2020

# Lockean Copyright versus Lockean Property

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## ABSTRACT

Locke's labor theory, the most familiar of property theories, has faced centuries of philosophical criticism. Nonetheless, recent legal scholars have applied it to intellectual property while overlooking these philosophical critiques. Philosophers, on the other hand, are largely absent in IP theorizing, thus not asking whether Locke's resilient intuition is salvageable in copyright's domain. This Article argues that Lockean copyright is actually far more plausible than Lockean property, for it avoids the most devastating objections the latter faces. It then defends a surprising doctrinal implication of this theoretical conclusion: a workable Lockean copyright favors rights far more limited than present law.

## 1. 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

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doi:10.1093/jla/laaa002

> 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*

John Locke's labor theory of property—the most well-known of property theories—is both frustratingly untenable and frustratingly unshakeable. It has been challenged countless times by numerous compelling objections, and yet the underlying intuition that we are *sometimes*, *in some sense* morally entitled to the fruits of our labor persists among many. Within the law, we see pseudo-Lockean rhetoric—language evoking labor, desert, fairness, or free-riding—appearing in judicial opinions both within and beyond the domain of property.[1] Nonetheless, it would be safe to say that the majority of *philosophers* who have contemplated property in the years since Locke's *Two Treatises of Government* have concluded, for countless reasons, that Locke's notorious theory of property simply cannot be right.[2]

Notwithstanding this conclusion in the philosophical literature, however, recent legal scholarship has 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.[3] Indeed, such legal 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 become a fundamentally economic theory, one according to which the only value sought by intellectual property law is efficiency[4]—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 ignoring the numerous challenges raised against them in the philosophical literature, and which many—like myself—have taken to be decisive against such a property theory. Moreover, in so doing, these legal scholars have tended to also ignore the important *metaphysical* differences between intellectual and physical objects—and the resulting

1 For such rhetoric in the context of copyright, *see, e.g., Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("sacrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered.") For examples in lower court opinions, *see also* Sterk (1996), Yen (1990), and Weinreb (1998).

2 *Infra* Section 2.

3 *See, e.g.*, Fisher III (2001); Hughes (1988, p. 291), Fisher III (1988, p. 1688), Gordon (1993), Becker (1993, p. 610); McGowan (2004, p. 25); Moore (2012), Claeys (2017).

4 *See, e.g.*, Landes & Posner (1989).

normative differences between exclusive rights in each—let alone examining whether these have implications for the applicability of the aforementioned objections to Locke. In other words, then, such scholars seem to make the mistake of taking it as settled that Locke's theory of property is itself defensible, then 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 really be remains unanswered by the work of legal scholars.

This failure of 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 nature of rights that the most promising version of a Lockean copyright theory would actually support, thus 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*,[5] ones who believe that even the best example of such a theory (i) cannot vindicate copyright's fundamental structure, including its defining limitations;[6] and thereby (ii) requires even stronger and more expansive copyright grants than the ones currently offered by American law, an implication taken to be independently normatively implausible.[7] As a result, the economic theory of copyright law—according to which it is not in the business of protecting authorial rights but instead only of producing optimal creative incentives, and which presently dominates among American intellectual property scholars[8]—remains dominant not only without recognizing the existence of formidable challengers, but occasionally even without the sense of needing to say anything at all in its own defense. But this widespread skepticism of a Lockean copyright theory is also mistaken, in that it envisions a theory that is only as good as Lockean property theory itself, one thus afflicted by the very problems that (perhaps unbeknownst to them) have been raised in the philosophical literature many times over the years.[9] Such Lockean copyright skeptics thus 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

5 *See, e.g.*, Lemley (2015, p. 1337) (criticizing the "jettisoning [of] utilitarianism for talk of morality" and calling it a "retreat from evidence [to] faith-based IP . . . a form of religious belief").

6 Drassinower (2003); McGowan (2004) at 51.

7 Lemley (2015).

8 Landes and Posner (1989).

9 *Infra* Section 2.

promising version of Lockean copyright which nonetheless lacks every one of these damning shortcomings.

On the other hand, in the philosophical literature, the normative questions surrounding intellectual property remain surprisingly under-explored.[10] This is surprising because, of course, philosophical work has long focused on—and contributed profoundly to—our understanding of *property*, 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 primarily 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,[11] and—in the case of copyright—*expressive* in nature.[12] These metaphysically mysterious objects raise a class of considerations distinct from those in the simple case of physical property, ones which have largely yet to be grappled with in even the most property-theoretic of philosophical scholarship.

Moreover, with respect to the small class of theorists who *have* considered Lockean theories of intellectual property while reflecting on 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 them, 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 intellectual property rights. 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.[13] But, as I have argued elsewhere, Shiffrin's challenge here also falls short;[14] for it does not grapple with all of the implications of the metaphysical differences between intellectual and physical objects and with respect to what copyright owners actually own,

10 *But see* Waldron (1993), Shiffrin (2009).

11 Landes and Posner (1989) ("A distinguishing characteristic of intellectual property is its 'public good' aspect.")

12 17 U.S.C. §102 ("original works of authorship fixed in any tangible medium of expression").

13 Shiffrin (2001).

14 Chatterjee (2019).

ones which we will soon see bear—in a surprising way—on the relative plausibility of Lockean copyright versus Lockean property.

Going against each of these dominant perspectives, the present Article demonstrates an important way in which the existing scholarship surrounding Lockean rights and copyright theory has systematically gone awry. Instead, this Article defends the view that—once the 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 these 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: that the frustratingly persistent Lockean intuition—though hopeless in the property context that Locke himself considered—can be compellingly salvaged in the domain of copyright. This article thus has the surprising implications that (i) those 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 (ii) those who have rejected Lockean property theory (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 still avoiding the most challenging problems faced by the former. This article then demonstrates that a Lockean copyright theory might have profound practical and doctrinal implications for the design of copyright law, ones which are squarely the opposite from those which Lockean copyright skeptics have heretofore assumed. In particular, we will see that the version of Lockean copyright theory I develop implies that copyrights should perhaps be far more limited, in numerous dimensions, than they presently are under U.S. law. The article thereby demonstrates how the philosophical questions surrounding copyright theory and Lockean rights importantly bear on the scope and structure of copyright doctrine, such that they warrant more careful exploration than either legal scholars or philosophers have yet given them.

By way of roadmap, Section 2 provides an explication of Locke's theory of property, including its three dominant interpretations and the most damning objection that it has been faced with: namely, the so-called "first laborer" problem. Section 3 then turns to Lockean copyright, providing the *prima facie* case for the theory and then analyzing the metaphysical differences between copyrightable subject matter and physical property, identifying two defining properties of the former: namely, (i) *non-rivalry* and (ii) *transformability*. It then demonstrates that these defining features of copyrightable subject matter allow a Lockean theory of copyright to entirely overcome the "first laborer" problem, so long as the scope of copyright grants are adequately *limited*, and such that a

version of Lockean copyright turns out to be far more plausible Locke's own theory of property. This argument yields surprising and novel conclusions, ones with theoretical and doctrinal implications unpacked in Section 4: 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 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 would actually recommend copyright doctrine to be revised to grant a more limited right. These are (i) for *transformative fair use* to be regarded as a robust limitation on copyrights rather than an affirmative defense to claims of infringement; (ii) for the *derivative right* to be abolished; and (iii) for the *moral right of integrity* to be abolished. Finally, the Article concludes by outlining some broader questions about intellectual property scholarship—in particular, ones concerning the current dominance of the utilitarian theory of copyright among American intellectual property scholars—that the preceding discussion casts into relief. It thereby showcases the importance of the lessons herein, not just for those who antecedently take Lockean rights seriously, but for all those concerned with intellectual property law.

## 2. LOCKEAN PROPERTY AND THE "FIRST LABORER" PROBLEM

The present section provides an account of Locke's theory of property, noting its three dominant interpretations; and it then articulates the most devastating "first laborer" objection, which challenges *all* interpretations and which I take to be decisive against the theory itself.

### 2.1 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* (Locke 1698). Locke's argument is put forth with the aim of establishing the existence of *moral* or *natural* property rights, in contrast to property rights that 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 that 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, and thus, Locke's argument has yielded three dominant and importantly distinct interpretations: (i) the *literal labor-mixing* interpretation; (ii) the *desert* interpretation; and (iii) the *maker's right* doctrine.

Locke begins his discussion of property in Chapter 5 by articulating what we will call his *common ownership thesis*: 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. 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." (*id.*, § 24). 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" (*id.*, § 26) so that mankind is able to actually put the commons to *use* towards its support and comfort? Locke sets aside one possible mechanism for such appropriation: the unanimous consent of the commoners. He says 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." (*id.*, § 28). 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* (*id.*, § 27). 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.

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. From this principle of self-ownership, Locke gets the idea that we also own our labor. Thus, according to Locke, the process of laboring onto the commons is a

process of taking something private (labor) 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 commons elements with our own labor—because this act of mixing joins the unowned thing with labor, something already owned; and it thus create a unique entitlement in the formerly commonly held thing. So, by way of example, if I reach up and pick an apple from a tree, Locke's theory would tell us that I now 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 (*id.*, § 28).

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 (1974, p. 174) 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?

Waldron, on the other hand, has pointed out that the very idea of mixing labor with physical materials is fundamentally incoherent (1983, p. 37). 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.[15]

15 Note that many theorists have also rejected the literal interpretation of Locke's argument for the reason that they regard the *self-ownership thesis* to itself be implausible. Some say that the idea of self-ownership to be a kind of category mistake, as persons—even selves—are, in virtue of being free and autonomous, simply not the kind of thing that can be owned (Cohen 1994). Others reject the notion of self-ownership as normatively implausible, insisting that humans are beings with a dignity rather than a price, and such that they cannot be reasonably regarded as anyone's property (even one's own). (Kant 1797, p. 434) ("a human being regarded as a person, that is, as the subject of morally practical reason, is exalted above all price . . . as an end in himself he possesses a *dignity*

In light of these challenges faced by the literal understanding of the argument, scholars have sought to salvage the otherwise compelling Lockean intuition by interpreting the theory in two other ways. 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. Though Locke himself does not seem to explicitly endorse this view, he does discuss the virtues of labor, noting at points that God has commanded us to labor (Locke 1698, § 32), such that a laborer is acting dutifully. He also notes that labor produces value and thereby increases the stock for all (*id.*, § 37), such that those who do the work of laboring might be entitled to some reward in exchange. Furthermore, 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" (*id.*, § 34), 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 (Simmons 1992, p. 246), one might nonetheless claim that there's textual basis for thinking that Locke in fact did believe 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.[16]

The second alternative interpretation is known as *the maker's right doctrine*, or *the workmanship model* (Tully 1980, p. 37; Sreenivasan 1995, p. 63). It maintains that the right way to understand Lockean theory is as saying that a laborer's 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. (Locke 1698, § 4).

by which he exacts *respect* for himself from all other beings in the world."). Thus, for all those who reject the self-ownership thesis, the literal labor-mixing argument will not even get off the ground.

16 Note that this desert interpretation 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 (Waldron 1991, p. 205). 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.

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 (Tully 1980, p. 37).

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, in virtue of God creating all of mankind (Locke 1698, § 6). 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 (Tully 1980; Colman 1984). Of course, underlying this doctrine is a conception of laboring according to which it is a mechanism for making things. 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.[17]

17 Note that the maker's right doctrine has also faced unique challenges. On the interpretive side, some have said that Locke says nothing 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 (Simmons 1992, p. 258; Waldron 1991, p. 198). On the normative side, there are 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*, mankind is only capable of making something *out of* that which has already been created (according to Locke, by God). Thus, even if 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 (Simmons 1992, p. 258).
One might also wonder whether the maker's right doctrine succeeds in the context of a secular picture of the world. 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 (Sreenivasan 1995, p. 63). 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.

### 2.2 The "First Laborer" Problem

Even if the desert interpretation and maker's right doctrine avoid a number of the challenges faced by Locke's literal argument, they are still unable to help Lockean theory with the most compelling challenge that the theory has faced, as it is one that devastates all three available interpretations. This 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 (Waldron 1991, p. 176).

Put differently, the point to be gleaned 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 *first* laborers—or, laborers who work upon something which has not yet become someone else's property—that are entitled to said labor's fruits. If someone labors upon something owned by another, perhaps even unbeknownst to them, then even if this laboring results in some distinct fruits, Lockean theory would not tell us that this second laborer is entitled to them. Instead, this second laborer—by laboring upon the property of another without their consent—is simply violating the earlier laborer's right. However, this implication of the theory raises a pressing normative question: is there any good reason for holding, as a categorical matter, that 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 on Lockean grounds?[18]

18 Note that a "first laborer" theory of property (or intellectual property) might be perfectly defensible on the basis of a *non*-Lockean argument. For example, a utilitarian might give various consequentialist reasons for caring only about the first laborer, arguing that it beneficially incentives laborers (and authors/inventors) racing to get to the finish line *faster*, and therefore creating value sooner rather than later, or arguing that—as an empirical matter—the work done by first laborers (and authors/inventors) really is more valuable and worth incentivizing. But the point explored here is that the fact that a Lockean labor theory of property is only a theory of "first laboring" is a problem for the *Lockean*, who grounds property rights on the moral significance of labor. In other words, we will see that there does not seem to be good reason *from a Lockean perspective* for thinking that only the first laborer should be entitled to her labor's fruits, and such that there is a deep tension internal to the Lockean property theory itself.

#### 2.2.1 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", and take this to be the Lockean property theory's most fundamental flaw (Waldron 1991, Simmons 1992). To see why, note that the "first laborer" objection actually has two related but distinct dimensions. For the first dimension of the concern, consider the case of the so-called *but-for laborer*. We can ask the question: why is a laborer who is the first to come upon a pile of wood and labor upon it to turn it into a chair thereby 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 from the perspective of a sound Lockean theory, 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, and that one was simply in the *lucky* position of coming first (and the other was in the unlucky position of coming second). Reflecting on this case, it seems unfair to categorically disfavor later laborers in this way. Indeed, given that Lockean property theory tells us that laborers are entitled to their fruits in virtue of the significance of *laboring itself* (be this a matter of labor-mixing, desert, or workmanship), 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 subsequently came upon would necessarily involve overriding the earlier laborer's right in the same. In other words, the earlier and but-for laborer's rights cannot, as a matter of metaphysics, coexist. Instead, 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 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, one way or another.

#### 2.2.2 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

could insist that it is not enough that one *would* have labored under sufficiently different circumstances in order to thereby have some moral claim to a particular bit of property, nor is it the case that anyone has a positive right to specific opportunities to labor. Instead, such a theorist would maintain, 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 (or the pile of wood) itself. It is simply not actually her labor's fruits.

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 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 in fact did 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—again, the moral significance of labor itself—for the latter does not seem to uniquely support private property grants rather than "socialist conclusions." (Waldron 1983, p. 33). 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." (*id.*). 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, as granting such rights would inevitably amount to overriding the rights of the earlier laborers instead. 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 favored. The Lockean theory emerges as implausible once again.

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 regarding the case of the but-for laborer, 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 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 one—is entitled to a property right. Similarly, with respect to the follow-on laborer, regardless of why labor is the basis of a laborer's property right—again, whether this labor-ownership, desert, or workmanship—the only difference between the earlier and follow-on laborers is that the former is laboring upon unowned materials. In other words, there is no difference between the earlier and follow-on laborers' *labor itself*.

Thus, due to the metaphysics of physical property, the "first laborer" problem devastates each of the available interpretations of Lockean property theory. Some version of this objection has resultantly 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 largely ignored 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.

## 3. COPYRIGHT VERSUS PROPERTY: NON-RIVALRY, TRANSFORMABILITY, AND THE "FIRST LABORER" PROBLEM

### 3.1 The *Prima Facie* Case for a Lockean Copyright

Though copyrights, like physical property rights, might be understood as exclusive rights of ownership, there are important metaphysical differences between the subject matter of these areas of law, ones yielding 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 their nature. Most importantly, as

we have already seen, physical objects are—in contrast to intellectual ones—*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, as 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, usable by another author in a story of her own.

Moreover, copyrights are rights in a particular *subset* of intellectual objects: so-called "creative works" or "works of authorship,"[19] a category most commonly defined as intellectual objects that are *expressive* in nature. In other words, 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. Of course, 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—but copyrightable subject matter includes all paradigmatically expressive intellectual objects, such as pieces of music, films, visual art, and literary works.[20]

As a matter of existing law, 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."[21] 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.[22] 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.[23] Thus, if an

19 17 U.S.C. §102 ("original works of authorship fixed in any tangible medium of expression").

20 *See* Buccafusco (2016).

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

22 *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).

23 17 U.S.C. § 106.

independently acting author happens to make a creative work that 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.[24]

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 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

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

> 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 (Fisher 2001, p. 168).

From engaging in this sort of exercise, then, some might conclude that it 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. But this conclusion would be 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* that result in them and that are claimed to ground rights in them are not. To see this, first note that an importantly 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 (Locke 1698, § 30 (bk. I)). 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—again, 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, 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 grounded in only 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. Thus, there is no in principle reason for a theory which calls itself "Lockean" (in contrast to a theory limited only to Locke's actual views) to limit itself to physical activity, thereby fetishizing labor in particular. 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 can 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,[25] *authorial* activity—both come from one's person. From this starting point, it seems that both physical and intellectual activities provide equally strong bases for granting a Lockean right in their fruits, whether this is a right of property or of copyright. But we have seen that the non-rivalrous and expressive subject matter of copyright is importantly different from that of property law; and upon more closely examining these metaphysical differences and their normative implications with respect to what a property owner versus a copyright owner *owns*, it will become apparent that Lockean copyright versus Lockean property are in fact

25 See my note on Lockean theories of patent law in sub-section 4.3 below.

not equally plausible. Instead, only the Lockean case for copyrights can survive the most compelling of scrutiny that Lockean property rights have been faced with.

### 3.2 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. To put the matter another way, 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 the phenomenon of *independent creation* is even possible: viz., that it is possible for two distinct authors to independently use the *very same* raw materials in order to make structurally identical works. As we outlined above, 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 the fact that instances of independent creation are a possibility as a metaphysical matter in the domain of creative works is entirely due to 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 (i) they cannot utilize the materials at the same time, due to their rivalry; and (ii) they cannot independently utilize the materials at different times, as the subsequent laborer would then be laboring directly upon the fruits of the first laborer's work rather than "independently". It follows that, 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 normatively significant implication. 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.[26] In other words, since the independent creation defense assures that subsequent authors are 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 removed 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, 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 what 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 raw materials from that which is commonly held. However, this non-appropriative nature of copyright grants is in stark contrast to physical property, since property grants undeniably *do* remove the physical objects in 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, (i) since copyright, unlike property, grants rights in objects made from non-rivalrous materials; and (ii) since copyright has an independent creation defense; (iii) 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, 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. 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.

### 3.3 Non-Rivalry and Transformability

Consider next the second defining feature of creative works. 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 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

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

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, 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 raises questions regarding the permissibility—and, indeed, copyrightability—of subsequent yet non-independent acts of authorship, such as (i) 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 (ii) 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 that are actually made, as 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: (i) 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 (ii) 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 see 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, (i) the idea/expression dichotomy and (ii) 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 Lockean copyright to avoid the most devastating challenge faced by Locke's property theory.

### 3.3.1 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 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 the 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."[27] 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.[28] It follows from this that every

27 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."

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

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, even when the subsequent transformative author has in fact "copied" the idea from the work of the first.

For an example of how such a "transformation of ideas" might look, consider the facts of the case *Nichols v. Universal Pictures Corp.*, perhaps regarded as the most classic statement of the idea/expression dichotomy.[29] 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 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."[30]

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

29 45 F.2d 119 (2d Cir. 1930).

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

transforming into her own creative work, this did not constitute an instance of copyright infringement.

#### 3.3.2 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 owns, *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 itself, rather than the general ideas that might be abstracted from the work. Put differently, 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 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 thereby 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.[31]

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, as a simple example, while it would be infringing for me to simply copy and reproduce 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, 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 nonetheless my own. I have thus not taken his expression from him or impeded his rights in it but instead used it as a raw material, in order to make something (a criticism) new, imbued with expression of my own.

31 17 U.S.C. § 107.

For the landmark example of such expression-transformation, consider the Supreme Court's case *Campbell v. Acuff-Rose Music, Inc*,[32] 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."[33] 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 is also importantly different in virtue of having been transformed, imbued with the parodic expression of the subsequent author. And 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, 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 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.[34] 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.[35] I will briefly return to this point in Section 5 of

32 510 U.S. 569 (1994).

33 *Id.*

34 *See, e.g.*, Adler (2016) (discussing and defending the copying-based artwork of Richard Prince).

35 *Id.* I explore this argument further in Section 4.

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.

#### 3.3.3 Transformability and Copyright versus Property

We may now complete our inquiry into how the non-rivalry and transformability of creative works make them different 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 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 a normatively important distinction. We could imagine life in a very different possible universe—one where there is no scarcity of land, and where ray guns allow us to replicate the property of another and then transform only the replication, while still always leaving the original intact—but this obviously is not what the actual world is like. And yet, this process of replication and transformation without destruction is precisely what goes on in our world when subsequent 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 works, because such transformed fruits are imbued with their own 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 instance. This conclusion has an almost paradoxical appearance; but it is the result of the uniquely intellectual and expressive nature of copyright's subject matter, and which sets it apart from other possible objects of rights.

### 3.4 Copyright and the "First Laborer" Problem

We are now equipped to return to Lockean theory and the problems it has faced in its original application. As the reader is likely to have anticipated by this point, the non-rivalrous and transformative nature of copyright's subject matter has profound implications for the plausibility of a Lockean copyright, because 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.

#### 3.4.1 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, even one using them in the very same ways. Thus, unlike the case of property—which must choose between the earlier and but-for laborer—two independently acting authors can both engage and receive simultaneous rights in their authorial work, and such that the first dimension of the problem is avoided.

#### 3.4.2 Non-Rivalry, Transformability, and the Second Dimension of the "First Laborer" Problem

Next, consider the second dimension concerning the *follow-on laborer*, 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 is a follow-on laborer who turns another's chair into a table not also entitled to a right in her table? We again 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 is also not decisive against a Lockean system of copyright, due to the nature of creative works and the possibility of transformation. This is because a non-independent, follow-on author who encounters the work of another 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 a distinct new work. And 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.[36] The Lockean copyright can thus be structured in a way that accommodates the intuition that there is no normative reason for thinking that only first

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

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 able to co-exist, so long as these rights are both limited by doctrines sufficiently protective of independent and transformative authorship. 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 can be said in the case of copyright. In this way, copyright is utterly unique; for in case of other types of property, granting someone some benefit thereby 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 (Chatterjee 2019, 2020). Indeed, even many *non*-property contexts would seem to face problem: for example, the granting of awards, jobs, positions, incomes, or any other relevantly "scarce" benefits to one always deprives from others and thereby raise the question of the others' countervailing claims.[37] Nonetheless, given the nature of creative works, the fact that copyright is singular in this way should ultimately be unsurprising. It is because *expression* is so unique that there could be a system of rights in expression that recognizes the rights of all.

## 4. THE IMPLICATIONS OF A LOCKEAN COPYRIGHT THEORY

The preceding arguments show that the persistent Lockean intuition turns out to be far more promising as a basis for exclusive rights in the context of copyright 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, but we in fact have good positive reason for thinking that Locke was simply not a Lockean about

37 *See, e.g.*, Scheffler (2000) (discussing the problems that arise in desert-based allocations of scarce resources).

copyright at all.[38] And yet, unbeknownst to him, though his original, *prima facie* intuitive ideas about property have been compellingly dismantled by subsequent philosophers, the spirit of his theory has now been—in some sense—salvaged, yet in a distinct and unintended context entirely. This article will unpack a number of surprising implications of this theoretical finding. In particular, it will explain why the Lockean copyright theory lends support for copyright's existing and defining limitations, and in fact recommends that copyright be even more limited than it presently is. It will also briefly speak to the question of a Lockean theory of *patents*, explaining why such a theory in fact does seem to fall prey to the "first laborer" objection, thereby showcasing the unique plausibility of a Lockean *copyright* in particular.

### 4.1 Lockean Theory and Copyright's Limitations

The first important implication of our preceding discussion 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 that successfully avoids the "first laborer" objection theory actually requires 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 limitations that reach further than those in existing law, 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 (Hughes 1988; Gordon 1993). Furthermore, far from failing to vindicate copyright's defining independent creation defense, the 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.[39] For instance, consider

38 *See, e.g.*, Hughes (2010, p. 557) ("neither the memorandum nor, apparently, any other published writing of Locke makes any express connection between rights (or their absence) in expressive works and Locke's property theory . . . Locke was quite consciously opposed to the idea of perpetual exclusive rights in expressive works . . . he objects to exclusive rights 'in any book which has been in print fifty years.'").

39 *See, e.g.*, McGowan (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.").

Abraham Drassinower's (2003, p. 3) 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)."

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 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.[40]But we 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.

### 4.2 Lockean Theory, Egalitarianism, and the Minimalist Revision of Copyright Doctrine

Next, 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 unfavorable result. However, from the perspective

40 *See, e.g.*, *Id.* ("it is very hard to square existing fair use rights, or any other set of fair use rights, with Lockean theory.").

of the most plausible version of a Lockean copyright—namely, one which is so limited by protections for independent and transformative subsequent authorship—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 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.

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[41]—we need not be concerned about the first dimension of the problem.

But now 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 the idea/expression dichotomy and fair use already offer some of these necessary protections. However, from the perspective of Lockean theory, existing law still does not seem to be sufficiently protective of all follow-on authors. The present section outlines three of ways in which the Lockean theory defended would recommend that existing copyright should be grants must

41 Note that it is an open question whether existing law always does this. For instance, present courts might be mistakenly permitting plaintiffs to establish copying based on very strong presumptions that, if a defendant had access to a substantially similar work, then they actually copied it. Such presumptions are, I think, insufficiently protective of this important and defining right to engage in independent authorship.

be pared down—at least, barring compelling and overriding *non-Lockean* reasons for structuring the law as it is, such as consequentialist ones[42]—in order to assure that the law does not go too far in what it gives earlier (and thereby takes from follow-on) authors. In particular, these recommended doctrinal revisions are (i) the strengthening of transformative fair use; (ii) the abolishment of the derivative right; and (iii) the abolishment of the moral right of integrity.

#### 4.2.1 Transformative Fair Use as a Limitation on Copyright

First, most obviously, the Lockean theory suggests that copyright law must be protective of *all* instances of transformative subsequent authorship—both by regarding them as fair use, as well as by granting them copyrights of their own—in order for the "first laborer" problem to be completely 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 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, and 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.[43] For instance, Amy Adler (2016, p. 99) has compellingly argued that courts—which tackle the question

42 I make this qualification because one could accept that there exists something like a Lockean copyright—and even that this right provides the central normative foundation of copyright *law* itself—while still thinking that other normative considerations, such as ones of welfare, importantly bear on the design of copyright systems. Thus, for all I say in this article, even if I am right that Lockean theory recommends that copyright be more limited than it presently is, it remains possible that there are good non-Lockean reasons against this and that those reasons should override the Lockean arguments. The question of precisely *how* rights-based versus consequentialist considerations should be weighed against each other when they conflict in the process of designing legal rules is a general puzzle, and one beyond the scope of the present article. I instead focus in this section on explicating what the Lockean theory, *ceteris paribus*, recommends.

43 *See, e.g.*, Leval (1990, p. 1109) ("First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers. Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses." (footnote omitted)); Tushnet (2004) (defending the free speech value of pure copying, from audience interests to speaker interests in self-expression, persuasion, and affirmation of connection with a larger political, religious, or cultural group).

of whether something counts as a transformative work by asking whether it has a new *meaning or message*, substantively different *aesthetic properties*, or produces a different *impression on viewers*—are out of step with contemporary creative practices and the importance of expressive copying as itself technique in making new works. I am inclined to agree that these approaches underappreciate copying as an expressive and thereby transformative activity. Indeed, my own view—further explored and defended elsewhere—is that subsequent authorship can be transformative, using earlier expression as a raw material, while still retaining the same message, structure, or impression on the viewer as the earlier expression; for the question of whether 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 if it is to fully avoid the "first laborer" problem, and to thereby accord with the most plausible Lockean copyright theory would recommend.

A further implication from Lockean theory to note here is that transformativeness is not to be understood as an affirmative defense (as fair use presently is), but instead as a limitation on the scope of a copyright grant. Put differently, from the Lockean perspective defended, 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 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. But a Lockean copyright theory must view all authors (and their rights) *equally as authors*, in virtue of their respective authorial activity and irrespective of the order in which the activity has occurred, rather than viewing transformative authors as permissible infringers.

Note that this conceptual suggestion—that fair use should be understood as a limitation rather than a defense—has already been advanced by scholars who embrace the dominant utilitarian picture of copyright, according to which fair use is necessary to optimize the balance between incentives and access (Lunney, Jr. 2002, Loren 2015). But again, the point to be gleaned here is that the most plausible *Lockean* theory recommends such an understanding, such that the scholars who have assumed that a Lockean copyright has no room for fair use at all have been mistaken. Instead, it is precisely *because* so-called fair users have done the authorial work of making something new that they are rights-holders in the same vein as those authors whose work they have

transformed from the Lockean perspective; 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 genuinely possible.

#### 4.2.2 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,[44] 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".[45]

This definition does not give anything like a wholly satisfying analysis of what it is to be a derivative work; 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 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.[46]This is especially suggested by the fact that protection against "copying" is itself not limited to literal or verbatim copying, as courts have long noted that such a narrow conception of what constitutes infringement of the reproduction right would allow plagiarists to "escape by immaterial variations."[47]In other words, as a matter of existing law, one might infringe an author's exclusive right to produce copies

44 17 U.S.C. § 106(2).

45 17 U.S.C. § 101.

46 Lemley (1997, p. 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").

47 *Nicholas v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

by taking "nonliteral" elements of a work, such as the "total concept and feel" of the work,[48] the plot outline of a movie or novel,[49] or the organization and structure of piece of software.[50] 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,[51] then it is hard to see how the derivative right adds anything beyond what the reproduction right already grants.

However, an apparently crucial and distinct aspect of the derivative right is that, if a subsequent author is found to have created an unauthorized derivative work, then 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).[52] 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

48 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).

49 See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 396–398, 397 (1940) (confirming that the appropriation of a story line beyond the "mere use of [the] basic plot" could amount to copyright infringement).

50 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).

51 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."

52 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.").

respect to the perhaps substantial original creativity that she had herself contributed.[53] 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 (i) on the one hand, the derivative right gives the original work's author exclusive rights beyond her labor; and (ii) 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 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. Thus, if we embrace the Lockean copyright theory according to which labor—and *only* labor—grounds authors exclusive rights in their work, then—again, barring some overriding, non-Lockean reason otherwise—we cannot 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 that are entirely her own. However, this rule cannot be justified by the favored Lockean perspective. After all, there is no *a priori* reason to think that the subsequent authors' work in producing (even unauthorized) derivatives is "less laborious" or meriting of protection than the labor of original authors; indeed, we can 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.[54] It is one according to which the mere fact that

53 *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).

54 Note that existing patent law is *not* structured this way: instead, later-comers are able to obtain improvement patents on their follow-on innovation, so long as they satisfy the requirements of patentability. (Lemley 1997).

the former came "first" entitles her to absorb the fruits of the another, and which thereby cannot be supported by a workable version of the Lockean theory. And once again—in contrast to some scholars' view that rights-based pictures of copyright would be most amenable to derivative rights—we see these rights are actually ones that this theory would tell us to abandon.

#### 4.2.3 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).[55] 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 they are unjustifiable and do more harm to art and creativity than good. Most notably, in her paper *Against Moral Rights*, Amy Adler (2009) argues that integrity rights in visual art presuppose an outdated conception of art itself, in fact impeding artistic creation rather than facilitating or protecting it. 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.[56] 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 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

55 17 U.S.C. §106A.

56 *Id.*

> Greenberg: unpainted Smiths are more valuable than painted ones. Critics, museums and collectors prize the unpainted over the painted sculptures.

What does the Lockean theory have to say 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. 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.

This distinction is one with incredible normative significance from the perspective of this Article's arguments, 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 in the first instance, 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,[57] it is clear that this right granted by VARA is in fact 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 in virtue of its non-rivalrous, physical subject matter. Indeed, 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 only apply to visual art

57 *See, e.g.*, Lemley (1997) ("copyright's restrictions on improvement might be thought to further important moral rights").

objects. Thus, a Lockean right of integrity is objectionable for 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 (Adler 2009, p. 287).

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 seen—and criticized—in the context of Locke's theory of property; and because, unlike in the case of a non-rivalrous intellectual object, creating a physical art piece that deconstructs the physical art of an earlier artist *does* 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 discussion that the greatest strength of Lockean copyright properly understood—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 see reason to reject integrity rights as well.

### 4.3 A Note on Lockean Patent versus Lockean Copyright

In the preceding sections, we have seen that, contrary to the assumption of many, Lockean copyright (i) vindicates the existing limitations of copyright and (ii) even recommends that copyright grant a more limited right than it presently does. As a final takeaway from the present article, it is worth briefly acknowledging that I have focused only on the question of Lockean copyright

versus Lockean property and have 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 (Chatterjee 2019, 2020a). Thus, I want to emphasize 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. Indeed, I elsewhere argue that a Lockean theory of patents *would* fall prey to many of the objections faced by Locke's property theory (*id.*). By way of summary: this is because, although the subject matter of patent law is non-rivalrous (like copyright), it is also the case that (i) 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 (thereby triggering the first dimension of the "first laborer" problem); and (ii) as a matter of metaphysics, since innovations—unlike creative works—are not intrinsically expressive,[58] it is not the case that they are transformable (thereby triggering the second dimension of the "first laborer" problem). Put differently, 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* follow-on inventor who "labors upon" the innovation of another will always be able to transform it into something distinct, in the way that a subsequent author can always transform another's expression into her own. It follows, then, that grants of patents cannot be justified by an unproblematic version of Lockean theory, and are 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 other work.

58 This is not to say that innovations can't be expressive in a certain sense of the term; rather, it is to say that they lack expressive *content* of the kind possessed by creative works, and which makes it the case that creative works can always be transformed into something new by any other. Of course, this purported bifurcation between "expressive" versus "useful" intellectual objects—though presupposed by the fundamental structure of intellectual property law, and the division of labor between systems of copyright and patent—is itself undoubtedly in need of further theorizing and defense. I set aside the challenge of analyzing and defending this conceptual distinction for future work.

## 5. CONCLUSION

This Article has not provided a complete defense of a Lockean copyright theory. Such a defense would require much more, such as independent positive arguments in favor of the existence of such a Lockean right and an analysis of what precisely the right would look like (e.g., which interpretation?), as well as arguments for why such a theory is to be preferred over alternative accounts. I have also focused only on one objection to Lockean property theory—the "first laborer" objection—because I regard this to be the most compelling challenge that each interpretation of Lockean property theory has faced. But that it is not the only objection faced by Lockean property; indeed, as the reader might recall from Section 2, each interpretation faces more specific other objections of their own. And, of course, there might be other objections beyond those raised here—including ones pertaining to unique problems faced by Lockean intellectual property *in particular*, ones not even raised by Lockean physical property—that remain to be explored. Thus, though the present Article demonstrates an important way in which Lockean copyright is on firmer ground than Lockean property, it 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 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 (Chatterjee 2020b). I have also sought to provide a positive case for Lockean copyright, analyzing the nature of said right and defending the view that this theory offers a stronger foundation for copyright than each of the dominant available alternatives (namely, utilitarian, Kantian, and Hegelian theories of copyright) (*id.*). I refer the reader who is interested in the larger defense of such an account to my other work. This article has endeavored only to show a number of important ways in which the existing efforts to theorize on the question of Lockean theory and copyright—both by legal scholars and philosophers—have gone awry. It has shown that the metaphysics of creative works, its non-rivalry and transformability, allows a Lockean copyright to avoid the most troubling challenge faced by the persistent yet unworkable Lockean property. The domain of copyright turns out to be one where this persistent Lockean intuition, though hopeless in its original context, might be workable and perhaps even independently defensible.

At this point, my reader might wonder about the more general implications of this theoretical conclusion, 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 (Landes & Posner 1989; Lemley 2015). 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. 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.

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. Consequently, we need not embrace the view that efficiency is all that matters for copyright law on the grounds that it is the only plausible view on the table. As it turns out, there is 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 such a view in the context of property. This finding—I think—actually deserves enormous emphasis. For this majority of American intellectual property scholars (and courts) seem to presently assume that *no* plausible alternative to the economic picture exists, often putting forth economic theory as correct and complete without normative argument for why this is so.[59] Indeed, in so doing, they seem either to take the economic theory of copyright as almost self-evidently true, 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[60]—but still without an argument for why such promotion of progress can only be understood in the currency of efficiency.[61]

59 *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.").

60 U.S. Const. art. I, § 8, cl. 8. F.

61 *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("[t]he primary objective of copyright is not to reward the labor of authors").

However, the Lockean copyright poses a challenge for such theorists as a coherent and *prima facie* defensible alternative; and in so doing, 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 efficiency matters then owes us a normative argument in the view's defense. Thus, the more general lesson to be gleaned from this Article is that the theorists who think 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 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.

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