a property right in mankind.[41] In other words, the analogy operates by noting that that man (and his making) is sufficiently god-like for it to be the case that man has a property right in his workmanship, just as God would have, *if* God existed. Obviously, Locke himself *did* believe the theological proposition – the antecedent of the conditional

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[37] JAMES TULLY, A DISCOURSE ON PROPERTY, 8-9, 105, 108-10, 116-21 (1980); JOHN COLMAN, JOHN LOCKE'S MORAL PHILOSOPHY 189 (1983).
[38] WALDRON, THE RIGHT TO PRIVATE PROPERTY 198 (1988).
[39] A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS, [] 258.
[40] *Id.* at 257.
[41] GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY 63 (1995).

– but the point here is that we need not embrace it in order to believe that man is sufficiently god-like to own his labor's fruits.[42] Nonetheless, one might still feel that this secular interpretation leaves something to be desired *as an argument* for property. If God *doesn't* exist, then it is not clear why the analogy in question between God and man would have normative force. After all, in a Godless universe, it is *not* the case that man has been created by God in his "image", and so we might question whether man is sufficiently god-like to possess god-like rights.

b. THE "FIRST LABORER" PROBLEM

Thus, each of the three dominant interpretations of Locke's property theory face unique challenges of their own, ones which many take to be sufficient in undermining them all. But the most compelling challenge faced by Locke's property theory is one which devastates all *three* available interpretations, and which might be referred to as the "first laborer" problem. A preliminary gloss on the challenge is the following:

> Locke cannot rely on the importance or virtue of labour itself to justify the generation of these special rights, for it is not the case that *any* labour on a resource is going to be taken as creating an entitlement…Locke's is a theory of *First* Labour. Only the first person to take or labour on a resource gets to be its owner; subsequent labourers work on the resource only under the terms imposed by the owner and usually for his benefit more than their own.[43]

In other words, the point to glean is that Lockean property theory cannot be regarded as the view that *all* laborers are entitled to the fruits of their labor (either in virtue of labor-mixing, desert, or workmanship); rather, it is only the view that *first* laborers – or, laborers who work upon something which has not yet become someone else's property – are entitled to said labor's fruits. This is to say that, if someone labors upon something owned by another – even *unbeknownst* to them – then, even if this laboring results in fruits, Lockean theory would not tell us that this second laborer is entitled to them. Instead, by laboring upon the property of another without their consent, this second laborer is simply violating the earlier laborer's right. However, this structure of the theory raises a pressing normative question: is there any *good* reason for thinking that – as a categorical matter – although first laborers are entitled to their fruits, later laborers are not? In other words: is a first laborer theory of property actually normatively defensible?

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[42] *Id.*

[43] Jeremy Waldron, THE RIGHT TO PRIVATE PROPERY 176.

i. The First Dimension: The "But-For" Laborer and the Moral Irrelevance of Timing

Many – including myself – think the answer to this question is a resounding 'no', in fact taking it to be the Lockean property theory's most fundamental flaw. To see why, note that the "first laborer" objection might actually take two related but distinct forms. For the first dimension of the concern, consider the case of the so-called *but-for* laborer. We can ask the question: why should a laborer who is the first to come upon a pile of wood – and who then labors upon that wood to turn it into into a chair – thereby be morally entitled to a property right in that chair, if it's the case that – *but for* this first laborer coming along – a second laborer would have done the very same thing themselves, but (due to the first laborer) simply never got the chance? In other words, do we have reason for thinking that *timing* is so morally significant, such that it should wholly determine who is entitled to rights of property? It seems hard to find a defense for this view. Indeed, we can stipulate that the first and but-for laborers imagined are entirely identical in all morally relevant ways, and that the *only* difference between them is the order in which they came upon the pile of wood, that one was simply lucky position of coming first (and the other was in the unlucky position of coming second). Reflecting on this case, it seems only unfair to categorically disfavor later laborers in this way; and given that Lockean property theory tells us that laborers are entitled to their fruits in virtue of the significance of laboring *itself*, there does not seem to be reason internal to the theory for favoring those who simply reach their raw materials earlier in time.

Nonetheless, as the reader is likely to have realized, the Lockean theory *cannot* be modified to avoid this unfair result, or to recognize the rights of the but-for laborer just as well as those of the earlier one. This is because granting a but-for laborer a right in the pile of wood she later came upon would necessarily involve *overriding* the earlier laborer's right. In other words, the earlier and but-for laborer's rights cannot, as a matter of metaphysics, coexist. Due to the *rivalrous* nature of physical property – such that an earlier laborer's use of some wood to make a chair thereby *precludes* another from using the very same wood to make one of their own, at least without thereby demolishing the original laborer's chair - it is not possible to grant labor-based property rights in this case without either favoring the earlier or later, and thereby discriminating on the basis of timing – a morally irrelevant factor – in some way.

ii. The Second Dimension: The "Follow-On" Laborer and Labor as the basis of One's Right

Now, one might push back on the suggestion that this first laborer's property

right is genuinely unfair to the but-for laborer. Instead, a committed Lockean might insist that it is not enough that one *would* have labored under sufficiently different circumstances for one to thereby have any moral claim to some bit of property, nor is it the case that anyone has a positive right to specific *opportunities* to labor. Such a theorist would instead maintain that there is no entitlement to property without *actual* labor; and thus, given that the but-for laborer was not actually the one to turn pile of wood in question into a chair, then – even if this is in virtue of her unlucky timing – we should not think that she has any positive claim to the chair itself. It is simply not actually her labor's fruits.

But this brings us to the second dimension of the "first laborer" objection, which regards the case of the so-called *follow-on* laborer. The question is this: if labor really is the entire basis of one's Lockean right in one's own fruits, then why is it that – although a "first laborer" who labors onto, say, an *unowned* pile of wood is entitled to the chair that she makes – a follow-on laborer who labors onto the *first laborer's* property, turning her chair into a table, is not thereby entitled to her labor's fruits as well? In other words, the question goes, why is it that only those who labor onto what is *previously unowned* have a moral entitlement, when a follow-on laborer's work is just as (for lack of a better word) laborious? Indeed, we can imagine situations in which the first laborer has in fact done only a minimal amount of laboring, but happened to do so onto raw materials that are not yet anyone's property (making, e.g., an extremely simple and mundane chair); and yet, in virtue of being first, even if a follow-on laborer does a considerably *greater* amount of laboring (turning the chair into, e.g., an extremely complex and special table) the fact that this is happening upon already owned materials entails, under the Lockean picture, that she has no entitlement whatsoever.

As Waldron puts it in another passage, this structure and implication of Lockean property theory is deeply in tension with its very foundation – namely, the moral significance of labor itself – for the latter does not seem to uniquely support *private* property grants rather than "socialist conclusions."[44] In other words, anything that can be said about the entitlement of an "independent Lockean appropriator seems equally applicable to the case of an employee working industriously on resources already appropriated by someone else."[45] Nonetheless, under Locke's theory, the property owner – the first laborer – is entitled to wholly absorb all the value produced by anyone who comes after him, laboring onto and even enhancing the value of that which he already owns. And again, there is no possibility of a revised version of Locke's theory with a contrary structure that equally recognizes the follow-on laborers' rights; for granting such rights would inevitably amount to thereby overriding the rights of the earlier laborers instead.

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[44] Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 THE PHILOSOPHICAL QUARTERLY [].
[45] *Id.*

The first and follow-on laborer's rights cannot, as a matter of metaphysics, coexist; but if actual labor is the basis of property rights then it is not clear why *either* laborer should be ultimately favored. The Lockean theory emerges as implausible once again.

iii. The "First Laborer" Problem and the Lockean Interpretations

As mentioned previously, this "first laborer" problem plagues each of the three interpretations of Lockean property theory outlined above. With respect to the first dimension of the objection regrading the case of the but-for laborer, it should be immediately clear why this would be so: for the observation that timing is morally irrelevant – such that being 'first in time' does not make earlier laborers *morally worthier* than later ones – does not make reference to or thereby depend on any particular view regarding *why* laborers are entitled to their fruits in the first place (be that in virtue of labor-mixing, desert, or workmanship). Instead, *whatever* you think the moral basis is of a laborer's entitlement, the challenge will arise as to why the laborer's lucky (or unlucky) timing should matter at all, and such that the earlier laborer – and not the but-for laborer – is entitled to a property right.

Similarly, consider the follow-on laborer. This clearly poses a challenge to the literal labor-mixing argument, since the follow-on laborer is *also* mixing her labor into that which she labors upon; and so, by not receiving a property right, she relinquishes her property in the precise way that Nozick relinquishes his tomato juice into the ocean. In response to this, one might argue that the labored-on object had simply became "filled up" by the *first* laborer's efforts, and such that there remained no room for the follow-on laborer's; but it is very mysterious why this would be so. In the context of the desert interpretation, the follow-on laborer's challenge is potentially even more compelling: for if the first laborer deserves the fruits of their labor then it is hard to see *any* reason for that the follow-on laborer to deserve any less, special scenarios where other facts about the follow-on laborer undercut her desert (such as delay by laziness). This is particularly clear if we imagine cases where the follow-on laborer does not even know she is laboring onto something owned by someone else, but whose fruits – and their value – are then entirely absorbed by the seemingly undeserving first laborer. Finally, the follow-on laborer also raises a problem for the workmanship model, for there is no reason for thinking that earlier laborers count as "makers" while follow-on laborers do not. After all, as we've already seen and as Locke himself believed, *neither* earlier *nor* follow-on laborers are creating *ex nihilo.* Both are simply rearranging that which already exists into something distinct, and such that there is no *in kind* difference between the earlier and follow-on laborers' work. Indeed, the only difference is that the earlier is making things from *unowned* raw materials while the follow-on one

is not – but this owned versus unowned status of raw materials has no bearing on the question of whether the materials are being used to *make* things. And since the basis of a maker's right under this doctrine *is* their status as maker (rather than the nature of the materials used), there is once again no good reason for thinking that only earlier makers are entitled to such rights.

In sum, then, this "first laborer" problem – indeed, both of its dimensions – devastates each of the available interpretations of Lockean property theory. As a matter of the metaphysics of property, it is only possible for the earlier laborers' rights to be recognized if we also fail to recognize those of later laborers; but there does not seem to be good reason for thinking that this is a justifiable or fair state of affairs, that only first laborers *have* Lockean rights worthy of recognizing, or that but-for and follow-on laborers always differ in some morally significant way. Some version of this objection has thus moved many philosophers – including myself – to reject Lockean property theory as deeply implausible. And yet, although those legal scholars who have considered Lockean *intellectual* property have entirely ignoring this (and all other) objections faced by Locke, our imminent examination of copyright will bring to light the surprising fact that a Lockean copyright theory– one built upon the same, persistent Lockean intuition – turns out to be able to avoid both dimensions of the "first laborer" problem entirely.

c. COPYRIGHT AND LOCKE

i. AN OVERVIEW OF COPYRIGHT

Though copyrights – like property – might be understood as exclusive rights of ownership, there are important metaphysical differences between the subject matter of these areas of law, and resulting normative differences between the nature of these rights themselves. For one thing, whereas property rights are rights in *concrete* objects – i.e. patches of land, pieces of fruit, tables, or chairs – intellectual property rights are in *intellectual* objects, which are metaphysically very different in nature. Most importantly, and as we have already seen, physical – *but* not intellectual – objects are *rivalrous*. To see the distinction, note that although my consumption of an apple thereby precludes anyone else's simultaneous consumption of the very same apple, my consumption of an *idea* does not, for ideas can be infinitely shared and simultaneously enjoyed by all they are shared with. Similarly, whereas my use of a particular pile of wood to create a chair thereby *extinguishes* that pile of wood and prevents it from being used by anyone else to create a chair, my use of a particular set of tropes and plotlines to create a story does not thereby extinguish those tropes and plotlines themselves; they instead remain existent, and usable by another author in a story of her own.

Moreover, note that copyrights are exclusive rights in a particular subset of

intellectual objects: so-called "creative works" or "works of authorship", a category most commonly defined as intellectual objects that are *expressive* in nature. In other words, then, an author who makes a copyrightable creative work has made something but has also *said* something, and what she has said is the expressive content of the creative work itself. Although it is a difficult question what *all* should count as expressive and therefore copyrightable in the law's eyes – one that scholars separately wrestle with, and which is difficult for reasons similar to why the questions "what counts as speech?" and "what counts as art?" pose difficulty as well – copyrightable subject matter includes all paradigmatically expressive intellectual objects, such as pieces of music, films, visual art, and literary works.[46]

As a matter of existing law, copyright protection is granted automatically, as soon as the creative work in question has been "fixed" in a tangible medium of expression.[47] Moreover, all that is required for a creative work to be eligible or copyright protection is that it be an "original" or 'independently created" work of authorship, and that it be made with a "modicum of creativity".[48] But copyright protection is ultimately also quite limited, only extending to the so-called *expressive components* of the work in question. This is to say that it does not protect any facts, functionality, ideas, or so-called stock elements that these expressive components have been combined with.[49] Moreover, copyright law recognizes an *independent creation defense* to all claims of infringement, which means that exclusive rights over works of authorship are only enforceable against cases of *actual copying* of the author's work. Thus, if an independently acting author happens to make a creative work which looks identical to the copyrighted work of another – using the very same *raw intellectual materials* in the very same way – then this does not constitute copyright infringement.

ii. THE *PRIMA FACIE* CASE FOR A LOCKEAN COPYRIGHT

Locke, in theorizing about property, was not himself speaking about rights like copyrights or patents. Each of his examples – from land to acorns – are physical, such that there is no reason to think he intended his theory to apply to intellectual objects or even believed that it could be so applied (and, in fact, there are reasons for thinking he did not). Moreover, when one thinks of Lockean

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[46] *See* Christopher J. Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016).

[47] 17 U.S.C. § 102(a).

[48] *Id.*, Feist Pub'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

[49] 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).

property theory, there is no word which more quickly comes to mind than the word *labor*. This is with some good reason, after all, in light of Locke's earlier-outlined remarks; but because labor itself is most naturally understood to be a distinctly *physical* activity, some might regard any effort to adapt Locke's labor-based theory of property to the context of copyright – and to the so-called intellectual activity of creating works of authorship – as itself ill-conceived. In other words, according to such a skeptic, it is not simply the case that labor offers *sufficient* grounds for a Lockean property right, but rather, that labor is *necessary* for such rights; and this therefore rules out the possibility of Lockean rights in creative works, since the concept of labor simply does not apply to the activity of authors. Indeed, some intellectual property scholars who *have* contemplated Lockean theory have already found the notion of labor difficult to fit apply to authorial and innovative activity. Consider William Fisher's following remarks on the difficulties that arise in defining so-called "intellectual labor":

> What, for these purposes, counts as "intellectual labor"? There are at least four plausible candidates: (1) time and effort (hours spent in front of the computer or in the lab); (2) activity in which one would rather not engage (hours spent in the studio when one would rather be sailing); (3) activity that results in social benefits (work on socially valuable inventions); (4) creative activity (the production of new ideas). The first of the four may be closest to Locke's original intent, but he was not focusing on intellectual labor. Justin Hughes has shown that serious arguments can be made in support of the both the second and the third. And Lawrence Becker reminds us how important the fourth is to our images of deserving authors and inventors. No grounds on which we might select one or another are readily apparent.
>
> Unfortunately, our choice among these four options will often make a big difference. The third, for instance, suggests that we should insist, before issuing a patent or other intellectual-property right, that the discovery in question satisfy a meaningful "utility" requirement; the other three would not. The second would counsel against conferring legal rights on artists who love their work; the other three point in the opposite direction. The fourth would suggest that we add to copyright law a requirement analogous to the patent doctrine of "non-obviousness"; the others would not. In short, a lawmaker's inability to choose among the four will often be disabling.[50]

From engaging in this sort of exercise, then, some might conclude that it

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[50] William W. Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001).

does not really make sense to think of intellectual activity as labor, that "labor" is essentially the activity of the body and *not* the mind, and that it is therefore a mistake to even examine intellectual property from a Lockean lens. However, this conclusion would be hasty and misguided. For one thing, this purported dichotomy between physical and intellectual activity is not so stark as one might initially be tempted to think, even in Locke's own eyes. This is because there is both an indispensably intellectual aspect to physical work, and an indispensably physical aspect to intellectual work; and thus, even though intellectual versus physical *property* are undeniably, deeply metaphysically different – in ways we have already outlined and will more closely examine in the section that follow – the *activities* which result in them and which are claimed to ground rights in them are not. To see this, first note that an important and intellectual dimension of physical labor is the *plan* guiding the labor itself, one to – say – cultivate a field or build a table and all the steps that doing so requires, and which is indispensable to the productive physical process. In other words, then, there is no labor without some intellectual activity. Locke himself recognized this intellectual dimension of labor, and – indeed – the centrality of man's intellectual nature to his status as man.[51] On the other hand – and similarly – an important dimension of the activity that results in intellectual objects is the physical work involved in *embodying* such objects into something physical, in – say – typing the novel, building the computer, painting the canvass, or synthesizing the chemical compound. Thus, though the physical and intellectual fruits subject to property rights are themselves importantly different – in ways that we will continue to explore – the activities *resulting* in these fruits seem to be on a continuum, and such that there is no obvious reason to think only one but not the other can result in something we might refer to as a Lockean right.

Moreover – and contrary to the implication of Fisher's above passage – even in Locke's own famous discussion of labor as a mechanism for private appropriation, his claims about the moral significance of labor are entirely separable from any ideas he might have had about how much effort it takes to labor, its unpleasantness, or the social or original benefits that it results in. Rather, the moral significance of labor is described as being grounded in the fact that labor *comes from one's person.* But, of course – just like one's physical activity – one's intellectual activity comes from one's person as well. In other words, the very same grounds which give rise to the special normative status of labor under Locke's picture seem *prima facie* to give rise to the special status of intellectual activity, including the specific authorial, expressive activity that results in copyrightable creative works. There is thus no in principle reason for a theory which calls itself "Lockean" (in contrast to a theory which seeks to limit itself to Locke's own, actual view) to limit itself to physical activity, thereby fetishizing labor in particular.

[51] Locke, First Treatise, Section 30

Rather, it is perfectly sensible to ask if the subject matter of copyright might be amenable to a Lockean theory of rights, one which is perhaps even more normatively plausible than Lockean rights in physical fruits. The relevant analogy between property and copyright which we take as our starting point, then, is *not* an analogy focused on labor. Rather, the analogy goes, just as the fruits of one's physical activity are subjects of property rights under Locke's theory, we might ask whether the fruits of one's authorial activity are as well, in virtue of the fact that this activity is also from oneself.

Thus, let us begin with the plausible premise that one's physical *and* intellectual activities – in particular, given our focus on copyright,[52] *authorial* activity – *both* come from one's person. From this starting point, it seems that both provide equally strong bases for granting a Lockean right in their fruits, whether this is a right of property or copyright. But as we proceed to closely examine these fruits – and, in particular, their metaphysical differences – it will become apparent why this is not so; for only the Lockean case for copyrights can survive the most compelling of scrutiny that Lockean property rights have been faced with.

iii. Intellectual Property and Lockean Theory: The State of Theorizing

As outlined in the Introduction, the discussions surrounding intellectual property and Lockean theory up till this point – among legal scholars as well as philosophers – leave the state of theorizing with much to be desired. We have just seen that certain scholars like Fisher have not even appreciated the *prima facie* case for Lockean intellectual property rights, as a result of overly emphasizing or fetishizing the activity of physical labor in particular. But the intellectual property scholars who *have* defended Lockean theories have failed to engage with or respond to the aforementioned "first laborer" objection – or, indeed, with any of the concerns with Lockean theory raised by philosophers – and have thus not provided a genuine *case* for such a theory or for why they should be believed, let alone why they are preferable to alternative accounts. Such theorists have also not dug into the implications of the differences between intellectual or physical objects and have instead essentially sought to simply slot in the word "copyright" in place of "property" in Locke's theory, otherwise saying nothing more in analysis or defense. As a result, many intellectual property scholars who *lack* sympathies with the Lockean intuition reject the very idea of such a theory of copyright as unreasonable, "faith-based", or unworthy of serious consideration; and they have further assumed that such a theory would not be able to justify or cohere with copyright's defining structural limitations. Moreover, as a result, the *economic* theory of copyright law

[52] See my note on Lockean theories of patent law in Part III, Section D below.

according to which it is *not* in the business of protecting rights but instead only producing optimal creative incentives, and which presently dominates among American intellectual property scholars – remains dominant not only without any formidable challengers, but without even the sense of needing to say anything at all in its own defense.

Philosophers, on the other hand, have been mysteriously absent in the domain of copyright theory, notwithstanding the fact that they have done centuries of work on the copyright-related subjects of *property, metaphysics,* and *expression*. Yet the uniquely intellectual and expressive nature of copyrightable subject matter raises a class of normative questions that theories of ordinary property need not face, and that is therefore only more desperately in need of philosophical exploration. Moreover, the sole philosophers who *have* contemplated intellectual property law have concluded that the metaphysical differences between intellectual and physical objects only make a Lockean theory of the former less plausible than such a theory of the latter. But the remainder of this Article – by analyzing the unique metaphysical properties of creative works, and the normative implications of these properties with respect copyright – demonstrates that all such scholars have gone awry.

II. COPYRIGHT VS. PROPERTY: CREATIVE WORKS AS NON-RIVALROUS AND TRANSFORMABLE

We have seen that the subject matter of copyright is importantly different from that of property law, in virtue of the fact that creative works are *non- rivalrous* and *expressive* in nature. This Part more closely examines these metaphysical differences, as well as their normative implications with respect to what exactly a property owner versus a copyright owner *owns,* before turning towards their implications for the "first laborer" problem and a Lockean theory of copyright law.

a. NON-RIVALRY AND INDEPENDENT CREATION

The first important metaphysical difference between the fruits of labor and authorship mentioned above – one with implications for the plausibility of Lockean property versus Lockean copyright – is that the latter, but not the former, are made from *non-rivalrous* raw materials. In other words, one author's use of a certain set of raw materials in order to create a work does not *extinguish* those materials, and therefore does not preclude another author from using the very same materials in creating a work of her own. But physical fruits of labor, on the other hand, are not like this: for if I use a certain pile of wood to create a chair, then doing so extinguishes that pile, such that the very same wood cannot also be used by anyone else.

The normatively significant implication of this non-rivalrous nature of the raw materials for authorship is that so-called independent creation is even *possible:* or, that it is possible for two distinct authors to independently use the *very same* raw materials in order to make structurally identical works. I noted above that it is a fundamental feature of copyright law that there is no infringement without copying, and that independent creation is a complete defense to claims of infringement. But note that the fact that instances of independent creation are even a possibility as a *metaphysical* matter in the domain of creative works is entirely in virtue of the non- rivalrous nature of such works' raw materials. Since a former author's use of such materials does not extinguish them, a subsequent author is *able* to independently make use of them in the context of her own work. In sharp contrast, in the physical case, although two laborers may independently produce, say, (roughly) structurally identical rocking chairs, these chairs will nonetheless be the products of distinct raw materials. Two laborers *cannot* independently make use of the *very same* physical materials, because a) they cannot utilize the materials *at the same time*, due to their rivalry; and b) they cannot *independently* utilize the materials at *different* times, as the subsequent laborer would then simply be laboring directly upon the fruits of the first laborer's work rather than "independently". Thus, unlike the case of copyright, it is not *conceptually* possible to introduce an independent creation defense into the context of property rights.

Now, the fact that independent creation is possible in the domain of creative works, and that the defense is in fact a fundamental feature of copyright law itself, has the following, also normatively significant, implication.[53] When an author makes use of raw materials from the "intellectual commons" in order to make a creative work, although her work *uses* the commons, it does not *appropriate anything* from it. In other words, since the independent creation defense assures that subsequent authors are entirely free to utilize the very same materials (so long as they do so independently), it simply *can't* be the case that the author's copyright in her work actually removes those materials from the intellectual commons. Instead, it must be that those materials are *still in there,* available to be used by subsequent authors independently, and in whatever other works they might choose to make (even ones structurally identical to the copyrighted works of another). In light of this, it is clear that all that copyright grants an author is protection only in the particular creative work that she has authored, and which she has imbued with her *own* expression; but this cabined scope of copyright cannot be regarded as removing anything from that which is is commonly held. However, note that this non-appropriative nature of copyright grants is in stark contrast to physical property, since property grants undeniably *do* remove the physical objects in

[53] For a closer look at this argument, see my article *Intellectual Property, Independent Creation, and the Lockean Commons.*

question from the physical commons; those same pieces of wood, for instance, can no longer be used by anyone else. Thus, whereas copyright law's independent creation defense assures that copyright grants are not appropriative, physical property systems *necessarily* are.

In sum, a) since copyright, unlike property, grants rights in objects made from non-rivalrous materials, and b) since copyright has an independent creation defense, c) it follows that grants of copyrights – unlike property – do not actually appropriate from the commons of raw materials. Labor both uses and extinguishes that which it labors upon to create something new; but authorship *only* uses, without extinguishing, and thereby leaving that which has been used free to be used by independent subsequent authors. This distinction is one with substantial normative significance, which might already be apparent to the reader. But this will become even more vivid once we turn our attention back to the "first laborer" problem and why both of its dimensions can ultimately be by a system of copyright.

b. NON-RIVALRY AND TRANSFORMABILITY

Before turning back to the "first laborer" problem and Lockean copyright theory, we must examine the second defining feature of creative works. For although the existence of an independent creation defense enables subsequent authors to *independently* use the raw materials that have been utilized in other authors' copyrighted works in the very same way, this leaves us with the question of the phenomenon of *non-* independent subsequent authorship. In other words, the idea that independent creation is permissible – such that grants of copyright do not appropriate from the commons – is only a source of comfort for subsequent authors at the moment of such earlier works' creation and so long as they are privately held, and *not* once the works have themselves been shared with the world. Especially in the modern world, in which works can be so swiftly and widely disseminated, it is not difficult for copyrighted works to become almost impossible to avoid. This thus raises questions regarding the permissibility – and, indeed, copyrightability – of subsequent yet non-independent acts of authorship, such as 1) works from authors who *would have* independently created a work utilizing the same raw materials as in the work of an earlier author if they hadn't encountered that earlier author's work, but who nonetheless *do* encounter it and thereby lack the ability to create independently; and 2) works from subsequent authors who, *upon* encountering an earlier work, are thereby *inspired* or *influenced* to create a work of their own, but which nonetheless makes use of many of the same materials as the earlier author. Indeed, such *non*-independent subsequent authorship constitutes what is likely the vast majority of all creative works which are actually made, since very few authors are operating within a creative vacuum; but reflecting on non- independent subsequent authorship brings to light the second distinctive feature of creative

works. This is that, in virtue of being expressive, creative works are also *transformable.*

This is where, I think, the unique nature of creative works becomes even more interesting; for given the transformability of expression, a system of copyright can be designed such that first authors' *appropriately limited* copyrights in their own works are wholly compatible with the rights of even non-independent subsequent authors, *so long as* these subsequent authors also engage in the authorial work of transformation: or, of creating distinct creative works with expression of their own. To clarify this thesis regarding the unique transformability of *expression* in particular, we will see that transformative subsequent authorship can in fact take two forms: 1) the transformation of ideas, which simply involves copying some high-level, *unprotected* idea captured in or evoked by another's creative work and re-expressing it in one's own way in one's work, and 2) the transformation of expression itself, which involves copying the literal, *protected* expressive content of another's creative work in a way that is *itself* expressive, or imbued with the subsequent author's expression, and which therefore constitutes the subsequent author's own, distinct work. In fact, we will that these two forms of transformative authorship (roughly) correspond to two existing doctrinal limitations in U.S. copyright law, limitations which (roughly) seek to protect such forms of subsequent authorship: namely, a) the idea/expression dichotomy and b) the fair use defense. I unpack these two notions of transformability and explain how they are reflected in the corresponding doctrinal limitations in the following sections. We will then see why physical property is *not* transformable in the same way as creative works, before turning to the question of why this transformative nature of expression – in combination with the non-rivalry of authorial raw materials – enables copyright to avoid the most devastating challenge faced by Locke's property theory.

i. Transformation of Ideas: The Idea-Expression Dichotomy

The first and (for our purposes) less interesting kind of transformative subsequent authorship is what I have dubbed the *transformation of ideas*. This occurs when an author takes a high-level idea such a theme, storyline, emotion, message, or topic from the work of another – one which is *not* the explicit content of the creative work, but rather evoked or conveyed by the work at a higher level of abstraction – and then uses the high-level idea in guiding the creation of a distinct creative work of her own. Such instances of transformative authorship might naturally be regarded as instances of inspiration, and it is obvious that they occur regularly. Moreover, of course, so long as the first author's copyright in her own work is limited to the creative work *itself* – and not the themes, storylines, emotions, messages, topics, and so on that it evokes or conveys – then the fact that a

subsequent author has transformed the copied idea in her *own* work in no way infringes on the first authors' copyrights. In other words, it is clear that both such authors can create and exclusively utilize their works – ones which evoke or convey some of the same ideas, but are nonetheless distinct – without thereby infringing on each others' copyrights in their *works* themselves.

This metaphysical transformability of ideas – combined with the view that subsequent authors should be *allowed* to so transform – corresponds to and is protected by an existing and central limitation of American copyright law known as the "idea/expression dichotomy".[54] Under this doctrine, ideas are not copyrightable. Rather, all that is copyrightable is the particular way in which the author has chosen to *express* the idea in her work; and if the author happens to be expressing an idea which can only be expressed in one or a small number of ways, then the expression is also not copyrightable in that case, under what is known as the merger doctrine.[55] It follows from this that every author has the right to express any idea she likes, and that two authors can hold copyrights in distinct expressions of the same idea without either right interfering with each other, and *even* when the subsequent, transformative author has in fact "copied" the idea from the work of the first.

For an example of what such a "transformation of ideas" might look like, consider the facts of the case *Nichols v. Universal Pictures Corp.*, which is perhaps regarded as the most classic statement of the idea/expression dichotomy.[56] At issue in this case was the play "Albie's Irish Rose" and the subsequent motion picture "The Cohens and the Kellys". Both told the story of a Jewish family and an Irish-Catholic family whose children fall in love and get married, infuriate their parents, have a child, and then eventually reconcile with their family. But Judge Hand held that *even* if the subsequent author copied these high-level ideas from the other, this would not constitute a copyright infringement:

> In the two plays at bar we think both as to incident and character, the defendant took no more -- assuming that it took anything at all -- than the

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[54] See, e.g., *Baker v. Selden,* 101 U.S. 99 (1879) (holding that, although exclusive rights to the "useful arts" described in a book could be available through patent law, only the description of the useful art was protectable by copyright); *Harper & Row Publishers, Inc. National Enters.,* 71 U.S. 539, 556 (1985 (holding that "copyright's idea/expression dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression"); *Mazer v. Stein,* 347 U.S. 201, 217 (1954) (holding that "unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression o the idea – not the idea itself."

[55] *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

[56] 45 F.2d 119 (2d Cir. 1930).

> law allowed. The stories are quite different. One is of a religious zealot who insists upon his child's marrying no one outside his faith; opposed by another who is in this respect just like him, and is his foil. Their difference in race is merely an obbligato to the main theme, religion. They sink their differences through grandparental pride and affection. In the other, zealotry is wholly absent; religion does not even appear. It is true that the parents are hostile to each other in part because they differ in race; but the marriage of their son to a Jew does not apparently offend the Irish family at all, and it exacerbates the existing animosity of the Jew, principally because he has become rich, when he learns it. They are reconciled through the honesty of the Jew and the generosity of the Irishman; the grandchild has nothing whatever to do with it. The only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation… so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her "ideas."[57]

In this case, then, although the first author held a copyright in her work *itself* and which therefore protected its explicit contents, this did not extend to the general, higher-level ideas and themes the work expressed; and so, even if the subsequent author copied these ideas from the work of the first author before transforming into her *own* creative work, this did not constitute an instance of copyright infringement.

ii. TRANSFORMATION OF EXPRESSION: FAIR USE

The second possible form of transformative authorship – which is more interesting and pertinent to our present purposes – is the transformation of the literal, protected expression itself, or of precisely that which the copyright-holding earlier author does own, *into* the expression of another author. This form of transformative authorship is more interesting and pertinent for the following reason. In the case of idea-transformation, the subsequent authors' transformation of another's idea is straightforwardly not an infringement on their copyright simply *because* copyright is limited to protecting an author's *creative work,* rather than the general ideas that might be abstracted from the work. In other words, in the case of idea-transformation, that which is transformed is something which is unprotected anyway. In contrast, however, the literal, *expressive* content of one's creative work *is* the subject of one's copyright in that work. And yet, because of the unique nature of expression, the expression contained in the copyrighted work of another is also

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[57] *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

itself transformable into the expression of another author. In particular, this occurs when non-independent, subsequent authors use another's creative work in a way that is *itself* expressive, or as *raw materials* for their *own* expressive work, and such that the result of said transformation is *not* what the first authors' copyright protects but a distinct creative work entirely. In other words, this is to say that – due to this transformability of expression – an earlier author's creative work might be a creative *input* for a subsequent author, who then transforms that input into an output imbued with her *own* expression. The work resulting from such transformation is therefore importantly distinct from the earlier author's creative work, one *not* infringing on her copyright.

What I have just said will likely appear abstract; so it will be helpful to look to examples, tease apart what exactly is going on when an author transforms another's expression into her own, and see why this does not constitute violating the other's exclusive right, so long as it is limited to their own expression. First, note that there already exists a doctrine in U.S. copyright law – namely, the doctrine of fair use – which protects many of these so-called "transformative" uses. 17 U.S.C. § 107 states the following;

> Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> 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 potential for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[58]

In essence, under this doctrine, fair uses are uses of copyrighted material that are permissible in virtue of the *way* in which the material is being used. So, for a simple example, while it would be infringing for me to simply copy and reproduce

[58] 17 U.S.C. § 107.

protected materials from an author's book and sell them as my own work, it would be fair for me to utilize said protected materials from the book in the context of producing a criticism of the book itself. Thus, one way of describing this distinction is by saying that, when I write a criticism of another's work which also contains protected expressive elements from said work, then this is not an infringement of the author's copyright because my use of her expression is *itself* expressive: or, I have *transformed* her material into expression of my own. For instance, as an easy example, if I say in the context of my own (highly novice) literary criticism that "Philip K. Dick's powerful and succinctly articulated declaration that "it is sometimes an appropriate response to reality to go insane", appearing in his 1981 science fiction novel VALIS, conveys a viscerally relatable sentiment while putting pressure on the alleged distinction between the rational and the insane", then although I am speaking of – and thereby using – Philip K. Dick's expression, I have transformed it into something which is my own. I have not thus not *taken his expression* from him or impeded his rights in it; I've used it as a raw material, in order to make something (a criticism) new and imbued with expression of my own.

For the landmark example of such expression-transformation, consider the Supreme Court's case *Campbell v. Acuff-Rose Music, Inc*,[59] which regarded the rap group 2 Live Crew's parody of Roy Orbinson's "Oh, Pretty Woman". The Court here emphasized the importance of assuring that the protection of copyrighted material still permits others to build on said material and create new works. It therefore held that although the parody in question copied the original song's first line and opening bass riff, thereby copying "the original's 'heart', the heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim."[60] This parody's use of the heart of the song it parodies does the perfect job illustrating the relevant notion of transformation. In one sense, the heart of the song is the *same* – of course, otherwise the parody would not even work – but it's also importantly *different,* in virtue of having been transformed, or imbued with the parodic expression of the subsequent author. Thus, although this so-called heart was "taken" from the original work in the sense of *coming* from it, it was not "taken" in the sense of *depriving* the original author of her exclusive control in the precise expression appearing in *her* work. Ultimately, the resulting parody constitutes the *subsequent* author's transformed expression, and is thus distinct from the expression of – and owned by – the first author.

Now, I acknowledge that none of this is to say that it will always be an easy question whether some subsequent author's work counts as transformative, or whether it is a "new" creative work with the subsequent authors' expression rather than simply infringing. In fact, the task of drawing this line is far from trivial. The

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[59] 510 U.S. 569 (1994).
[60] *Id.*

clearest cases of such expressive transformation include the examples of criticisms and parodies discussed above; harder cases include the artwork of appropriation artists like Richard Prince, such as his infamous *New Portraits* series constituted by selections of others' Instagram posts with only the most minimal modifications, and which he himself seems to claim are *not* his own expression.[61] Many other fascinating and puzzling examples lie along the authorial spectrum. My own view is that transformation is much easier to come by than existing fair use law might suppose, and thus, that U.S. law is presently perhaps *not* sufficiently protective of such transformative authors' rights. In other words, I embrace the view that the existing *legal* notion of 'transformativeness' might be too narrow to capture all truly transformative – and thereby expressive – subsequent authorship.[62] I will briefly return to this point in Part IV of the present Article, although a complete exploration of transformative authorship is set aside for other work. Suffice it to say for present purposes that, as a conceptual matter, I favor a view according to which the relevant question to ask is whether the subsequent author has used another's expression as *raw materials* in the creation of her own expression, rather than simply *using another's expression full-stop*; but I embrace a comparatively thin picture of what it takes for an earlier work to be used as a raw material.

In any case, whether or not my reader and I ultimately agree about what a subsequent author *must do* in order to transform another's expression – or about all of the cases we would count as "transformative" rather than "infringing" – so long as the reader recognizes that there *are* clear cases of transformative expression (e.g., quotation, commentary, and parody) and that it is always possible for authors who does the requisite "labor" to so transform, then we are in agreement regarding the metaphysical thesis that expression *is transformable.* This thesis is all that I presently seek to show, and it alone has important normative implications for the plausibility of the Lockean copyright.

iii. TRANSFORMABILITY AND COPYRIGHT VS. PROPERTY

We may finally complete our inquiry into how the non-rivalry and transformability of creative works make them very different in kind from physical objects. It's true that physical objects are, in *one* sense, transformable. Just as I can recast the idea of your play into a distinct, expressively different play of my own, I can deconstruct the chair you have built and transform it into a table. But because physical objects are made of rivalrous materials, they are not transformable in the same way as creative works. Whereas I can look to your painting and re-express its general ideas (say, in my *own* painting) or expressively use its expression (say, in

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[62] []

my own collage) *without* destroying your painting (and thereby undermining your copyright), I cannot transform your chair into a table without destroying your chair (and undermining your property right). The work of physical labor produces fruits which necessarily *consume, extinguish,* and *replace* the raw materials from which they are made, but the work of authorship does no such thing. This is an important point of difference. We could imagine life in a very different possible universe – one where there was no scarcity of land, and where ray guns allowed individuals to replicate the property of another and then transform *only* the replication, whilst still leaving the original intact – but, obviously, this is not what the actual world is like. Nonetheless, this process of replication and transformation without destruction is precisely what goes on in our world when authors make creative works.

In sum, we have seen that, so long as copyright has an independent creation defense, it does not appropriate authorial raw materials from the intellectual commons, and independent subsequent authors are entirely free to receive copyrights in their own work. We have further seen that, so long as copyright has sufficient protections for transformative subsequent authorship – which, in the language of U.S. law, would take the form of a robust idea/expression dichotomy and fair use – an author's copyright does not prevent subsequent authors from creating their own, distinct works, because such transformed fruits are imbued with *their* author's expression and thus do not infringe on the earlier author's copyright in her own. The surprising fact about copyright is thus that, so long as it is appropriately limited, an author can receive her copyright without *taking away* from the rest world in the first interest. This conclusion has an almost paradoxical appearance, but it is only the result of the uniquely intellectual and expressive nature of copyright's subject matter.

III. CREATIVE WORKS AND THE "FIRST LABORER" PROBLEM

As the reader is likely to have noticed by now, the non-rivalrous and transformative nature of copyright's subject matter has profound implications for the plausibility of a Lockean copyright theory, for it allows the theory to avoid "first laborer" objection entirely. To see this clearly, let us once again consider each dimension of the objection in turn.

a. NON-RIVALRY, INDEPENDENT CREATION, AND THE FIRST DIMENSION OF THE "FIRST LABORER" PROBLEM

The first dimension of the "first laborer" problem considered the case of the *but-for* laborer, who would have labored upon some set of raw materials if given the chance, but lacked the ability to do so simply because an earlier laborer made use of them first. We asked the question: why does my use of some pile of wood to make a chair gain me an exclusive right, when – but for me – someone else would

have used the same wood to make a chair of their own? We saw that, due to the rivalrous metaphysics of physical objects, it is not possible for *both* the first and the but-for laborers to make chairs out of the very same pile of wood, or to thereby possess distinct property rights in their own chairs. But this raises the question of whether a system of property rights should be regarded as fair if it categorically favors (or disfavors) only those laborers who were lucky (or unlucky) enough to come earlier (or later) in time, when timing is itself morally irrelevant.

Nonetheless, this objection poses no challenge for Lockean copyright, due to the nature of creative works and the possibility and permissibility of *independent creation*. In other words, since the raw materials for creative works are non-rivalrous, it is *not* the case that one author's use of some intellectual materials in the course of producing her creative work thereby extinguishes said materials, and such that they cannot be used by any later authors. In fact, so long as copyright law maintains an independent creation defense – something which, we have seen, is a defining aspect of the structure of copyright law itself – these raw materials remain freely in the commons to be used by an independent subsequent author in making her own, copyrightable work. Thus, unlike the case of property – which *must* choose between the earlier and but-for laborer – two independently acting authors, at *any* time, can both engage and receive simultaneous rights in their authorial work.

b. Non-Rivalry, Transformability, and the Second Dimension of the "First Laborer" Problem

Consider next the second dimension concerning the *follow-on* labor, who labors upon the property of another. We asked the question: if labor is the basis of one's entitlement to property – such that a laborer who turns an unowned pile of wood into a chair therefore owns that chair – then why does a follow-on laborer who turns another's chair into a table not also own her table? Again we noted that, because of the metaphysics of property, the earlier and follow-on laborer's rights cannot simultaneously exist; but this results in the intuitively unjust implication that the earlier labor, in virtue of being first, is thereby entitled to absorb all of the value produced by this follow-on laborer's work.

However, this dimension of the objection also poses no challenge for Lockean copyright, due to the nature of creative works and the possibility of *transformation.* In other words, a non-independent, follow-on author who encounters the work of another author *may* "labor" upon it, not only by transforming the ideas expressed in the work but by in fact transforming the work's expression *itself* into her own, thereby creating an entirely new work. In fact, we have seen, the follow-on author can then even obtain her own copyright in these fruits of her own transformative authorship without thereby interfering with the appropriately limited copyright of the first author, and such that the first author does

not simply absorb the follow-on one's work and fruits.[63] The Lockean theory of copyright can thus be structured in a way that accommodates the intuition that there is no normative reason for thinking that only *first* laborers' labor is meriting of a Lockean right, instead granting copyrights to all who engage in the authorial work of transformation, regardless of when this work occurs.

Since I take the "first laborer" objection to be the most compelling challenge to Locke's theory of property and its motivating intuition, the fact that copyright is able to accommodate the objection is the most important way in which the Lockean copyright outpaces the theory of property. In the property case, one could only grant a right to the subsequent laborer in the fruits of her transformed labor – say, the table that she's built out of the first laborer's chair – while *also taking away* the rights of the first laborer; but in the case of copyright, the rights of the first author and subsequent author are entirely able to co-exist, so long as these rights are both limited by doctrines protective of independent and transformative authorship. And if everyone is entitled the fruits of their labor, then everyone (or, save that, no one) should actually receive those fruits. It should be *possible*, even, for everyone to receive them; and this is the case in the context of copyright. In this way, copyright is utterly unique; for in other contexts of property, granting someone some benefit also involves also taking something away from others, where these others might also have some claim. We have seen that all physical property faces this problem, and I argue elsewhere that patents face this problem as well. Indeed, even many *non*-property contexts face this problem: for example, the granting of awards, jobs, positions, incomes, or any other relevantly "scarce" benefits to one will always deprive from others and therefore raise the question of the claims of all others.[64] But given the nature of creative works, that copyright is singular in this way should ultimately be unsurprising. It is *because* expression is so unique that a system of rights in expression can recognize the rights of all.

c. LOCKEAN THEORY AND COPYRIGHT'S LIMITATIONS

The aforementioned discussion has demonstrated that the nature of creative works allows a Lockean copyright to be far more plausible than such a theory of property. But it also shows something further, with important implications for the theory's plausibility as an account of copyright law. This is that, in contrast to the views of those "Lockean-skeptic" intellectual property scholars alluded to above – who have claimed that a Lockean copyright cannot vindicate or make sense of copyright's defining limitations – it turns out that the version of Lockean copyright theory that successfully avoids the "first laborer" objection theory actually *requires*

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[63] As I will argue below, copyright law's existing derivative right is defective in exactly this manner, and therefore needs to be abolished.

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doctrinal limitations roughly like U.S. copyright law's independent creation defense, idea/expression dichotomy, and fair use. In fact – as I argue in the final Part of this Article – it even seems to require laws *more* stringent than these existing limitations, so as to *guarantee* that all subsequent authors are equally and sufficiently protected. The most plausible version of Lockean copyright is thus importantly different from what is seemingly defended by existing discussions among intellectual property scholars of such a theory, which do not consider the objections to Lockean property and therefore also do not analyze the limitations necessary in copyright for these objections to be overcome.[65] Further, far from *failing* to vindicate copyright's defining independent creation defense, this theory in fact precisely requires it. Finally, this analysis directly responds to all those skeptics who have challenged Lockean theories of copyright for the reason that copyright is *not* in the business of "sweatworks" protection, as evidenced by the idea/expression dichotomy and fair use.[66] For instance, consider Abraham Drassinower's following criticism of Lockean theories of copyright:

> "All that is copyrightable originates in the author's labour, but not everything originating in the author's labour is subject to copyright protection. The idea/expression dichotomy differentiates the domain of the author's copyright (i.e., expression) out of the larger expanse of the author's labour (i.e., idea and expression)."[67]

Drassinower argues that the fundamental structure of copyright cannot cohere with Lockean labor theory because copyright *only* protects the expression of the work, but not the higher-level ideas evoked or conveyed therein, even if such ideas might have themselves resulted from the author's labor. However, we now see why this limitation in fact perfectly coheres with the most plausible version of Lockean copyright. Since *expression* is uniquely transformable even while protected, *only* a Lockean right in one's expression can avoid the biggest problem faced by Locke's property theory; for if copyright instead *lacked* the idea/expression dichotomy and extended its protection to the higher-level ideas evoked or conveyed by creative works, then it would prevent subsequent authors from making works which also evoked or conveyed the same ideas *even if* they did so in their own, expressively

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[65] See, e.g., Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,* 102 YALE L. J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property,* 77 GEO. L.J. 287 (1988).

[66] David McGowan, *Copyright Non-Consequentialism,* 69 MISSOURI L. REV. 2, 25 (2004) ("It is also hard to see why Lockean theory does not justify rights in ideas, assuming for the moment that they could be made concrete enough to protect.")

[67] Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy*, 16 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 3 (2003).

distinct way. Thus, copyright without an idea/expression dichotomy would face the "first laborer" objection. Similarly, some have argued that a Lockean theory of copyright leaves no room for the existence of anything like a system of fair use.[68] But we instead now also see that a workable Lockean copyright system in fact *requires* robust fair use protections for transformative subsequent authorship, so that the authors who have done the work of transformation also receive that which they are entitled to, and so the expression of *all* authors is equally protected.

d. A NOTE ON LOCKEAN PATENT VS. LOCKEAN COPYRIGHT

At this point, it is worth acknowledging that present discussion has focused only on the question of Lockean copyright versus Lockean property and has thus entirely set aside Lockean theories of other types of intellectual property, such as of *patent* rights, which are exclusive rights in innovations. I have emphasized elsewhere the importance of attending to the metaphysical differences between the subject matter of copyright versus patent law as well, and the resultant normative differences between copyrights and patents themselves, rather than assuming that the two are theoretically unified.[69] Thus, I want to remind to the reader that the arguments of the present Article – which apply to the subject matter of copyright *specifically,* in light of the uniquely non-rivalrous and transformable nature of creative works – cannot be assumed to also apply to all other subjects of intellectual property rights, such as the innovative ideas protected by patent law. Instead, as noted above, I argue elsewhere that a Lockean theory of patents *would* fall prey to many of the objections faced by Locke's property theory: and this is because, although the subject matter of patent law is non-rivalrous (like copyright), it is also the case that a) as a matter of existing law, *independent creation* is not a defense to claims of infringement in patent, such that patent grants really do appropriate the raw materials used to devise the innovation from the intellectual commons[70] (thereby triggering the first dimension of the "first laborer" problem); and b) as a matter of metaphysics, since innovations – unlike creative works – lack expressive content, it is not the case that they are *transformable.* In other words, although subsequent inventors are able to "improve" an innovation – say, by adding some modules to it – or even occasionally devise a "new use" for it, it is not the case that *every* inventor who "labors upon" the innovation of another will always be able to transform it into something *distinct and new* in the way that a subsequent author

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[68] David McGowan, *Copyright Non-Consequentialism,* 69 MISSOURI L. REV. 2, 51 (2004) ("it is very hard to square existing fair use rights, or any other set of fair use rights, with Lockean theory.").

[69] Mala Chatterjee, *Intellectual Property, Independent Creation, and the Lockean Commons*.

[70] *Id.*

can always transform another's expression into her own (thereby triggering the second dimension of the "first laborer" problem). It follows, then, that grants of patents cannot be justified by an unproblematic version of Lockean theory, and such that – if they are justifiable – they may only be justified by a theory of a very different kind (such as, perhaps, the dominant utilitarian theory of patent law). Nonetheless, I leave a closer examination of this nature of innovations – and its normative and doctrinal implications – for future work,[71] confining the focus of the remainder of this paper to copyright specifically.

IV. LOCKEAN COPYRIGHT THEORY AND THE LAW

This final Part unpacks the implications of the preceding analysis for 1) our wider theoretical debate on intellectual property law's foundations, outlining what a complete defense of a Lockean copyright theory would require; and 2) the structure of copyright law itself, outlining three minimalist and revisionary doctrinal implications.

a. SURPRISING CONCLUSION #1: COPYRIGHT VS. PROPERTY AND THE LOCKEAN INTUITION

First, this Article has demonstrated that the persistent Lockean intuition turns out to be far more promising as a basis for exclusive rights in the context of copyright than than in its original domain of property. This alone is a surprising conclusion: after all, not only did Locke himself *not* intend for his discussion of property to be applied to the case of creative works,[72] but we in fact have good positive reason for thinking that Locke was simply *not* a Lockean about copyright at all.[73] And yet, unbeknownst to him, though his original, *prima facie* intuitive ideas about property have been compellingly dismantled by countless philosophers, the spirit of his theory has now been – in some sense – salvaged, yet in a distinct and unintended context entirely.

Of course, I have not provided a *complete* defense of a Lockean theory of copyright in the present paper, as such a defense would require *positive* arguments in favor of the existence of such a Lockean right or an analysis of what precisely such a right would look like, as well as arguments for why such a theory is to be preferred over all alternative accounts. Moreover, I have focused only on *one* objection to Lockean property theory – the "first laborer" objection – because I regard this to be the most compelling challenge that every interpretation of Lockean

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[71] Mala Chatterjee, *Understanding Intellectual Property: Expression, Innovation, and Individuation.*

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property theory has faced. But we saw that it is not the *only* objection faced by Lockean property; indeed, as the reader will recall from Part I, each of the three dominant interpretations faced numerous, more specific other objections of their own. Thus, the present Article – though demonstrating a very important way in which Lockean copyright is on firmer ground than Lockean property – does not fully settle the question of whether some version of Lockean copyright should ultimately be embraced.

In any case, I have argued at length elsewhere that the aforementioned unique properties of creative works – and the resulting disanalogy between copyright and property grants – allows a Lockean copyright theory to avoid *each* of the more specific objections that the labor-mixing argument, desert argument, and workmanship model for property have been faced with, including each of the arguments mentioned above.[74] I have also provided a positive case for Lockean copyright, analyzing the nature of said right and defending the thesis that this theory offers a stronger foundation for copyright than each of the dominant available alternatives (namely, utilitarian, Kantian, and Hegelian theories of copyright).[75] I refer the reader who is interested in the larger defense of such an account to my other work. Nonetheless, the thesis defended in the present Article alone has important practical and doctrinal implications, which I elaborate on in the sections below.

b. SURPRISING CONCLUSION #2: LOCKEAN THEORY, EGALITARIANISM, AND THE MINIMALIST REVISION OF COPYRIGHT DOCTRINE

As previously noted, it is a common view among American intellectual property scholars that a "rights-based" conception of the foundations of intellectual property law – such as a Lockean conception – inevitably yields so-called *maximalist* rather than *minimalist* implications, or a strengthening and widening of the scope of intellectual property grants themselves, which many take to be an independently normatively unfavorable result. But it is now clear that, if we assume the most plausible version of a Lockean copyright – namely, one which is so limited by protections for independent and transformative subsequent authorship – then it follows that existing copyright law is in fact already more expansive than it should be, in virtue of interfering with subsequent authors rights. Ultimately, this is due to the fact that a Lockean system of copyrights is *egalitarian* rather than *utilitarian* in structure. A plausible rights-based theory is one that does not favor the rights of some (i.e., earlier authors) over those of others, regardless of whether overall utility

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might be promoted by doing so. Thus, contrary to the dominant assumption, a Lockean copyright theory in fact offers a *stronger* case for copyright minimalism than the dominant utilitarian theory ever could, for it is one grounded – not on the empirical and contingent question of what may or may not be efficient – but on the need to *equally* protect the expressive rights of all, *regardless* of what turns out to be the efficient structure.

Thus, let us examine these required further limitations. In analyzing the "first laborer" objection, I noted that it has two dimensions; one concerning the *but-for* laborer and the other concerning the *follow-on* laborer. I argued that, so long as copyright law requires *actual copying* for infringement – and such that independent creation is a complete defense –we need not worry about the phenomena of "but-for authors", since such authors are free to independently use any intellectual materials whether or not they have been used by another author first. As a doctrinal matter, it follows from this that a system of copyright law that aligns with the Lockean theory must take the independent creation defense very seriously. But of course, the defense is already widely embraced as a fundamental feature of the structure of copyright, such that – so long as it is consistently preserved and honored – we need not be concerned about the first dimension of the problem.

But consider next the state of the law with regard to second dimension and the case of *follow-on* laborers. I argued that the non-rivalrous and transformable nature of expression entails that – as matter of metaphysics – the rights of first and follow-on authors can coexist, and such that a system of copyright can be designed that avoids this dimension of the problem as well. I also noted that existing limitations on copyright grants – such as the idea/expression dichotomy and fair use – already offer some of these necessary protections. However, we will now see that the present state of law is not *sufficiently* protective of *all* follow-on authors. The present section outlines three of ways in which existing copyright grants must be pared down, in order to assure that the law – in the eyes of a workable Lockean copyright theory – does not go too far in what it gives earlier (and thereby takes from follow-on) authors. In particular, these required doctrinal revisions are a) the strengthening of transformative fair use, a) the abolishment of the derivative right, and c) the abolishment of the moral right of integrity.

i. Transformative Fair Use as a Limitation on Copyright

First, most obviously, copyright law must be sufficiently protective of *all* instances of *transformative* subsequent authorship – both by deeming all such transformative works to be fair use, *as well as* by granting them copyrights of their own – in order for the "first laborer" problem to be entirely avoided. I noted above that it is a substantive theoretical question what it takes for some activity to count

as authorial rather than merely infringing; for although there are clear cases on either side of the spectrum – say, the work of a pirate on the one hand, and the work of a parodist on the other – intermediate cases such as the appropriation art of contemporary artists like Richard Prince pose us with a greater challenge. I earlier set aside the question of where *precisely* we should draw the line as a black box for present purposes, given that it is a substantial theoretical question in its own right, also difficult for reasons similar to why the questions "what counts as speech?" or "what counts as art?" are also difficult. Nonetheless, I want to note that I sympathize with scholars who have argued that the *law's* present notion of transformativeness is too narrow and, therefore, insufficiently protective of subsequent authors. For instance, Amy Adler has compellingly argued that courts – who tackle the question of whether something counts as a transformative work by asking whether it has a new *meaning* or *message,* substantively different *structural* (aesthetic) properties, or produces a different impression on viewers – are out of step with contemporary creative practices and the importance of *copying* as itself technique in the making of new works;[76] and I am inclined to agree that these approaches under-appreciate copying as an expressive and thereby transformative activity. In other words, my own view – further explored and defended elsewhere – is that subsequent authorship can be transformative, using earlier expression as a raw material, while still having the same message, structure, or impression on the viewer as the earlier expression; for the question of whether d distinct authors' expression is itself distinct does not depend on whether they share these superficial properties. This means that the law's conception of the distinction between *infringing* versus *expressive/transformative* copying needs to be further theorized and calibrated, in order for it to fully avoid the 'first laborer' problem and to thereby accord with the most plausible Lockean copyright theory. Nonetheless, I set this line-drawing question aside for now.

However, a further implication from Lockean theory to note here is that transformativeness should not be understood as an affirmative defense (as fair use presently is), but instead as a *limitation* on the scope of a copyright grant. In other words, authors' entitlements should be straightforwardly conceived as limited to the particular creative work that they have created, such that a subsequent author who has produced their own transformative work has simply *not infringed at all,* rather than engaging in a "defensible" or "permissible" instance of infringement. This is because conceiving of transformative fair use as an affirmative defense rather than as outside the scope of the authors' rights amounts to *conceptually* favoring the rights of the first author, even if – as a practical matter – the transformative author is permitted either way. A Lockean copyright must view all authors (and their rights) *equally as authors*, in virtue of their respective authorial

[76] Amy Adler, Fair Use and the Future of Art.

activity and irrespective of the order in which the activity has occurred, rather than simply viewing transformative authors as permissible infringers.

Now, note that this conceptual suggestion – that fair use should be understood as a limitation rather than a defense – has been advanced by other scholars, ones instead embracing the dominant utilitarian picture of copyright according to which fair use is necessary to optimize the balance between incentives and access.[77] But the point to be gleaned here is that the most plausible *Lockean* theory normatively requires such an understanding. Thus, again, this conclusion goes against scholars who have assumed that a Lockean copyright has no room for fair use at all. Instead, it is precisely *because* so-called fair users have done the authorial work of making something new that they are as entitled to recognition of their Lockean rights as those authors whose work they have transformed; and because of the unique metaphysical properties of expression – its non-rivalry and transformability – so long as the rights are limited to the work *that author* has made, this simultaneous recognition of authorial rights is entirely possible by the hands of the law.

ii. ABOLISHING THE DERIVATIVE RIGHT

Consider next the Lockean theory's implications for the so-called *derivative* right. By way of background, in the Copyright Act of 1976, U.S. Congress officially granted authors a generalized right to control all "derivative works" based on their own work of authorship,[78] providing the following definition of a derivative work:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".[79]

Of course, this definition does not provide a wholly satisfying analysis of what it is to *be* a derivative work (perhaps because such an analysis would be impossible to give); rather, it only provides an incomplete list of examples of such works, and such that examples others than those listed are to be categorized as derivative works on the basis of case-by-case determination. Indeed, what is particularly unsatisfying about this definition is that it leaves us with a number of

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[77] Cite to Glynn S. Lunney, Jr. et al.
[78] 17 U.S.C. § 106(2).
[79] 17 U.S.C. § 101.

conceptual questions. For instance, the derivative right might appear to be redundant in light of American copyright law's central right against *copying,* or the unauthorized (non-transformative) reproduction of expressive elements taken from another's protected work.[80] This is especially in light of the fact that protection against 'copying' is itself not limited to *literal* or *verbatim* copying, as courts have long been noted that such a limited conception of what constitutes infringement of the reproduction right would allow plagiarists to "escape by immaterial variations."[81] In other words, as a matter of existing law, one might infringe an author's exclusive right to produce copies by taking "nonliteral" elements of a work, such as the "total concept and feel" of the work,[82] the plot outline of a movie or novel,[83] or the organization and structure of piece of software.[84] Thus, if derivative works are simply defined as ones combining some elements taken from a prior, protected work – including elements both literally or nonliterally contained – with new elements,[85] then it is hard to see how the derivative right *adds* anything beyond what the reproduction right already grants**.**

However, a crucial and distinct aspect of the derivative right is that, if a subsequent author is found to have created an unauthorized derivative work, then

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[80] Mark Lemley, *The Economics of Improvement,* at 1017 (noting that it is not clear precisely how a derivative work differs from a non-literal copy); 2 Nimmer on Copyright Section 8.09 [A] at 8-137 (arguing that the derivative works right is superfluous because whenever this right is infringed "there is necessarily also an infringement of either the reproduction or performance rights").

[81] Nicholas v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[82] See Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970); see also Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977); Arnstein v. Porter, 154 F.2d 464, 469-73 (2d Cir. 1946) (both applying the "total concept and feel" test).

[83] See, e.g., Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 396-98, 397 (1940) (confirming that the appropriation of a story line beyond the "mere use of [the] basic plot" could amount to copyright infringement).

[84] See Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1248 (3d Cir. 1986); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 702-12 (2d Cir. 1992).

[85] It is worth noting that the US Copyright Office Circular 14 says the following about derivative works: "A typical example of a derivative work received for registration in the Copyright Office is one that is primarily a new work but incorporates some previously published material. This previously published material makes the work a derivative work under the copyright law. To be copyrightable, a derivative work must be different enough from the original to be regarded as a "new work" or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify the work as a new version for copyright purposes. The new material must be original and copyrightable in itself. Titles, short phrases, and format, for example, are not copyrightable."

such an author is *not* entitled to any copyright protection in their work *even with respect to the elements that have been originally created by the subsequent author herself,* rather than having been taken from the prior existing work. As Section 103 of the Copyright Act provides, derivative works are only copyrightable *by* the copyright owner of the original work (or their licensees).[86] This means that, for instance, if a subsequent author makes a film which is ultimately deemed to be infringing on some prior existing book and is thereby deemed an unauthorized derivative work, then this subsequent author is not entitled to *any* copyright protection in any aspects of the movie, even with respect to the perhaps substantial original creativity that she had herself contributed.[87] Instead, the copyright is absorbed by the earlier author.

There is thus a fundamental issue with the derivative right from the perspective of a sound Lockean copyright theory: namely, that 1) on the one hand, the derivative right gives the original work's author exclusive rights beyond her labor, and 2) on the other hand, the derivative right *fails* to give exclusive rights to the unauthorized author *despite* her labor. In other words, it falls squarely prey to the "first laborer" problem. Consider the original author. Though it it is true that she has "labored" to create the original work in question, the fruits of this are already protected by the exclusive right to reproduce *that* particular work (and its expressive elements). The derivative right, however, grants the original author exclusive control over an *entire class* of possible works that she has not even created yet, ones that do not even exist at the time the right is granted, let alone that said author has already labored to create. Thus, if we embrace the Lockean copyright theory according to which labor – and *only* labor – grounds authors exclusive rights in their work, then we cannot seem to justify a derivative right which grants authors exclusive control over works they have not even made.

Consider now the case of the subsequent author who in fact *does* labor to produce some derivative work, one which includes expression from the earlier author's work but which also contains original expression of her own. Under existing law, despite the fact that the work of this subsequent author goes beyond that of the original, she does not receive a right *even in* the portions of the work which are entirely her own. However, this rule cannot be justified from the favored Lockean perspective. After all, there is no *a priori* reason to think that the

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[86] 17 U.S.C. § 103(a) (1994) ("The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

[87] *See* Gracen v. Bradford Exch., 698 F.2d 300, 302-03 (7th Cit. 1983); Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933, 938 (N.D. Cal. 1992); Dynamic Solutions, Inc. v. Planning & Control, Inc., 646 F. Supp. 1329, 1340 (S.D.N.Y. 1986); Gallery House, Inc. v. Yi, 582 F. Supp. 1294, 1297 (N.D. Ill. 1984).

subsequent authors' work in producing (even unauthorized) derivatives is "less laborious" or meriting of protection than the labor of original authors; indeed, we can even easily imagine examples of derivative creations that would require far more work and creativity than many "original" works might require. Nonetheless, because the relevant original author has already snatched up the right to all possible derivatives, the labor rights of such subsequent authors go unrecognized by existing law.

The derivative right is thus an aspect of American copyright law favoring earlier authors over later ones. It is one according to which the mere fact that the former came "first" entitles her to absorb the fruits of the another, and which thereby cannot be made sense of by a workable Lockean theory of copyright. And once again – in contrast to some scholars' view that a rights-based picture of copyright such as a Lockean theory would be *most* amenable to derivative rights – we can see it is actually one that the favored theory would tell us to abandon.

iii. AGAINST MORAL RIGHTS OF INTEGRITY

The final existing legal right to consider are so-called *moral rights of integrity,* granted to works of *visual art* under the Visual Artists' Rights Act (VARA).[88] Integrity rights – which are rights to prevent the *distortion, mutilation, or modification* of one's work – have already faced criticism at the hands of many scholars, typically arguing that such rights are unjustifiable and do more harm to art and creativity than good. Most notably, in her paper *Against Moral Rights,* Amy Adler challenges integrity rights in visual art for the reason that they presuppose an outdated conception of art itself, in fact *impeding* artistic creation rather than facilitating or protecting it.[89] In particular, Adler argues that moral rights laws mistakenly assume that the artist should always retain control over her work *even after* she has sold it away, and despite the fact that the interests of the public, subsequent artists, or the advancement of art generally may diverge from those of the earlier artists themselves. Adler provides numerous instances of the so-called destruction, distortion, or mutilation of the art ultimately serving further artistic ends:

> For example, Clement Greenberg, the great modernist critic and champion of master sculptor David Smith, reportedly changed some of Smith's sculptures after the artist's death in direct violation of Smith's wishes. Smith's most famous sculptures are in unpainted steel, but he sometimes executed painted steel forms as well. Greenberg found the unpainted work

[88] []
[89] Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

> artistically superior. After Smith died, Greenberg, as executor of his estate, stripped several of the painted sculptures and exposed others to the elements, destroying their painted surfaces. He did so in direct violation of Smith's intent. The art world was horrified, labeling Greenberg's act vandalism. These accusations were well founded; there is clear evidence that Smith would have been outraged by Greenberg's violations and would have disowned the sculptures. And yet, consider this: Greenberg's vandalism, his flagrant violation of the artist's intent, made the sculptures "better." The art market (although not necessarily a good indicator of artistic merit) agreed with Greenberg: unpainted Smiths are more valuable than painted ones. Critics, museums and collectors prize the unpainted over the painted sculptures.[90]

What does Lockean theory have to say about about moral rights of integrity? Among scholars who have considered the issue in the past, many have tacitly assumed that the moral right of integrity is best justified by a "rights-based" rather than utilitarian theory of copyright, such as the Lockean copyright theory presently discussed. However, to hastily assume this would also be a mistake, for there is a very important difference between the subject matter of copyright and such rights of integrity: for, whereas the former are rights in *non-rivalrous*, *intellectual* objects – which are made *from* raw materials in the intellectual commons but do not (as we have seen) remove anything from it – the latter are rights in particular *rivalrous*, *physical* objects: namely, the objects in which said intellectual objects have been embodied. In other words, rights of integrity are *not* rights in works of art *abstractly construed* – such as the "painting" understood as something that can be re-printed onto any number of t-shirts and bags, but that would not be destroyed *itself* if all such t-shirts and bags were to be destroyed – but are instead rights in works art *construed concretely* – such as the "painting" understood as something partially constituted by a canvass, and that *would* be destroyed if said canvas was destroyed.

Now, this distinction is one with incredible normative significance, since we have seen that rights in non-rivalrous objects are necessarily appropriative of the physical commons. In other words, whereas a sufficiently limited copyright – one that protects intellectual objects while permitting independent and transformative subsequent authorship – cannot plausibly be regarded as *appropriating* anything, rights of integrity are *always* appropriative, since they restrict what can be done with a certain class of physical objects (art objects). Thus, despite many associating moral rights laws with rights-based accounts of copyright,[91] it is clear that this right granted by VARA is in fact completely

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[90] *Id.*

[91] Mark Lemley, *The Economics of Improvement in Intellectual Property Law* []

orthogonal to the right elucidated by the present theory. Moreover, it follows from the metaphysical difference between the subjects of these rights that, whereas Lockean copyright *avoids* the problems of Lockean property, integrity rights entirely fall prey to them: for the problems of Lockean property arise entirely in virtue of its *non-rivalrous, physical* subject matter. In other words, rights of integrity are in the very same *kind* of objects as Lockean property itself had in mind – albeit, in a proper subset of the latter's subject matter, since they integrity rights only apply to *visual art* objects. Thus, a Lockean right of integrity is objectionable for all the very same reasons as Lockean property rights themselves. This becomes particularly clear once we notice that Adler's fundamental criticism against integrity rights is ultimately a version of the *first laborer* problem. Consider the following passage:

> [The contemporary] vision of art [is] completely at odds with the moral rights regime. Art becomes a dialogue among vandals, in which destruction and creation merge. The initial artist/vandal creates work by "destroying" property; the Splasher mutilates the initial artist's work in an act of "creative passion"; the first artist builds upon the previous destruction, modifying it to create yet another artwork. In my view, this model of creative vitality captures the ethos of the present era. Yet it is worlds away from the model of creation that moral rights law presumes.[92]

As Adler observes, contemporary art is filled with works which are precisely constituted by the destruction of the physical artwork of another, in order to thereby create something new. Thus, Adler's concern with integrity rights is that they allow earlier artists to "lock up" artistic objects, when the so-called destruction or mutilation of such objects can itself constitute novel artistic creation, thereby prioritizing earlier artists' creative work over that of possible subsequent artists. Integrity rights are thus another instance of the familiar phenomena that we have already seen – and criticized – in the context of Locke's theory of property; and because– unlike in the case of non-rivalrous intellectual object – creating a physical art piece that deconstructs the physical art piece of an earlier artist *does* thereby extinguish the earlier work, it is familiarly not the case that there could be integrity rights without *either* favoring the earlier or later artist. It follows from this that the greatest strengths of Lockean copyright – its avoidance of the problems of Lockean property – is entirely absent in rights of integrity; and thus, far from *requiring* that integrity rights be maintained or expanded, the theorist who embraces Lockean copyright while acknowledging the intractable problems of Lockean property (such as myself) should perhaps only be moved to reject integrity rights as well.

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[92] Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

CONCLUSION

In sum, this Article has demonstrated that the existing efforts to theorize on the question of Lockean theory and copyright – both by legal scholars and philosophers – has gone awry in a number of important ways. On the one hand, legal scholars favoring Lockean copyright theory have failed to actually *defend* it, instead entirely overlooking all of the problems raised by philosophers – and which have been so damning – in the context of Lockean property; and legal scholars disfavoring Lockean copyright have assumed that such a theory can only be as plausible as Lockean property itself, thus mistakenly concluding that it cannot make sense of or justify copyright's defining limitations, and would instead only require an expansion and strengthening of the scope of copyright grants. On the other hand, philosophers – who have long theorized about rights of property – have almost entirely overlooked the question of what justifies intellectual property rights, notwithstanding the important metaphysical differences between physical and intellectual objects; and moreover, the few philosophers who *have* considered these metaphysical differences in the context of a Lockean framework have failed to consider the full implications of these differences, thus mistakenly concluding that a Lockean copyright would be *less* rather than *more* defensible than such a theory of property.

To the contrary, this Article has shown that the non-rivalrous and transformable nature of copyrightable subject matter allows a Lockean copyright to avoid the most troubling of challenges faced by the persistent yet unworkable Lockean property. So long as our system of copyright law grants rights that are sufficiently limited, the rights of subsequently acting authors – ones acting either independently *or* transformatively – are able to exist compatibly and simultaneously with the rights of so-called first authors, and such that both dimensions of the "first laborer" objection can be entirely overcome. In so doing, this Article has also shown that a feasible Lockean copyright a) vindicates copyright's existing and defining limitations (independent creation, the idea-expression dichotomy, and fair use), and b) in fact requires that copyright be further limited in surprising ways (expanding transformative fair use and treating it as a limitation on copyright, abolishing the derivative right, and abolishing the moral right of integrity). Thus, the unique metaphysics of creative works – their abstractness and their expressiveness – make it the case that the domain of copyright turns out to be *surprisingly* well-suited for a Lockean account. It is one where the persistent intuition, though hopeless in its original context, can be workable and perhaps even independently defensible.

At this point, my reader might wonder about the more general implications of this theoretical observation, especially in a scholarly context in which the vast

majority of American intellectual property scholars favor a purely utilitarian – and, in particular, *economic* – conception of copyright.[93] This is to say that, according to such theorists, considerations of rights (including Lockean rights) have no place in our thinking about intellectual property law whatsoever, as such systems of law should only be designed in the service of incentivizing the efficient proliferation of intellectual works.[94] These committed economic theorists are indeed Lockean copyright skeptics, but they would characterize their position as a *positive* rather than a *negative* one: one fundamentally grounded in a commitment to the goal of efficiency, rather than in a distrust or distaste of Lockean alternatives in particular.[95]

However, this Article's observation regarding the relative plausibility of a Lockean copyright is one with implications not merely for those with antecedent sympathies with the Lockean intuition, but for all those theorizing about the foundations of intellectual property law. This is because the present Article has demonstrated that – contrary to the rhetoric and apparent assumption of such committed economic theorists – there *is* a genuine and plausible alternative to the dominant theory of copyright available on the table. In other words, we *needn't* embrace the view that efficiency is all that matters for copyright law, for there turns out to be a genuine case to be made for the view that copyrights should exist to – and be *sufficiently limited* to – effectuate something like authorial Lockean rights, and *even if* we entirely reject this in the context of property. Now, this finding – though it might initially appear trivial – actually requires enormous emphasis: for this majority of American intellectual property scholars seem to presently assume that *no* plausible alternative to the economic picture exists, thus often putting forth economic theory as correct and complete *without* normative argument for why this is so.[96] Indeed, such scholars seem either to take the economic theory of copyright as almost self-evidently true,[97] or at best assert that it directly follows from the U.S. Constitution's Progress Clause – which grants Congress the power to "promote the progress of science and useful arts" through exclusive rights for authors and inventors in their works[98] – but still without an argument for why such promotion of progress can only be understood in the currency of efficiency.[99]

Instead, then, the Lockean copyright poses a challenge for such theorists as a coherent and *prima facie* defensible alternative: for it reminds us that there *are* values other than efficiency that systems of law – such as copyright – could legitimately be concerned with, and such that anyone who favors the view that only

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one such value matters then owes us a normative argument for why this should be believed. Thus, the more general lesson to be gleaned from this Article is that the theorists who favor the view that copyright should only be concerned with promulgating efficiency must *also* tell a story for why this would be so, as well as for why – if Lockean copyright *does* avoid all of the problems of Lockean property such a theory should nonetheless still be rejected. Moreover, the surprising plausibility of Lockean copyright – something which Locke himself did not have in mind – reminds us that all such theorizing must be done thoroughly and carefully; for the correct answer might be one that we did not expect.