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## Locking Out Locke: A New Natural Copyright Law

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## **Cover Page Footnote**

Senior Notes & Articles Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVII; J.D. Candidate, Fordham University School of Law, 2017.

# Locking Out Locke: A New Natural Copyright Law

Joseph A. R. Gerber\*

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## INTRODUCTION

“Copyright could . . . stand upon no other foundation, than natural justice and common law.”<sup>1</sup>

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\* Senior Notes & Articles Editor, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Volume XXVII; J.D. Candidate, Fordham University School of Law, 2017.

<sup>1</sup> *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 207.

For decades lawyers, professors, philosophers, and law students have been trapped in an endless, two-sided debate regarding the justification for copyright law in the United States. On one side stand the utilitarians, who argue that modern American copyright law amounts to nothing more than positive law<sup>2</sup> in the form of an economic incentive for authors to express themselves creatively. Natural law theorists, on the other hand, argue that there is something more substantial behind the current copyright regime—that copyright is not merely a formulation of positive law, but a recognition of philosophical principles of ownership inherent in the natural order of the world. Discourse on this subject has resolved little, all the while exposing flaws for anti-copyright proponents to exploit along their path toward a complete[ly destructive] public domain. For this reason, copyright advocates desperately need a new theory—one that replaces the questionable reliance on John Locke but also incorporates the economic incentives argued for by the utilitarians. This Note attempts to start that process by rebuilding the understanding of copyright law from a teleological perspective.

Part I outlines the arguments on both sides of the copyright law debate, including their weaknesses. Part II introduces an Aristotelian natural law theory, and Part III applies these principles to the U.S. Constitution. Part III also explores the consequences of thinking teleologically about the Copyright Clause of the Constitution. Finally, Part IV explains how this new perspective both aligns with current copyright jurisprudence and answers some of the field's most vexing questions that are crucial amid a growing anti-copyright movement.

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<sup>2</sup> The term “positive law,” as opposed to “natural law,” typically refers to human-made legal structures that function as law principally because society recognizes them as law. *See Positive Law*, BLACK'S LAW DICTIONARY (10th ed. 2014). In contrast, natural law is understood as law that reflects a greater, natural ordering inherent in the world. *See id.* at *Natural Law*.

## I. THE CURRENT DEBATE

*A. The Utilitarian Argument*

The utilitarian argument begins where every philosophical analysis of copyright law should start. The Copyright Clause gives authors limited rights in their creative expressions “[t]o promote the Progress of Science.”<sup>3</sup> These rights, William Patry argued in his copyright treatise, amount to nothing more than a “statutory tort, created by positive law for utilitarian purposes.”<sup>4</sup> To Patry and his sympathizers, American copyright law is only meant to incentivize authors<sup>5</sup> by distributing property rights among them to exploit for personal monetary gain.<sup>6</sup> Without such an incentive, the continued creation of expressive works in the country would arguably diminish.<sup>7</sup>

The first objection to the utilitarian theory comes from many of the authors themselves; simply put, they do not do it for the money.<sup>8</sup> The argument that authors would lose the desire to express themselves creatively flatly ignores the millions of individuals who devote time and money to their creative outlets for little or no profit. Artists who make a living off their work are few and far between, but artists nevertheless abound.

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<sup>3</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>4</sup> 1 WILLIAM PATRY, *PATRY ON COPYRIGHT* § 1:1 (2016).

<sup>5</sup> Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 *CARDOZO ARTS & ENT. L.J.* 775, 779–80 (2009) (“[The Copyright Clause] embodies the rationale that conferring limited property rights is the best means of achieving the broader public interest goal of knowledge advancement and societal development.”). *But see* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS* 39 (2010) (noting that the “utilitarian calculus reflects an asserted balance between the need to protect incentives for the creation of new information and the desire to protect access to a resource whose consumption is nonrivalrous”).

<sup>6</sup> Adam Moore & Ken Himma, *Intellectual Property*, *STAN. ENCYCLOPEDIA PHIL. ARCHIVE* § 3.2 (Sept. 22, 2014), <http://plato.stanford.edu/archives/win2014/entries/intellectual-property/> [<https://perma.cc/64CN-F9ZM>] (“Thus control is granted to authors and inventors of intellectual property, because granting such control provides incentives necessary for social progress.”).

<sup>7</sup> *See* PATRY, *supra* note 4, § 1:1.

<sup>8</sup> For example, Walt Disney’s personal mantra was: “I don’t make movies to make money—I make money to make movies.” *Walt Disney and Brad Bird on Why They Want to Make Money*, BOB SUTTON: *WORK MATTERS* (Mar. 6, 2014), [http://bobsutton.typepad.com/my\\_weblog/2014/03/walt-disney-and-brad-bird-on-why-they-want-to-make-money-1.html](http://bobsutton.typepad.com/my_weblog/2014/03/walt-disney-and-brad-bird-on-why-they-want-to-make-money-1.html) [<https://perma.cc/HE34-Z8L4>].

One of the more fundamental objections to the utilitarian theory of copyright is a rejection of its reliance on economics. Economic theories of law have faced heavy criticism, despite their recent popularity, both generally and in the context of copyright law.<sup>9</sup> Political philosopher Michael Sandel outlined two such objections in his book *Justice: What's the Right Thing to Do*: “First, [the utilitarian approach] makes justice and rights a matter of calculation, not principle. Second, by trying to translate all human goods into a single, uniform measure of value, it flattens them, and takes no account of the qualitative differences among them.”<sup>10</sup>

Sandel’s second objection is particularly relevant, considering that the three major areas of intellectual property law—copyright, trademark, and patent law (all with their own separate underlying rationales and utilities)—are often flattened together under the umbrella of “intellectual property.”<sup>11</sup> The differences between them are frequently ignored.<sup>12</sup> The fact that these important distinctions are consistently overlooked by utilitarians suggests, as

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<sup>9</sup> See, e.g., MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 260–61 (2009); James Gordley, *The Moral Foundations of Private Law*, 47 *AM. J. JURIS.* 1, 5 (2002) (“From the economist’s standpoint, a distribution of purchasing power is not efficient or inefficient or just or unjust. Consequently, in and of itself, nothing bad can have happened if the distribution of purchasing power between two individuals changes. That cannot be the evil the law seeks to remedy. For an economist, the evil must be that unless relief is given, someone will incur some unnecessary cost.”); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 299 (1988); Katie Sykes, *Toward a Public Justification of Copyright*, 61 *U.T. FAC. L. REV.* 1, 23 (2003); Wong, *supra* note 5, at 780 (“‘Incentive theory’ and a wholly economic analysis of copyright law do not fully explain all the principles that form part and parcel of modern copyright law, and do not easily accommodate the influence of other theories, such as the natural rights theory . . .”).

<sup>10</sup> SANDEL, *supra* note 9, at 260.

<sup>11</sup> See, e.g., Moore & Himma, *supra* note 6, § 2. See generally Rufus C. King, *The “Moral Rights” of Creators of Intellectual Property*, 9 *CARDOZO ARTS & ENT. L.J.* 267 (1991).

<sup>12</sup> See *infra* Section III.B. The Supreme Court often refers to the “useful arts” and—a term meant for the patent context—in the context of copyright. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 705 (2013); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (improperly referring “inventors,” in addition to the “useful arts,” in the copyright context).

others have, that the utilitarian theory is not concerned with justice at all, but only with efficiency.<sup>13</sup>

Even if the merit in the economic perspective is assumed, the incentive argument does not align with the current copyright framework.<sup>14</sup> Arguments for the efficiency of an incentivization scheme in copyright law do little to explain why artistic endeavor should be encouraged in the first place.<sup>15</sup> More importantly, any incentive facilitated by the current copyright regime ought to be an incentive to share, not merely to create.<sup>16</sup> Countless scholars have explicitly stated that U.S. copyright law persists to incentivize creation.<sup>17</sup> However, any author is free to stubbornly sit on her creations and refuse to share her insights with the public. If she does sit on them, copyright laws may be of no use to her. The focus should therefore be on sharing, and not on creating. The utilitarians, busy with their calculations, have largely overlooked this important distinction. Those who recognize the importance of sharing creative expressions, not just making them, argue that the incentives provided by U.S. copyright law ensure that more and more information is added to the public library.<sup>18</sup> Nevertheless, this argument misses a fundamental problem exposed by Professor Justin Hughes

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<sup>13</sup> James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 5 (2002) (“Those who try to explain the law in terms of economics do not concern themselves with justice but with efficiency.”).

<sup>14</sup> Wong, *supra* note 5, at 780 (“‘Incentive theory’ and a wholly economic analysis of copyright law do not fully explain all the principles that form part and parcel of modern copyright law, and do not easily accommodate the influence of other theories, such as the natural rights theory . . .”).

<sup>15</sup> See Rufus C. King, *The “Moral Rights” of Creators of Intellectual Property*, 9 CARDOZO ARTS & ENT. L.J. 267, 271 (1991) (“To say that the legal right to prevent others from exploiting one’s intellectual property is an ‘economic right’ does not mean that it is not also a moral right.”).

<sup>16</sup> Cf. Gary Kauffman, *Exposing the Suspicious Foundation of Society’s Primacy in Copyright Law: Five Accidents*, 10 COLUM.-VLA J.L. & ARTS 381, 383–84 (1985) (discussing the differences in a copyright system that promotes “production” and one that promotes “access”).

<sup>17</sup> See, e.g., Kauffman, *supra* note 16, at 383 (“A copyright serves as an incentive; it fosters creation.”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) (“Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.”).

<sup>18</sup> See, e.g., Kauffman, *supra* note 16, at 384 (“Society must have access to literature, of course, to gain the benefit of increased production.”).

in his seminal article on copyright philosophy: “If the new wealth remains the private property of the laborer, it does not increase the common stock.”<sup>19</sup>

The utilitarian’s incentive argument is further weakened by the copious social and legal restraints on copyright owners.<sup>20</sup> If the reward for artistic creation is the right to exploit her work for financial gain, why is that right undercut by fair use jurisprudence, the first sale doctrine, and term limits, among others? What incentive is there for photographer Patrick Cariou to continue crafting his art if courts are simply going to allow appropriation artist Richard Prince to make the slightest of changes and sell the same prints for an exponentially higher profit?<sup>21</sup> What reason do textbook publishers have to continue investing in education materials under the ruling in *Kirtsaeng v. John Wiley & Sons*?<sup>22</sup> Furthermore, if incentivization is the only impetus for copyright law, then rights in intangible property ought to protect works forever, just as rights in real property do.<sup>23</sup>

Most damaging to the utilitarian argument is the existence of moral rights in both U.S. and international copyright law. Calling them “moral rights” single-handedly suggests that more than mere calculations toward efficiency justify copyright.<sup>24</sup> For example, the Visual Artists Rights Act (“VARA”) gives authors a right of attribution by which they can demand recognition as the work’s original author even after the work and its underlying copyright have been sold.<sup>25</sup> The right of attribution has little, if anything, to do with exploiting the right for financial gain. After the sale, the author who exercises her moral rights has already received her re-

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<sup>19</sup> Justin Hughes, *supra* note 9, at 299.

<sup>20</sup> See PEÑALVER & KATYAL, *supra* note 5, at 39, 41.

<sup>21</sup> See *infra* Section IV.B. for a discussion of *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>22</sup> See *infra* Section IV.C. for a discussion of *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351 (2013).

<sup>23</sup> There is some disagreement as to whether copyright and other forms of intellectual property confer “property” rights on their owners. See *infra* Section III.B.

<sup>24</sup> See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 520 (1990) (arguing that frequent decisions in controversial copyright cases often make no mention of economic considerations which suggests that “something besides economics influences copyright decisions”).

<sup>25</sup> 17 U.S.C. § 106A (2012).



ward. In fact, monetary remedies are prohibited when recovering under the right of attribution; the only recourse available remains an injunction.<sup>26</sup> Either utilitarianism does not account for the entirety of the copyright regime or moral rights are unjustified under a framework built strictly to incentivize.

### B. *The Lockean Argument*

John Locke's explanation of *traditional* property rights has become the classical argument for the justification of *intellectual* property rights in the United States.<sup>27</sup> His theory for property ownership begins with an individual's body.<sup>28</sup> When a man mixes his labor with the natural world, the argument goes, his labor "adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being."<sup>29</sup> Through this process, man comes to own the commonly held natural goods upon which he expends his energy.<sup>30</sup>

In truth, the Lockean argument seems overly fantastical. As Jeremy Waldon points out, "the idea of mixing one's labor is incoherent—actions cannot be mixed with objects."<sup>31</sup> That is not to say that metaphysics has no place in legal philosophy. Rather, the problem is that Locke's argument is a decidedly physical one.<sup>32</sup> Locke meant to justify real property, not intangible property. Any possi-

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<sup>26</sup> See *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 55–56 (1st Cir. 2010). Similarly, plaintiffs suing under the right of integrity typically only receive injunctions if the work is one of "recognized stature." *Id.* at 53 n.13. Even in instances where damages are awarded, they are done so in order to make whole the author's damaged reputation, not to recapture profits lost from a stolen opportunity to exploit the work. See § 106A(a)(2) (specifying that moral rights are available to prevent damage to the author's "honor or reputation").

<sup>27</sup> See King, *supra* note 15, at 284; see also PATRY, *supra* note 4, § 1:1.

<sup>28</sup> King, *supra* note 15, at 285.

<sup>29</sup> Hughes, *supra* note 9, at 297; see also King, *supra* note 15, at 284; Moore & Himma, *supra* note 6, § 3.3 ("When an individual labors on an unowned object, her labor becomes infused in the object and for the most part, the labor and the object cannot be separated.").

<sup>30</sup> See Moore & Himma, *supra* note 6, § 3.3 ("The intuition is that the person who clears unowned land, cultivates crops, builds a house, or creates a new invention obtains property rights by engaging in these activities.").

<sup>31</sup> *Id.* § 3.3.1.

<sup>32</sup> See Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891, 896 (2006).

bility that he intended to apply labor theory to copyright law or other forms of intangible property is foreclosed by what he said about authors.<sup>33</sup> Real property, unlike its intellectual counterpart, can be physically possessed, the implications of which ought not to be ignored in an attempt to understand the rationale for private intellectual property rights. And, as at least one commentator has pointed out, the codification of copyright law into positive statute arose out of the difficulty of applying common law to items “unpossessable as a matter of natural law.”<sup>34</sup> The nail in the coffin is hammered home by the fact that Locke tasked himself with justifying the distribution of limited resources in order to avoid a tragedy of the commons.<sup>35</sup> In the realm of creative expression, resources are not limited in the same way,<sup>36</sup> so there is no need to construct a theory that avoids such a problem.<sup>37</sup>

As with the utilitarian argument, the Lockean argument too has trouble aligning itself with modern American copyright law. Sympathizers argue that copyright protection is granted as a result of the value created by an individual’s mixture of labor and land.<sup>38</sup> But this does not explain why even valueless works are given copyright protection.<sup>39</sup> Hundreds, perhaps thousands, of original works of authorship are created every year and never purchased by anyone.

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<sup>33</sup> See *id.* at 896, 898–905.

<sup>34</sup> Yen, *supra* note 24, at 551.

<sup>35</sup> See Jeremy Waldron, *Property and Ownership*, STAN. ENCYCLOPEDIA PHIL. § 5 (Sept. 6, 2004), <https://plato.stanford.edu/entries/property/> [<https://perma.cc/GV5J-NGZR>] (outlining perspectives on the Tragedy of the Commons, including Locke’s conclusion that even the laborer who owns no private property benefits from a privatized economy).

<sup>36</sup> Robert Cunningham, *The Tragedy of (Ignoring) the Information Semicommons: A Cultural Environmental Perspective*, 4 AKRON INTELL. PROP. J. 1, 19 (2010) (“The unique nature of information means that there is no need to allocate its use since there is no danger of a ‘tragedy of the commons’ as the information commons simply cannot be overgrazed.”); see also PEÑALVER & KATYAL, *supra* note 5, at 38 (noting that because there is no risk of over-distributing an idea, “more than one individual can share a single good simultaneously with others, and with no danger of depriving anyone else”).

<sup>37</sup> Cunningham, *supra* note 36, at 26 (“Given [that information is not a scarce resource], the legal structures and policy discourse that surround information should also be different.”).

<sup>38</sup> Hughes, *supra* note 9, at 297; see also King, *supra* note 15, at 284; Moore & Himma, *supra* note 6, § 3.3 (“When an individual labors on an unowned object, her labor becomes infused in the object and for the most part, the labor and the object cannot be separated.”).

<sup>39</sup> Hughes, *supra* note 9, at 309; see Yen, *supra* note 24, at 520.

Under a Lockean theory, such works would be afforded no protection. Never mind that assessing the value of a creative work is wildly subjective; it is not the province of the law to pass judgment on artistic merit.<sup>40</sup>

The labor theory of copyright would logically entail that effort always creates property. Current copyright jurisprudence, however, does not embrace that conclusion. Two basic requirements of the Copyright Act of 1976 dispel the idea that labor alone creates property. First, works must be “original” in order to earn the statute’s protection.<sup>41</sup> In short, the Act demands that creative works display a “modicum of creativity” in order to earn its protection.<sup>42</sup> Generic expressions of naturally existing items earn no protection, no matter the amount of effort invested in the expression’s development. Lockeanism suffered a serious blow in this regard in *Feist Publications, Inc. v. Rural Telephone Service Co.*, where the originality requirement flexed its muscles.<sup>43</sup> The Supreme Court explicitly rejected the “sweat of the brow” argument presented by the plaintiff, the manufacturer of a phone book copied by a competitor.<sup>44</sup> The Court described sweat of the brow as a combination of labor and “public domain materials,” a description dangerously similar to Locke’s labor theory.<sup>45</sup> Copyright protection on the basis of sweat of the brow alone, the Court held, “distorts basic copyright

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<sup>40</sup> See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation . . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.”).

<sup>41</sup> 17 U.S.C. § 102 (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

<sup>42</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991).

<sup>43</sup> See *id.*

<sup>44</sup> *Id.* at 359–60 (“In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act.”).

<sup>45</sup> *Id.* at 354; see also *id.* at 352–53 (citing *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 88 (1922)).

principles . . . without the necessary justification of protecting and encouraging the creation of ‘writings’ by ‘authors.’”<sup>46</sup>

Second, the Copyright Act also requires works to be sufficiently fixed in a “tangible medium of expression.”<sup>47</sup> For example, a song existing only in the mind of a musician earns no copyright protection until it is recorded or written down, no matter how many hours the musician spent crafting it in his head.<sup>48</sup> The finding that the fruits of the mind receive no protection has been settled law for more than 130 years. The Supreme Court articulated the rationale for the idea/expression dichotomy, which is now codified in federal law,<sup>49</sup> in the 1879 case *Baker v. Selden*.<sup>50</sup> The plaintiff’s book describing a method of accounting enjoyed no copyright protection, the Court concluded, because “[w]here the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.”<sup>51</sup> Mixing labor with “common property,” the Court seems to have said, is not enough on its own to create a property right.<sup>52</sup>

Even these two most basic elements of modern copyright law, originality and the idea/expression dichotomy, cannot make room for Locke. Nevertheless, natural law theorists continue to cling to Locke as if he is at the helm of a lifeboat.<sup>53</sup> But the death of Locke’s

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<sup>46</sup> *Id.* at 354 (quoting 1-3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 3.04 (1990)).

<sup>47</sup> 17 U.S.C. § 102 (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

<sup>50</sup> 101 U.S. 99 (1879).

<sup>51</sup> *Id.* at 100–01.

<sup>52</sup> *See id.*

<sup>53</sup> Some scholars have advocated for a third, personality-based theory that relies on the philosophy of Martin Heidegger. *See generally* Hughes, *supra* note 9. But this theory, too, suffers from similar problems, and Hughes has argued that it only makes sense when combined with Locke’s labor theory. *Id.* at 329. It is an interesting theory, but it suffers

labor theory does not preclude a natural justification for the American copyright framework. Of all the natural law philosophers, Locke is but one. The idea that America's Founding Fathers were influenced by no other natural law philosophers is unsupported. The remainder of this Note therefore attempts to find a new natural copyright law. This time, the man at the helm of the lifeboat is one whose ideas have endured much longer than, and may have even influenced, Locke.<sup>54</sup> He is the man Thomas Aquinas ("The Naturalist") referred to as *The Philosopher*, and whom many consider one of the original sources of natural law: Aristotle.<sup>55</sup>

## II. ARISTOTLE'S TELEOLOGY

### A. Introduction to Teleology

Justice in the eyes of Aristotle meant treating equals *equally* and unequals *unequally*.<sup>56</sup> In other words, it meant giving each person his due.<sup>57</sup> But how does one determine what each person is due? As Sandel explains, it depends on what is being distributed.<sup>58</sup> Aristotle's famous example asked a simple question: Who should play the best flutes?<sup>59</sup> The best flute players, of course.<sup>60</sup> Sandel explained:

Justice discriminates according to merit, according to the relevant excellence. And in the case of flute playing, the relevant merit is the ability to play well. It would be unjust to discriminate on any other ba-

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from the same fantastical problems as Locke's theory. Furthermore, it does not answer the question of why legal imprimatur ought to be given to embodiments of personality.

<sup>54</sup> See SUSAN FORD WILTSHIRE, *GREECE, ROME AND THE BILL OF RIGHTS* 12–13 (1992) (noting that Locke referred to Aristotle's focus on the rational "exercise of the mind" as the "special capacity of human beings").

<sup>55</sup> *Id.* at 13.

<sup>56</sup> ANTHONY WALSH & CRAIG HEMMENS, *LAW, JUSTICE, AND SOCIETY* 29 (4th ed. 2016).

<sup>57</sup> See TONY BURNS, *ARISTOTLE AND NATURAL LAW* 91 (2011).

<sup>58</sup> SANDEL, *supra* note 9, at 187.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

sis, such as wealth, or nobility of birth, or physical beauty, or chance (a lottery).<sup>61</sup>

The conclusion that the best flute players should play the best flutes is derived through teleological thinking. In order to determine each individual's rights in social institutions one must first uncover the "purpose, end, or essential nature" of the issue at hand.<sup>62</sup> Aristotle referred to the purpose, end, or essential nature of a thing as its *telos*.<sup>63</sup> Thinking teleologically, therefore, allows one to consider the true nature of a thing—a practice, a custom, or an institution—in order to craft laws that best fulfill that practice, custom, or institution's purpose.<sup>64</sup>

Teleological thinking in modern times is not uncommon, even in the law.<sup>65</sup> A recent movement for the reinstatement of Aristotle in contemporary law argued that "the final end of law is to promote human flourishing—to enable humans to lead excellent lives."<sup>66</sup> Such an aretaic theory—named after the Greek word for excellence, *arête*—puts virtue and teleology back at the center of law.<sup>67</sup> Instead of defending modern legislative proposals on economic bases alone, an aretaic theory of law harmonizes efficiency and natural law by harnessing economic arguments as a means for constructing laws aimed at achieving the natural *telos* of a given regulatory framework.<sup>68</sup> The realm of private law in particular, which today includes copyright law, is better understood by an Aristotelian approach.<sup>69</sup> Instead of constructing property rights from outside

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 186.

<sup>63</sup> *Id.* at 188.

<sup>64</sup> THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS xix (William P. Baumgarth & Richard J. Regan eds., Richard J. Regan trans., Hackett Publ'g Co., 2d ed. 2002) ("The central theme of Aristotle's metaphysics is that the natures of things determine their type of activity, and, conversely, that their specific type of activity indicates the things' natures.").

<sup>65</sup> See ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 3 (Oxford Univ. Press rev. ed. 2012) ("That one comprehends law through its goals . . . is particularly well entrenched in American legal scholarship.").

<sup>66</sup> VIRTUE JURISPRUDENCE 2 (Colin Farrelly & Lawrence B. Solum eds., 2007).

<sup>67</sup> *Id.* at 3.

<sup>68</sup> See Gordley, *supra* note 13, at 2 ("Private law is better explained by the concepts central to the [Aristotelian tradition] such as preference satisfaction and economic efficiency as the economists understand them.").

<sup>69</sup> *Id.*

the social system, and then applying them to society and its positive laws as Locke sought to do,<sup>70</sup> Aristotle's property theory intertwines positive laws with the natural world and its aim for human flourishing in society.<sup>71</sup>

### B. *Distributive Justice*

Determining what each person is due is a matter of what Aristotle called "distributive justice."<sup>72</sup> It is in this context that he disagreed with Plato over how to distribute private property: Plato argued that society is best served when property is held in common so that all individuals can contribute to it and reap its benefits.<sup>73</sup> Aristotle pointed out that social progress is better achieved through private ownership.<sup>74</sup> After all, property held in common is often the least cared for.<sup>75</sup> Without private ownership, no one would have an incentive to work, improve, and care for their property.<sup>76</sup> The public benefits from resources cultivated by private citizens.<sup>77</sup> Human flourishing, Aristotle argued, is therefore achieved by giving each individual a personal stake in the success of the whole group.<sup>78</sup>

It may be easy to assume that Aristotle intended to distribute all things equally—that is, that all persons should receive the same distributions. This is not the case. Distributive justice is not equal

<sup>70</sup> See WALSH & HEMMENS, *supra* note 56, at 14–15 (stating that Locke's labor theory "logically preceded an established political system"); King, *supra* note 15, at 285.

<sup>71</sup> See WEINRIB, *supra* note 65, at 4 ("The goal-oriented understanding of private law follows from the seemingly axiomatic proposition that the object of the law is to serve human needs.").

<sup>72</sup> WALSH & HEMMENS, *supra* note 56, at 29–30 ("Distributive justice relates to how a political entity such as a nation-state distributes resources to its members.").

<sup>73</sup> See Waldron, *supra* note 35, § 2 ("Plato . . . argued that collective ownership was necessary to promote common pursuit of the common interest, and to avoid the social divisiveness that would occur 'when some grieve exceedingly and others rejoice at the same happenings.'" (citing PLATO, *REPUBLIC*, bk. V, § 462b (C.D.C. Reeve ed., G.M.A. Grube trans., Hackett Publ'g Co. 2d ed. 1992) (c. 380 B.C.E.))).

<sup>74</sup> *Id.* ("Aristotle responded by arguing that private ownership promotes virtues like prudence and responsibility: '[W]hen everyone has a distinct interest, men will not complain of one another, and they will make more progress, because every one will be attending to his own business.'" (quoting ARISTOTLE, *POLITICS*, bk. II, § 1263a (C.D.C. Reeve trans. Hackett Publ'g Co. 1998) (c. 350 B.C.E.))).

<sup>75</sup> See Cunningham, *supra* note 36, at 20.

<sup>76</sup> See Gordley, *supra* note 13, at 3.

<sup>77</sup> See *id.*

<sup>78</sup> See Waldron, *supra* note 35, § 2.

in amount, but equal in proportion according to what each individual deserves.<sup>79</sup> For example, “[t]wo people may have identical needs, but one of them may *deserve* a much greater proportion because of his or her contributions to the community.”<sup>80</sup>

On this bedrock of teleology and distributive justice, the next Part considers the natural *telos* of American copyright law and its implications for the positive laws that were crafted for it even before the birth of the nation.

### III. REBUILDING COPYRIGHT

#### A. *Copyright Teleology*

It is one thing to argue for a legislative framework based on teleological thinking. It is another to put that into practice. In particular, the question here asks for the *telos* or purpose U.S. copyright law is meant to serve. Fortunately, the Constitution’s framers largely answered this question: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>81</sup>

The *telos* here is clear: Copyright laws aim to “promote the progress of Science.”<sup>82</sup> The term “Science” in 1789 carried a slightly different meaning than it does today. It was not meant to refer to science in the literal sense, but rather simply as the general advancement of knowledge.<sup>83</sup> For the sake of clarity, this Note refers to the progress of Science as the progress of knowledge.

It is worth pointing out that the terms “Science” and “useful Arts” in the Copyright Clause carry two entirely distinct meanings. Science is meant to be governed by the copyright regime, and useful Arts by the patent regime.<sup>84</sup> A quick glance at the structure of

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<sup>79</sup> WEINRIB, *supra* note 65, at 62, 66.

<sup>80</sup> WALSH & HEMMENS, *supra* note 56, at 30.

<sup>81</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>82</sup> *Id.*

<sup>83</sup> Giles Sutherland Rich, *The “Exclusive Right” Since Aristotle*, 14 FED. CIR. B.J. 217, 224 (2004).

<sup>84</sup> *Id.*



the Copyright Clause reveals its symmetry: The “Progress of Science” is carried out by “Authors” through their “Writings,” and the “Progress of useful Arts” by “Inventors” through their “Discoveries.”<sup>85</sup>

This is an important point for understanding how copyright laws should be construed. As discussed, the copyright framework is meant to foster the advancement of knowledge, not utility. Unfortunately, this distinction between knowledge and utility has gone overlooked throughout the years, even by the Supreme Court.<sup>86</sup> And, as several scholars have pointed out, these and others of the courts’ mistakes have contributed to a significant misunderstanding of copyright in general and, more importantly here, in its application toward the directive it serves.<sup>87</sup> To be clear, no discussion of copyright, whether in law review articles, courts, or on the floor of Congress should include the words “useful Arts,” “Inventors,” or “Discoveries.” Copyright law is not a tool for increasing utility. That directive and the above terms are served by the patent regime.

Returning to the *telos* of copyright law, the advancement of knowledge may seem like an unfulfilling answer on its own. For what purpose? Surely the framers thought greater understanding to be important to society in general. To Aristotle, the advancement of knowledge is crucial for human flourishing.<sup>88</sup> Virtue of thought, together with virtue of character, leads to wisdom, without which “one cannot determine right action.”<sup>89</sup> It is virtuous thought, the progress of knowledge, Aristotle said, that facilitates human flourishing.<sup>90</sup>

It is quite possible that the framers of the Constitution meant to promote the advancement of knowledge for its own sake. However, the language the framers used, together with the history of natural philosophy that influenced them, both support the argument that

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<sup>85</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>86</sup> See cases cited *supra* note 12.

<sup>87</sup> See generally Kauffman, *supra* note 16.

<sup>88</sup> See Chapin F. Cimino, *Private Law, Public Consequences, and Virtue Jurisprudence*, 71 U. PITT. L. REV. 279, 285 (2009).

<sup>89</sup> *Id.*

<sup>90</sup> See *id.*

the framers intended the Constitution to function as a means for the advancement of an Aristotelian concept of human flourishing.<sup>91</sup> Both the Declaration of Independence and the Constitution are replete with ambitious language aimed at creating a prosperous and propitious society. The Declaration of Independence, for example, considered separation from Great Britain to be necessary under the “Laws of Nature” in order to build a new government “most likely to effect [the People’s] Safety and Happiness.”<sup>92</sup> Likewise, the preamble to the Constitution, penned thirteen years later, stressed the desire to form a “perfect Union,” to “establish Justice,” and to promote the “general Welfare” of the country’s citizens.<sup>93</sup> The framers’ inclusion of copyright protection in the foundation of the government should be viewed as neither accident nor convenience; its own aim rightly points in the direction of the even higher goal of promoting human flourishing.<sup>94</sup>

In her book *Greece, Rome, and the Bill of Rights*, Professor Susan Ford Wiltshire traced these ideas back to Ancient Greece, and to Aristotle in particular.<sup>95</sup> These natural law principles expressed by the framers, Wiltshire argued, reflect their search for human flourishing.<sup>96</sup> Justice Louis Brandeis also recognized the framers’ intentions in his concurring opinion in the 1927 case *Whitney v. California*:

Those who won our independence believed that *the final end of the state* was to make men free to develop

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<sup>91</sup> See *id.* at 281 (arguing that the legal theory embodied in the Constitution is built “on the norms of virtue”); see also Yen, *supra* note 24, at 522–29 (tracing the development of copyright law from Roman times to the present day).

<sup>92</sup> THE DECLARATION OF INDEPENDENCE para. 1, 2 (U.S. 1776).

<sup>93</sup> U.S. CONST. pmbl.

<sup>94</sup> The framers’ certain familiarity with Great Britain’s Statute of Anne—perhaps the world’s first piece of copyright legislation—suggests that the choice to forego the need for legislation and instead embed copyright protection into the government’s bedrock was a deliberate one. See Yen, *supra* note 24, at 527–29 (discussing the impact of the Statute of Anne on early American copyright theory).

<sup>95</sup> See generally WILTSHIRE, *supra* note 54.

<sup>96</sup> *Id.* at 184 (“When traced to their earliest origins, the [ideas and practices that formed the Bill of Rights] represent the yearnings of people over a period of two and a half millennia for better ways of living together and for civic arrangements that bring those hopes to reality . . . It was belief in natural law that undergirded the claims of the framers to the rights articulated in the first ten amendments.”).

their faculties, and that in its government the deliberative forces should prevail over the arbitrary. *They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.* They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>97</sup>

The Copyright Clause, as an indispensable element of the Constitution, is therefore best understood not as a means for the advancement of human knowledge alone, but as a means for building a government that can continue to improve the human condition.

#### *B. The Harmony of Positive and Natural Law*

The idea that federal copyright law is only meant to incentivize authors for its own sake ignores these crucial implications about human fulfillment and knowledge. This is not to say that there is no room for positivism in the law. Aristotle differentiated between positive law and natural law, but thought them both necessary.<sup>98</sup> In his terminology, certain rules are recognized not as the ultimate aim of the law, but as a means for achieving it.<sup>99</sup> These rules, which Aristotle called the *nomoi*, take the shape of positive laws that create the conditions for society to flourish.<sup>100</sup> Economic incentives and arguments for efficiency therefore have their place in a community striving to advance human flourishing.<sup>101</sup> It is not difficult

<sup>97</sup> 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

<sup>98</sup> SANDEL, *supra* note 9, at 188; WILTSHIRE, *supra* note 54, at 12 (“Thus, for Aristotle, natural law has an existence apart from the conventional or positive laws that human beings enact to deal with matters of every day justice.”).

<sup>99</sup> Gordley, *supra* note 13, at 291–92.

<sup>100</sup> *Id.*; see also Cimino, *supra* note 88, at 288, 292.

<sup>101</sup> See SANDEL, *supra* note 9, at 188; Gordley, *supra* note 13, at 291–92.

to imagine that the best way to achieve a given institution's *telos* is sometimes met through ideals of efficiency. The mistake is in thinking that efficiency is the only means by which to govern.

The beauty of an Aristotelian view of copyright law is that it not only incorporates positivism, but also some of the more consistent aspects of traditional copyright naturalism. For example, Aristotle's proportional distribution of goods according to what individuals deserve coincides with Locke's labor theory, by which individuals acquire property rights according to the effort—the contributions—they put into developing valuable social resources.<sup>102</sup> By harmonizing the positive and natural law as Aristotle does, one can properly understand copyright as an articulation of natural principles (the advancement of knowledge for the sake of human flourishing) to be carried out by positive law (through, for example, the Copyright Act and the judicial decisions that interpret it).<sup>103</sup> A means for the practice of virtuous thought, copyright is meant to serve as a guidepost on the path to social wisdom, enabling people to engage with one another intellectually in order to recognize and remedy unjust laws and cultural norms.<sup>104</sup> The next section of this Note considers how best to understand this harmony of natural and positive law and put it into practice.

### *C. Copyright Protection as a Means Toward an End*

Understanding copyright law as a harmony of natural and positive law only takes the argument so far. To understand how it is meant to promote human flourishing, it is necessary to first consider what copyright law is meant to protect. The Constitution's reference to "writings" has largely been understood to mean that copyright protects original artistic expression in a multitude of

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<sup>102</sup> See King, *supra* note 15, at 286 ("Differential treatment of similarly situated individuals is justifiable when the individuals deserve to be treated differently.").

<sup>103</sup> WILTSHIRE, *supra* note 54, at 184 ("For individuals to live together happily in communities requires a compromise between freedom and order. The Bill of Rights achieved this balance because of the two intellectual traditions that combined to give it birth: the natural law tradition, with its earliest origins among the Greeks, and the positive rule of law that is the gift of Rome."); see also Yen *supra* note 24, at 528 (concluding that copyright developed as a combination of natural law and economic principles).

<sup>104</sup> Leval, *supra* note 17, at 1109 ("The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society.").

forms.<sup>105</sup> Original expression in the case of a novel, for example, entails more than mere words on a page. Thus, the copyright in Albert Camus' *The Stranger* protects the physical copy of the book or the arrangement of words.<sup>106</sup> However, copyright ought to be seen as also protecting the idea for which the book stands—the dangers of apathy, perhaps—in exactly the way that Camus chose to express that idea.<sup>107</sup>

Copyright should be understood as protection not just for the physical expression but for the idea embodied in that particular expression.<sup>108</sup> Such protection has limits,<sup>109</sup> but the point is that only with such an understanding can the American copyright system promote the advancement of knowledge, as the framers intended. It is a purely practical matter: In order for an expressive work to contribute to social discourse, the idea's embodiment must be identified and protected. Commentary on, criticism for, and education of that idea is essential for the development of human understanding.<sup>110</sup> However, such commentary and criticism is only effective when that which is commented on is first clearly articulated and understood. Only then can those ideas be acted upon, modified, and enacted.

This explains why the United States has begun to recognize rights of integrity in copyrighted works that other countries have recognized for years. Copyright's protection of more than the words on a page, for example, is a relatively new concept in U.S.

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<sup>105</sup> See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (concluding that Congress has understood the copyright clause to grant protection for “the ideas in the mind of the author [which] are given visible expression”).

<sup>106</sup> See generally ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., Vintage Books 1989).

<sup>107</sup> Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 *LOY. L.A. ENT. L.J.* 509, 517–18 (1995) (“An original [work] is generally viewed as ‘the one and only perfect embodiment of that work which cannot be matched even by the best reproduction’ and thus is the only source of ‘complete artistic enjoyment.’”).

<sup>108</sup> *Id.* at 513 (pointing out that French courts, which borrow from similar natural law foundations in their own copyright jurisprudence, do not think of a work of art as simply an object, but as “an embodiment of its creator’s thoughts and personality”).

<sup>109</sup> See *infra* Section IV.E.

<sup>110</sup> Leval, *supra* note 17, at 1109 (“Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.”).

copyright jurisprudence. However, it is central to copyright systems throughout Europe.<sup>111</sup> Article 6bis of the Berne Convention, ratified by most of Europe and the United States,<sup>112</sup> provides protection to authors for the ideas embodied in their expressive works even after the copyright for those works has been transferred to another.<sup>113</sup> The United States ratified the Berne Convention in 1988<sup>114</sup> and, two years later, passed VARA, giving visual artists, among other things, the right to prevent any “distortion, mutilation, or modification” of their work.<sup>115</sup> Although the mechanism of VARA functions by focusing on the author’s “honor or reputation,” the right of integrity nevertheless provides the means by which the copyright system protects the ideas embodied in creative works for the sake of human flourishing.<sup>116</sup> Much like Aristotle argued that giving individuals a personal stake in the common good ensures proper care for the goods of the world,<sup>117</sup> the right of integrity carries the heart of copyright law in that it gives authors a personal stake in the dissemination and discussion of new ideas. Just as only the best flute players fulfill the purpose of the best flutes, the authors of original works are the best individuals to care for their works in ways that fulfill the purpose of greater collective understanding.

Some critics argue that intellectual property rights are not property rights at all.<sup>118</sup> The distinction is largely semantic, but it is

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<sup>111</sup> JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 449 (4th ed. 2015) (stating that moral rights are a “central and distinguishing feature of the continental European copyright tradition”).

<sup>112</sup> Reddy, *supra* note 107, at 519.

<sup>113</sup> Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, *revised at* Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention] (“Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”).

<sup>114</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>115</sup> Visual Artists Rights Act of 1990 § 603, 17 U.S.C. § 106A (2012).

<sup>116</sup> *See id.*

<sup>117</sup> *See supra* Section II.B.

<sup>118</sup> *See, e.g.,* PATRY, *supra* note 4, § 1:1 (“Copyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science.”).

worth noting that a right is a property right in so much as it is relational and exclusive: relational in that it dictates how individuals interact with one another,<sup>119</sup> and exclusive in that all property rights can be summarized simply as a right to exclude.<sup>120</sup> To illustrate the latter, the most commonly sought after remedy in copyright litigation is an injunction, which, in the realm of intangible property, is rightly akin to a prohibition against trespass.<sup>121</sup>

Whether it is called a property right or not, giving artists a personal stake in the advancement of knowledge is rightly viewed as an incentive to contribute. Lockean are therefore wrong to entirely dismiss the incentive argument. The key difference between this approach and the utilitarian approach is that the latter treats incentivization as both the means and the end of the copyright regime.<sup>122</sup> Utilitarians often ignore the existence of moral rights, such as the right of integrity, in their claims for expedience and efficiency (but never in their arguments for justice as an end of its own).<sup>123</sup> As Sandel explains, Aristotle's conclusion that the best flute players ought to play the best flutes goes beyond purely utilitarian perspec-

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<sup>119</sup> See Cunningham, *supra* note 36, at 4–5 (describing property rights as “a cluster of background rules that determine what resources each of us has when we come into relations with others and, no less important, what ‘having’ or ‘lacking’ a resource entails in our relations with these others” (internal citations omitted)).

<sup>120</sup> See generally Rich, *supra* note 83. See also Adam Mossoff, *Is Copyright Property?* 42 SAN DIEGO L. REV. 29, 41–42 (2005) (“In the context of tangible property rights, the courts have never demanded that a person be deprived physically of his property as a necessary prerequisite for finding a violation of property rights . . . it is sufficient that one lose the ability to use, control or dispose of the values that one has created. It is this concept of property that explains why copyright is in fact property, rather than monopoly privileges meted out to authors at the leisure of the state’s utility calculation.”).

<sup>121</sup> See Paul Edward Geller, *Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement*, 46 J. COPYRIGHT SOC’Y U.S.A. 39, 59 (1998) (differentiating between property remedies and liability remedies in copyright law).

<sup>122</sup> See PATRY, *supra* note 4, § 1:1.

<sup>123</sup> For example, William Patry argues in his introduction to the philosophical underpinnings of copyright that copyright is not a natural right but a tort created by statute. *Id.* Nowhere in his argument does Patry ask whether creating a statutory right is the right thing to do. See also Gordley, *supra* note 13, at 5; Yen, *supra* note 24, at 520 (“[C]opyright protects works whose creation does not depend on the economic incentive of copyright. In fact, courts frequently decide controversial copyright cases with no explicit consideration of the economic consequences. This implies that something besides economics influences copyright decisions.”).

tives, though it acknowledges their importance.<sup>124</sup> Similarly, the distribution of exclusive rights under the copyright regime must come from the purpose of the law to bring about justice. Only then is it possible to discuss efficiency: In this case, that means any incentive created by the copyright regime is only a means by which society encourages authors to create *and share* their works for the advancement of knowledge, which ultimately allows for human flourishing.

To many utilitarians, copyright is law only because it is recognized as such.<sup>125</sup> An Aristotelian natural law perspective, on the other hand, allows for positive instruments, while also accounting for the need to promote society's knowledge in the natural order of the world. In the words of James Madison: "The copy right [sic] of authors has been solemnly adjudged, in Great Britain, to be a right at common law . . . . The public good fully coincides . . . with the claims of individuals."<sup>126</sup> Courts are not tasked with balancing private interests against public benefit, as some suggest.<sup>127</sup> Rather, copyright law facilitates the perfect and natural combination of both single-handedly.

#### IV. CORE COPYRIGHT CONCEPTS

##### *A. Originality, Ideas, and Expression*

As discussed in Part I, a Lockean account of natural law cannot account for some of the most fundamental aspects of modern American copyright law, including the originality requirement and the idea/expression dichotomy. Because the teleological approach is not dependent on labor, there is no conflict in refusing to grant copyright protection to authors of unoriginal works even when they have invested significant labor into them. Society has no need for

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<sup>124</sup> SANDEL, *supra* note 9, at 188 ("But [it is] important to see that Aristotle's reason goes beyond this utilitarian consideration.").

<sup>125</sup> See, e.g., PATRY, *supra* note 4, § 1:1 (arguing that copyright is a "statutory tort, created by positive law").

<sup>126</sup> THE FEDERALIST NO. 43, at 288 (James Madison) (Jacob E. Cooke ed. 1961).

<sup>127</sup> See, e.g., *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1138 (9th Cir. 2015), *amended by* 815 F.3d 1145 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 416 (2016); Leval, *supra* note 17, at 1127.



unoriginal works in its pursuit of knowledge.<sup>128</sup> They deserve no protection, as they contribute nothing to intellectual enrichment.<sup>129</sup> Therefore, there is no reason to give authors a personal stake in ideas already understood and articulated, and every reason to hold others liable when they falsely claim to be the guardians of an idea advanced by another. In a society where resources are distributed according to what each individual deserves, she who contributes nothing to the ultimate goal of copyright protection receives none.

### B. *Fair Use*

Contemporary fair use jurisprudence provides the best example of how a teleological understanding of copyright promotes the progress of knowledge.<sup>130</sup> In fact, fair use is so crucial to the fulfillment of copyright's purpose that some courts have recognized that the fair use of another's copyrighted work is not merely a defense to copyright infringement, but a right inherent in the Copyright Act.<sup>131</sup> The doctrine is outlined in section 107 of the Copyright Act, which specifies that "the fair use of a copyrighted work . . . is not an infringement of copyright."<sup>132</sup> The section also states that a use is generally fair when it is made "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research,"<sup>133</sup> all of which contribute greatly to social discourse aimed at increasing collective knowledge.

The issue for fair users, of course, is determining whether the new work builds upon the idea embodied in the original work such

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<sup>128</sup> See Geller, *supra* note 121, at 64 (arguing that "[rote] copies feed nothing into communication networks").

<sup>129</sup> See Leval, *supra* note 17, at 1111 (arguing that a work that "merely repackages or republishes" is unlikely to serve copyright's goal of promoting the progress of science).

<sup>130</sup> See *id.* at 1110 (describing the fair use doctrine as a "necessary part of the overall design" of copyright).

<sup>131</sup> *Lenz*, 801 F.3d at 1133 ("Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse . . ."); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (arguing that fair use is better viewed not as an excused infringement, but as a right granted by the Copyright Act).

<sup>132</sup> 17 U.S.C. § 107 (2012). The Ninth Circuit has gone even further to say that the ability to make a fair use of another's work is an independent right of the user. See *Lenz*, 801 F.3d at 1133.

<sup>133</sup> § 107.

that it stands as a separate and original work expressing its own idea.<sup>134</sup> Judge Pierre Leval famously identified this so-called “transformative” tenet of fair use analysis as one that speaks directly to the purpose-driven approach to copyright.<sup>135</sup> Although the Copyright Act provides a four-factor test to assist in the determination of whether a use is fair,<sup>136</sup> the Supreme Court reinforced the importance of transformativeness in *Campbell v. Acuff-Rose Music, Inc.*, where it stated that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”<sup>137</sup>

Consider again *Cariou v. Prince*.<sup>138</sup> Richard Prince, an appropriation artist,<sup>139</sup> reused several of Patrick Cariou’s photographs taken over the course of six years that Cariou spent living with Rastafarians in Jamaica.<sup>140</sup> After making very slight alterations, Prince published them under his own name in New York art galleries.<sup>141</sup> In some instances, the court said, “Prince did little more than paint blue lozenges over the subject’s eyes and mouth, and paste a picture of a guitar over the subject’s body.”<sup>142</sup> Nevertheless, the Court of Appeals for the Second Circuit concluded that twenty-five of the thirty photos Prince appropriated were taken fairly.<sup>143</sup>

This decision cannot sit well with Lockeans who, with their reliance on labor, no doubt feel as if Cariou—who spent six years liv-

<sup>134</sup> Leval, *supra* note 17, at 1110 (“Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”).

<sup>135</sup> Although Judge Leval took a utilitarian perspective on this purpose, his view, as well as the view of other utilitarians, can be reconciled with the hybrid natural law approach presented here where the goal of copyright conditions society to achieve the higher order, naturalistic goal of human flourishing. *See supra* Part III.

<sup>136</sup> § 107.

<sup>137</sup> 510 U.S. 569, 579 (1994).

<sup>138</sup> 714 F.3d 694 (2d Cir. 2013).

<sup>139</sup> Appropriation art is “the practice of artists taking already existing objects and using them, with little alteration, in their own works.” Hannah Jane Parkinson, *Instagram, an Artist and the \$100,000 Selfies—Appropriation in the Digital Age*, *GUARDIAN* (July 18, 2015, 5:00 AM), <https://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies> [<https://perma.cc/F5RE-NRW4>].

<sup>140</sup> *Cariou*, 714 F.3d at 698.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 701.

<sup>143</sup> *Id.* at 698.

ing in Jamaica for the sake of his photography—unfairly lost out to another artist with more notoriety who added a modicum of paint to Cariou’s photographs.<sup>144</sup> By severing the reliance on labor and focusing on the true purpose of copyright to promote the progress of knowledge, however, one can come to terms with the Second Circuit’s conclusion: “Here, looking at the artworks and the photographs side-by-side, we conclude that Prince’s images, except for those we discuss separately below, have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou’s.”<sup>145</sup> Assuming that the Second Circuit was correct in its belief that Prince’s works contributed new ideas to the information marketplace, the court was right to find his use fair.<sup>146</sup>

The case of *Sega Enterprises Ltd. v. Accolade, Inc.* also illustrates how copyright law, through the fair use doctrine, serves to enhance collective knowledge.<sup>147</sup> There, the Ninth Circuit allowed a video game competitor to copy computer software in order to develop an industry standard.<sup>148</sup> Combined with the fact that the Ninth Circuit has recognized fair use as a distinct right in the Copyright Act, *Sega* demonstrates how American copyright law grants a right of fair use just as much as it grants the right to exclude—both for the sake of intellectual enrichment.

### C. *The First Sale Doctrine*

The first sale doctrine, which the Supreme Court recently discussed in *Kirtsaeng v. John Wiley & Sons, Inc.*,<sup>149</sup> is also compatible with the teleological approach to copyright. After Supap Kirtsaeng

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<sup>144</sup> See *id.* at 706 (“Where Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.”).

<sup>145</sup> *Id.* at 707–08.

<sup>146</sup> Prince has since taken his art steps closer toward unfair use on the back of his courtroom success. A recent gallery show portrayed Instagram photos taken by other photographers. This time, Prince’s only contributions were “esoteric, lewd, emoji-annotated comments made beneath the pictures.” Prince sold some of these photos for up to \$100,000. Parkinson, *supra* note 139.

<sup>147</sup> 977 F.2d 1510 (9th Cir. 1992).

<sup>148</sup> See *id.* at 1518; see also Geller, *supra* note 121, at 62.

<sup>149</sup> 133 S. Ct. 1351 (2013).

came to study at a U.S. university and encountered the exorbitantly high price of college textbooks, he began selling copies of textbooks purchased by his family at his hometown bookstore in Thailand.<sup>150</sup> Because the books were considerably cheaper in Thailand than in the United States, he captured the opportunity to make a significant profit by reselling them in the United States at a considerable discount, as compared to other retailers.<sup>151</sup> When the publishing companies got wind of this, they brought a lawsuit against Kirtsaeng, alleging infringement of their distribution right.<sup>152</sup> Kirtsaeng's success in the case may be surprising, especially to utilitarians who rely so heavily on economic incentives as the only rationale underlying copyright. His victory may also unnerve Lockean because the publishing company no doubt made larger investments (labor) in the sale of their textbooks than Kirtsaeng did.

Though it may not adequately capture either the utilitarian or Lockean philosophy, the Supreme Court's decision is perfectly aligned with a teleological perspective. The first sale doctrine, as articulated in the Copyright Act, provides that the owner of a particular copy of a copyrighted work is permitted to sell that copy even without permission from the copyright owner.<sup>153</sup> Although the question presented before the Supreme Court focused on whether the words "lawfully made under this title" place a geographical restriction on the first sale doctrine,<sup>154</sup> the Court emphasized that such a restriction cannot comport with the American copyright system and its aim to facilitate the advancement of knowledge.<sup>155</sup> Libraries, universities, art galleries, and other artistic and educational institutions rely heavily on the doctrine for the continued operation of their businesses.<sup>156</sup> Beyond mere practicality, though, such a restriction is unnecessary to protect the ideas embodied in text-

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<sup>150</sup> *Id.* at 1356.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1357.

<sup>153</sup> 17 U.S.C. § 109(a) (2012).

<sup>154</sup> *Kirtsaeng*, 133 S. Ct. at 1357.

<sup>155</sup> *Id.* at 1364–67; *see also id.* at 1358 (“We also doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities.”).

<sup>156</sup> *Id.* at 1364, 1366.

books.<sup>157</sup> By contrast, a decision based exclusively on economics would likely have been in favor of the publishing company, though such a conclusion would have entirely evaded the purpose of American copyright law. After all, the publishing company still retains a personal stake in curating the knowledge found within its printed pages. Furthermore, Kirtsaeng's conduct facilitated the purpose of copyright by allowing for easier and cheaper access to valuable information.<sup>158</sup> The only burden an unrestricted first sale bestows on a publisher is a forced reevaluation of its competitive edge in today's information economy.<sup>159</sup> Unlike the utilitarian and Lockean theories, a teleological account of copyright law presents little or no conflict with the modern application of the first sale doctrine.

#### *D. Transfers of Ownership*

The information economy puts special importance on understanding copyright ownership.<sup>160</sup> Reconciling the transfer of a given copyright with a teleological perspective is potentially problematic.<sup>161</sup> This Note suggests that private property rights are justified by the need to protect ideas embodied in artistic expression, and that such protection is best provided by granting said property rights to the originator of that expression. How then can an original author assign her copyright to another person or company and still fulfill her responsibilities as the guardian of the idea embodied in her work?

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<sup>157</sup> Admittedly, the final outcome for Kirtsaeng has yet to be decided. The Supreme Court's decision allows Kirtsaeng to invoke the defense that was denied by the district court. It has since been remanded to the district court. *See* *John Wiley & Sons, Inc. v. Kirtsaeng*, 713 F.3d 1142 (2013).

<sup>158</sup> *Kirtsaeng*, 133 S. Ct. at 1364–67 (discussing how a decision against Kirtsaeng would severely impact the practices of libraries, bookkeepers, museums, and other information retailers).

<sup>159</sup> *See id.* at 1365–66 (explaining how fair trade is fundamental to the copyright regime).

<sup>160</sup> *See* PEÑALVER & KATYAL, *supra* note 5, at 27 (“Accordingly, property rights and the social norms that accompany (and are often reinforced by) ownership play a vital role in ordering our interactions with other human beings.”).

<sup>161</sup> *See id.* at 29 (“As Abraham Bell and Gideon Parchomovsky have argued, ‘the institution of property is designed to create and defend the value that inheres in *stable* ownership.’” (quoting Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 551 (2005))).

One potential explanation can be found in moral rights. The Berne Convention recognizes, as other countries do, that copyright ought to protect more than the rights of reproduction, distribution, publication, and others listed in the Copyright Act.<sup>162</sup> Instead, copyright ought to protect the “integrity” of the work, which, as discussed, is where the idea embodied in the expression truly lies.<sup>163</sup> The answer for the Berne Convention, then, lies in the fact that the right of integrity cannot be assigned, waived, or otherwise transferred, even if the author’s other “economic” rights have been.<sup>164</sup> Though the United States did not initially buy into this facet of the Berne Convention, it later embraced it—albeit limitedly—when Congress passed VARA.<sup>165</sup> Like the Berne Convention, VARA specifies that certain authors shall have rights of attribution and integrity for their entire lives,<sup>166</sup> regardless of whether or not the other exclusive rights or copies of the works have been transferred,<sup>167</sup> though they can be waived.<sup>168</sup>

The distinction between the moral rights delineated in VARA and the six exclusive rights provided by the Copyright Act is instructive.<sup>169</sup> The former protects the work’s integrity—the heart of the idea embodied in the expression<sup>170</sup>—and the latter protects matters that are arguably ancillary, such as the right to control how, when, and if reproductions are made, distributed, modified, and so on.<sup>171</sup> Decisions about these issues are without a doubt important for protecting the work and its idea, but they can be made by anyone. Decisions about a work’s integrity, however, can only be made by the original author. The “economic” rights are less, in a word, integral to the overall purpose of copyright law and its aim to promote the progress of knowledge, which is perhaps why VARA re-

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<sup>162</sup> See *supra* Section III.B.

<sup>163</sup> See Reddy, *supra* note 107, at 514 (noting that the right of integrity is considered by many to be the most important moral right).

<sup>164</sup> Berne Convention, *supra* note 113, at art. 6bis.

<sup>165</sup> King, *supra* note 15, at 267–68 (noting that when the United States finally ratified the Berne Convention, it did not recognize moral rights).

<sup>166</sup> 17 U.S.C. § 106A(d) (2012).

<sup>167</sup> § 106A(e)(2).

<sup>168</sup> § 106A(e)(1).

<sup>169</sup> Compare 17 U.S.C. § 106 (2012), *with* § 106A.

<sup>170</sup> See § 106A.

<sup>171</sup> See § 106.

cognizes that moral rights are “independent” from the exclusive rights of the Copyright Act.<sup>172</sup> So long as authors retain the right to protect the work’s integrity, they ought to be free to assign their other rights to whomever they choose under a teleological framework.<sup>173</sup>

A transfer of copyright can therefore be consistent with the teleological view: Original creators would remain the guardians of the original ideas embodied in their work even after relinquishing their exclusive rights granted by the Copyright Act.<sup>174</sup> However, VARA only applies to certain artists—namely, those that create works of the visual arts.<sup>175</sup> Such an extreme limitation is curious, especially considering that the Berne Convention made no such restriction.<sup>176</sup> The United States ought to expand its protection of moral rights to reflect that of the Berne Convention, not just for the sake of fashioning a teleological justification of copyright, but simply because authors of literary works, works of the performing arts, and musical works, to name a few, also have an interest in protecting the integrity of their work.<sup>177</sup> Given their meaningful contributions to social education and understanding, there is no reason not to.

### *E. The Public Domain*

The growth of the online information economy has put new pressure on copyright laws. Advocates for a rich public domain argue that information, knowledge, and culture are locked up by the existence and expansion of copyright and other intellectual property laws.<sup>178</sup> Proponents of the “copyleft” movement argue for the

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<sup>172</sup> § 106A(a).

<sup>173</sup> See Reddy, *supra* note 107, at 514 (noting that “[i]n most nations utilizing this copyright system, artists can never transfer all of their interests in a given work”).

<sup>174</sup> See Wong, *supra* note 5, at 814 (“[R]estrictions on an author’s exclusive rights are permissible so long as they do not encroach on the personal link between the author, her creation and the necessary exploitation of such creations which assure that author’s ability to lead an autonomous life . . . .”)

<sup>175</sup> § 106A(b).

<sup>176</sup> Article 2 of the Berne Convention protects “literary and artistic works,” which includes “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression . . . .” Berne Convention, *supra* note 113, at art. 2.

<sup>177</sup> See generally ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009).

<sup>178</sup> See Cunningham, *supra* note 36, at 6.

total abolishment of the copyright regime on the ground that privatization effectuated by these exclusive rights prohibits certain individuals from participating in civil discourse.<sup>179</sup> Even under a utilitarian or Lockean theory, these “leftists” are mistaken. But they are especially incorrect under a teleological perspective.

Copyright laws do not lock up information; to the contrary, they set it free.<sup>180</sup> The whole purpose of copyright law, as discussed in this Note, is to promote the advancement of knowledge. What good would the system be if it locked up information? If there was any credible evidence suggesting that the progress of knowledge has somehow been impeded by the system designed to facilitate it, the system would have been abandoned long ago. But technological innovation and scientific understanding have grown exponentially over the last two hundred years—a period that coincides with the history of expansion of copyright and other intellectual property laws.

More importantly, leftists fail to recognize two important things. First, the protection of public domain materials is *literally* written into American copyright laws in several ways: fair use, the first sale doctrine, originality requirements, the idea/expression dichotomy, and term limits, among others.<sup>181</sup> These and other restrictions on the Copyright Act’s exclusive rights facilitate civic discourse for the general advancement of social understanding.<sup>182</sup> Second, although the law recognizes, just as Aristotle did, that society benefits from granting property rights to those individuals who will cultivate the goods over which they exercise dominion, the law also recognizes that there is no point in granting such ex-

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<sup>179</sup> See PEÑALVER & KATYAL, *supra* note 5, at 27 (“The isolating and disabling effects of *exclusion* from participation in a property system, however, mean that those on the outside looking in will often have few means to communicate their dissent beyond the simple act of taking or occupying.”).

<sup>180</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545–46 (1985) (“[C]opyright is intended to increase and not to impede the harvest of knowledge . . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”).

<sup>181</sup> See 17 U.S.C. § 107 (2012) (fair use); *id.* § 109 (first sale doctrine); *id.* § 102 (originality requirement and idea/expression dichotomy); *id.* §§ 301–305 (copyright duration).

<sup>182</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 288 (1996).



clusive rights if the social benefits are never realized. In the traditional sense, such goods were land and the natural world; today these goods are information commodities.

The movement for a complete public domain can be generally summarized as a refusal to pay for information that individuals consume. Leftists cannot reconcile the thought of information packaged and sold with their desire for an information utopia. The solution for them, then, lies not in abolishing copyright law, but in changing the way individuals think about and share information with the community. Perhaps information should be entirely free. But at what cost to its quality and availability?

### CONCLUSION

Whether a grand unifying theory of copyright is truly possible is admittedly questionable.<sup>183</sup> However, rebuilding copyright from the ground up with a teleological approach is not only consistent with the core principles that make up the majority of the regime's enforcement, it can also shed light on crucial questions that continue to arise as society becomes more and more technologically dependent. Much more needs to be discussed, including: (1) whether the inheritance of copyright by an original author's heir comports with the purpose of copyright,<sup>184</sup> (2) whether software and other computer programs are best served by the copyright system or perhaps better by the patent system,<sup>185</sup> (3) whether and, if so, how copyright claims should be used to thwart competition,<sup>186</sup> and (4) the role intermediaries (such as online service providers) should play in protecting the copyright of others.<sup>187</sup>

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<sup>183</sup> See PATRY, *supra* note 4, § 1:1.

<sup>184</sup> See generally Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefitting Transfers*, 119 W. VA. L. REV. 297 (2016).

<sup>185</sup> See generally Dennis S. Karjala, *The Relative Roles of Patent and Copyright in the Protection of Computer Programs*, 17 J. MARSHALL J. COMPUTER & INFO. L. 41 (1998).

<sup>186</sup> See generally Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899 (2007).

<sup>187</sup> For a discussion of this issue, see Joel R. Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1076 (2007), who wrote: "By defining the rules of access to and control of information, intellectual property rights create the demarcation lines in a networked society of economic, political, and social interactions." *Id.*

For now, it is enough to remember that the protection copyright provides not only gives owners their due but also facilitates a system for continuing greater social understanding and flourishing. That is, after all, what the artistic works protected by copyright ultimately aim to do. It is about time the law comes around to fulfilling that end.