Rethinking Copyright: Intellectual Property and Second-Personal Communication

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Abstract

The historical development of copyright has been compromised by a lack of clear and coherent justificatory principles. A set of these principles is required to assess the appropriateness of copyright’s dual expansion in duration and scope. Whereas copyright was once limited to a term of 14 years, it now persists for the lifetime of an author plus 70 years. Similarly, whereas copyright once applied uniquely to the printed word, it now applies to maps, charts, music, photography, choreography, sculpture, software, and more. Previously, attempts to assess how long copyright should last, and attempts to assess which objects copyright ought to apply to, have been conducted largely independently. In this thesis I consider both questions in conjunction, arguing that resolving the problem of copyright’s scope, by determining which objects should be copyrightable (and why), is a necessary precursor in determining what protections (and what duration of protection) those objects should receive.

In this way I attempt to resolve the central tension between utilitarian economic accounts and deontological natural law accounts of copyright. Utilitarian economic accounts consider that copyright is justified precisely insofar as it incentivises the production of socially valuable copyrightable works, by providing monopoly rights that prevent free-riders from driving down the value of those works as commodities. Because copyright involves a restriction against the free use of socially valuable objects, however, on this view the duration of copyright should be restricted to the shortest term that still preserves its initial incentivising effect. By comparison, the deontological view regards copyright as a natural entitlement due to creators for the labour they perform. On this view, copyright protections should be perpetual, just the same as any other natural property rights which arise from labour.

I demonstrate through an assessment of the Lockeian labour theory of property that the natural law account cannot sustain a justification of perpetual economic copyright. However, an account of droits moral – or authors’ moral rights – is examined as a basis for the provision of perpetual copyright. Although it is appropriate to regard moral rights as perpetual rights, and despite moral rights intersecting importantly with economic copyright protections, it is shown that moral rights are not economic rights. Additionally, although moral rights legislation is indexed as a subsection of copyright law, it is also shown that most moral rights apply equally to uncopyrightable objects. Only one moral right, which is the right protecting authors against the modification of
their work, correctly applies uniquely to copyrightable objects. It is shown that this is because correctly copyrightable objects are second-personally communicative, which makes it uniquely important that they are preserved as a specific author’s exact communication. It is argued this second-personal communicative quality should be recognised as the defining feature of copyrightable objects, and so ought to inform copyright’s scope. This requires a recategorization of what objects are copyrightable. Because second-personal communicativeness represents the only natural difference between correctly copyrightable and uncopyrightable objects, however, the duration of economic copyright must continue to be determined as an empirical matter of incentivisation.
Acknowledgements

I owe a great debt to Dr. David Neil and Dr. Patrick McGivern for supervising this thesis. The direction they provided, and the support they offered, were both invaluable throughout the research process. Without that underpinning, this project would not have been possible.

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The argument advanced within the thesis was also fundamentally informed by two anonymous reviewers, whose criticisms of an early version of the account shaped the overall direction of the thesis. Furthermore, the account has been refined based on the insightful considerations offered by various conference audiences, especially at the Australasian Association of Philosophy annual conferences. These contributions have been greatly appreciated.

Finally, I owe a special thanks to Katherine Berthon, whose support and inspiration has been integral to the completion of the thesis. Your persistent encouragement has always buoyed me, and your confidence has changed what seems possible to me. Thank you, especially, for your patience.
Certification

I, James McKeahnie, declare that this thesis submitted in fulfilment of the requirements for the conferral of the degree Doctor of Philosophy, from the University of Wollongong, is wholly my own work unless otherwise references or acknowledged. This document has not been submitted for qualifications at any other academic institution.

James McKeahnie
31st March 2018
List of Names or Abbreviations

IP = Intellectual Property
NPG = Nature Publishing Group
VARA = Visual Artists Rights Act
WIPO = World Intellectual Property Organisation
# Table of Contents

Abstract ................................................................................................................................. i
Acknowledgements .............................................................................................................. iii
Certification ........................................................................................................................... iv
List of Names or Abbreviations ............................................................................................. v
Table of Contents .................................................................................................................. vi
List of Tables, Figures and Illustrations .................................................................................. xi
Chapter 1 ................................................................................................................................. 1
  Structure of the Argument: The Dual Expansion of Copyright ........................................... 1
    1.1 Introduction .................................................................................................................... 1
    1.2 Outline of the Thesis ..................................................................................................... 2
      1.2.1 Duration Problem: An Economic Approach ......................................................... 2
      1.2.2 Duration Problem: A Philosophical Approach ...................................................... 3
      1.2.3 The Scope Problem ............................................................................................... 5
    1.3 A Visual Representation of the Argument ...................................................................... 7
      Diagram 1.1 ..................................................................................................................... 9
      Diagram 1.2 .................................................................................................................... 10
      Diagram 1.3 ................................................................................................................... 11
      Diagram 1.4 ................................................................................................................... 12
Chapter 2 ................................................................................................................................. 13
  The History of Copyright ..................................................................................................... 13
    2.1 Introduction .................................................................................................................. 13
    2.2 Unprincipled Beginnings .............................................................................................. 14
      2.2.1 Livery Companies and the Invention of Printing .................................................. 14
      2.2.2 Growing Dissatisfaction ....................................................................................... 16
    2.3 Ad Hoc Continuation .................................................................................................... 18
      2.3.1 Statute of Anne, 1710 ............................................................................................ 18
      2.3.2 Appeal to Natural Law ......................................................................................... 20
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.3.2</td>
<td>‘As Good and As Much’ Proviso</td>
<td>74</td>
</tr>
<tr>
<td>4.3.3</td>
<td>The Comparable Exhaustibility of Tangible and Intangible Objects</td>
<td>75</td>
</tr>
<tr>
<td>4.3.4</td>
<td>The Link Between Scarcity and Commodification</td>
<td>79</td>
</tr>
<tr>
<td>4.3.5</td>
<td>Alternative Accounts in Lockean IP Literature</td>
<td>81</td>
</tr>
<tr>
<td>4.4</td>
<td>A Positive Normative Account Via Locke</td>
<td>84</td>
</tr>
<tr>
<td>4.4.1</td>
<td>Natural Limitation on Monopolies</td>
<td>84</td>
</tr>
<tr>
<td>4.4.2</td>
<td>Copyright via Social Contracting</td>
<td>85</td>
</tr>
<tr>
<td>4.4.3</td>
<td>The Social Importance of Production and Reproduction</td>
<td>87</td>
</tr>
<tr>
<td>4.4.4</td>
<td>Only Conventional Copyright</td>
<td>90</td>
</tr>
<tr>
<td>4.5</td>
<td>Conclusion</td>
<td>92</td>
</tr>
</tbody>
</table>

Chapter 5: Moral Rights: A Natural Law Component of Copyright .......... 93

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>93</td>
</tr>
<tr>
<td>5.2</td>
<td>Moral Rights Are Not Property Rights</td>
<td>94</td>
</tr>
<tr>
<td>5.2.1</td>
<td>The Case of Nature Publishing Group</td>
<td>94</td>
</tr>
<tr>
<td>5.2.2</td>
<td>The False Reduction of Deception to Theft</td>
<td>96</td>
</tr>
<tr>
<td>5.2.3</td>
<td>Deception offences are natural offences</td>
<td>99</td>
</tr>
<tr>
<td>5.2.4</td>
<td>NPG’s Response</td>
<td>100</td>
</tr>
<tr>
<td>5.2.5</td>
<td>Moral Rights are Natural, Perpetual, and Inalienable</td>
<td>102</td>
</tr>
<tr>
<td>5.3</td>
<td>There are No Natural Economic Rights Unique to Copyright</td>
<td>103</td>
</tr>
<tr>
<td>5.4</td>
<td>Conclusion</td>
<td>105</td>
</tr>
</tbody>
</table>

Chapter 6: A Non-Physical Basis Is Required for Determining Copyright Eligibility 106

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1</td>
<td>Introduction</td>
<td>106</td>
</tr>
<tr>
<td>6.2</td>
<td>The Historical Entrenchment of Physical-Centric Copyright</td>
<td>109</td>
</tr>
<tr>
<td>6.2.1</td>
<td>Understanding ‘Romantic Authorship’</td>
<td>112</td>
</tr>
<tr>
<td>6.3</td>
<td>The Inadequacy of a Physical Basis in <em>Baker v Selden (1879)</em></td>
<td>113</td>
</tr>
<tr>
<td>6.3.1</td>
<td>The Idea-Expression Divide</td>
<td>115</td>
</tr>
<tr>
<td>6.3.2</td>
<td>‘Expressions’ and ‘Ideas’ as Strictly Legal Artefacts</td>
<td>116</td>
</tr>
</tbody>
</table>
6.4 The Lack of a Positive Account ................................................................. 117
6.4.1 The Technical-Ornamental distinction ................................................. 118
6.4.2 A Consistent Physicalist Formulation of Copyright .................... 122
6.4.3 Preliminary Qualities of a Non-Physicalist Account ................... 124
6.5 Conclusion ................................................................................................. 124

Chapter 7 ........................................................................................................ 126
A Non-Physical Basis for the Copyright-Patent Divide ....................... 126
7.1 Introduction .................................................................................................. 126
7.2 The Equivalence of Labour Accounts and Object Accounts ........ 128
7.3 Intuitive (Non-Physical) Bases for the Copyright-Patent Divide ...... 132
7.3.1 Communicative vs Useful objects ......................................................... 132
7.3.2 Uniqueness vs Multiple Realizability .................................................. 133
7.3.3 Non-Modifiability vs Modifiability ....................................................... 136
7.4 Second Personal Communicativeness ..................................................... 139
7.5 The Second-Personal Principle in Action .............................................. 145
7.5.1 Maps .................................................................................................... 145
7.5.2 Instruction manuals ............................................................................. 146
7.5.3 One Million Random Digits ................................................................. 147
7.5.4 Computer Code and Software ............................................................. 148
7.5.5 Rube Goldberg Machines ................................................................. 150
7.5.6 Selden’s Description of His Bookkeeping System ......................... 151
7.6 Anonymous and Pseudonymous Works ............................................. 152
7.7 Conclusion .................................................................................................. 155

Chapter 8 ........................................................................................................ 156
Appropriate Copyright Protections Derived from Second-Personal
Communicativeness ...................................................................................... 156
8.1 Introduction .................................................................................................. 156
8.2 Refining an Account of Moral Rights ..................................................... 157
8.2.1 The Problem of ‘Honour and Reputation’ ....................................... 159
8.2.2 Domestic Moral Rights Legislation in the United States of America

8.2.3 Inadequate Duration of Moral Rights Under the Berne Convention

8.2.4 Moral rights for non-copyrightable objects

8.3 Non-Modifiability as a Moral Right Unique to Copyright

8.3.1 Offence Against Third Parties

8.3.2 Modification of a Work vs Creation of Derivative Works

8.4 Implications for the Implementation of Copyright law

8.5 Conclusion

Chapter 9

9.1 Introduction

9.2 A Paradox of Motivations and Principles

9.3 Failure of Natural Law in Economic Copyright

9.4 Inadequacy of the Social Utility Account

9.4.1 Indistinct Copyright

9.4.2 Indexation to the Author’s Life

9.5 Statutory Economic Rights are Correct, but not Complete

9.6 Moral Rights Compliment and Complete the Economic Account

9.6.1 Intuitive Personal Gap

9.6.2 Distinct Copyright

9.7 Radical Redefinition of the Scope of Copyright

9.8 Appropriate Provisions Under a Just Conception of Copyright

Bibliography
List of Tables, Figures and Illustrations

Diagram 1.1 ..............................................................9
Diagram 1.2 ..............................................................10
Diagram 1.3 ..............................................................11
Diagram 1.4 ..............................................................12
Chapter 1

Structure of the Argument: The Dual Expansion of Copyright

1.1 Introduction

This thesis is primarily concerned with two problems relating to the implementation of copyright:

1) The Duration Problem: What is an appropriate duration for copyright?
2) The Scope Problem: Which objects should qualify for copyright protection?

A central claim of the thesis is that the Duration Problem cannot be adequately resolved independent of the Scope Problem. This is because there is a deep connection between the question of duration and the question of scope that has not been adequately recognised. Specifically, what kinds of objects copyright protects ought to inform the protections that copyright confers; and the nature of the protections copyright confers ought to inform the duration of those protections.

Existing approaches to these problems are typically inconsistent. The question of copyright’s duration is widely understood to be of central importance to justificatory accounts of copyright. This acknowledged centrality motivates universal accounts founded on basic primary principles (drawn from political philosophy and meta-ethics), which are intended to sustain holistic responses to the issue. By contrast, the issue of determining which objects ought to attract copyright protection is often treated as a problem of peripheral cases. That is, the appropriateness of copyright is typically taken for granted in relation to what might be called the ‘core domains’ of copyright (e.g. books, music, and visual art), while any cases where the appropriateness of copyright is either contested or unobvious (e.g. software and computer code) are treated as unique problem cases requiring individuated, industry-specific solutions.

I argue that treating the scope problem as a problem of peripheral cases is inadequate. This is because determining the copyrightability of different objects in a piecemeal manner, rather than by appeal to a single principle that can be universalised across all objects, fails to establish a consistent and coherent account of what copyright fundamentally ought to be protecting. Moreover, without a coherent understanding of what copyright protects, it is
impossible to determine what provisions (and what duration of provision) it is necessary to provide by way of copyright protection.

A universalised solution to the problem of scope is required, and this forms the novel contribution made in the latter portion of the thesis (from Chapter 5 onward). The account provided suggests that copyrightability ought to be determined based on whether an object is a second-personal communication. This account is useful in two ways. First, it provides a general principle for determining whether any given object should be copyrightable. Second, it is instrumentally useful in informing solutions to the problem of copyright’s duration. The account ultimately reveals the need for a radically less expansive version of copyright, which should extend to fewer objects and provide shorter periods of economic protection. At the same time, however, defining copyrightability on the basis of second-personal communicativeness is shown to require a more expansive protection of authors’ personal non-economic rights.

1.2 Outline of the Thesis

This thesis begins with a detailed historical examination of the introduction and development of copyright in Great Britain and the United States. This investigation is important to the philosophical project because numerous problems which arise in relation the duration and scope problems have their origins in copyright’s earliest implementation. Even challenges relating to modern objects like computer software cannot be effectively diagnosed without reference to the origin and incremental expansion of copyright.

In the early Eighteenth Century, the duration of copyright was 14 years. Today, copyright lasts for the lifetime of the author, and an additional 70 years. Chapter 2 provides a detailed historical account of the incremental expansion of copyright, which has culminated in the present term of protection. Whether the modern duration of copyright provides adequate, inadequate, or exorbitant protection is contested in scholarship, policy, and popular discourse. This contestation takes two main forms: one economic and one philosophical.

1.2.1 Duration Problem: An Economic Approach

As an economic question, determining an appropriate duration for copyright is approached as a utility maximising task. At the heart of this task sits a collective action problem that hampers the realisation of utility. That is, the initial labour cost that must be outlaid to produce a creative object can be very high, whereas the labour cost required to subsequently
copy such an object is usually quite low. This acts as a deterrent to original creation, since there is a threat that freeloaders may copy original creations at little cost to themselves – thereby driving down market values to the point that original creators are unable to realise a worthwhile return on their labour. This deterrent incurs a steep social utility cost, since it decreases the likelihood of socially valuable objects being created.

The standard economic response to this problem is the introduction of statutory monopoly rights – copyrights – that provide an exclusive opportunity for original creators to realise a return on investment, sans the threat of competition by freeloaders. From this perspective the question then becomes: how long should such monopolies last in order to maximise utility? Although copyright monopolies may be accepted as necessary to overcome a socially costly freeloader problem, artificially sustaining higher market values limits access to these useful objects, and so incurs its own social utility cost. For any given creative object, then, the problem of appropriate copyright duration comes down to determining the shortest monopoly term that would still be sufficient to incentivise the object’s original creation. The standard economic view is that after this sufficient period of monopoly, creative objects should be freely subject to copying, to maximise society’s access to the utility those objects provide.

1.2.2 Duration Problem: A Philosophical Approach

The philosophical problem of copyright’s duration is logically prior to the economic problem. This is because the fundamental philosophical question is whether the economic question, represents a justifiable framework in the first place. Numerous critics object to the reduction of the duration problem to a utilitarian economic question, and instead assert that the conception of copyright as a mere economic tool is mistaken. Such critics propose deontological accounts of natural property – which they take to extend to intellectual property – and insist that natural law property rights (including copyright) cannot be justly limited by statute. On this view, the fixing of copyright to any limited term, for the purpose of allowing freeloaders to drive down market values and thereby increase social supply, amounts to an attack on individual liberties for the benefit of undeserving opportunists.

Although this thesis does not contend directly with the economic question, the philosophical account presented in the first portion (particularly Chapters 3 and 4) largely endorses the utilitarian economic framework as the correct approach to determining appropriate copyright durations. That framework often delivers economic accounts which recommend copyright terms of between 15 to 25 years; but I remain agnostic regarding
copyright’s precise duration, and no account presented here is contingent on that determination. Instead, the view presented here is simply that, contrary to natural law accounts of copyright, it is correct to regard economic copyright as a purely statutory artefact, justified solely by its provision of utilitarian value. I affirm that economic copyright protections should endure for whatever term of years shall maximise copyright’s utility – as determined by good, empirical economic analysis.

In objecting to natural law accounts of intellectual property, some charity is required. This is because natural desert arguments for extensive (and even perpetual) copyright durations frequently take the form of naïve appeals to labour. Often, natural rights proponents draw a comparison between copyright and the (perpetual) property rights that are established in relation to physical property. However, such comparisons are typically based on a flawed understanding of pre-existing labour accounts of the origin of property. Rather than respond directly to these simplistic and underdeveloped arguments, I consider whether a labour account of property (in particular Lockean accounts) can provide a basis for intellectual property.

To this end, I demonstrate in Chapter 3 that otherwise-underdeveloped natural law accounts of copyright, insofar as they appeal to notions of desert arising from labour, are implicitly established in the tradition of Lockean property theory. That is, the essential features of naïve accounts of natural copyright are also found (but better expressed) in Locke’s labour account of property. Moreover, given the historical success and influence of Lockean property theory in relation to property law in the West, situating naïve accounts of copyright within the Lockean tradition is defensible in that it is charitable. Such a conception preserves the core components of naïve accounts of copyright (i.e. labour; desert; and naturally perpetual proprietorship) in a way that is compatible with a standard account of traditional property.

Proceeding on this basis, then, the case against natural law copyright is made by demonstrating its incompatibility with fundamental tenets of Lockean theory. I show that, due to the intangible nature of intellectual objects (over which copyright exclusively extends), two of the fundamental limitations Locke placed on property acquisition (i.e. the ‘Lockean provisos’) entirely preclude a natural law basis for economic copyright. In addition, I demonstrate that Locke’s social contracting theory is compatible with a statutory system of copyright – so long as it achieves an adequately utilitarian end.
1.2.3 The Scope Problem

Although the account developed in Chapters 3 and 4 provides a novel refutation of natural law responses to the duration problem of copyright, there are components of copyright which do have a legitimate basis in natural law. These must be given due consideration, as it is important to positively establish their natural basis and to clearly distinguish them from copyright’s strictly statutory components. In providing this consideration, however, the question of copyright’s scope naturally arises.

If the only point of difference between copyright and other IP regimes was the duration of the protections it offers, then the account provided in Chapters 3 and 4 would reasonably raise doubts as to copyright’s overall necessity. Given that the standard justifications for patent regimes are utilitarian, it would seem as though the institutions of copyright and patent could be merged. In addition to the prevailing difference of duration, however, there are presently three critical points of distinction between the two regimes. These differences are:

1) The process through which protection is awarded;
2) The applicability of moral rights; and
3) Which objects are eligible for protection

Beginning in Chapter 6, I argue that each of these components is naturally related.

Summarising the first two of these differences is quite straightforward. To the first point, copyright applies automatically upon the publication of an eligible object, while patent protection requires the formal lodgement and assessment of an application. To the second point, the legal concept of ‘moral rights’ applies explicitly in relation to copyright law, but does not apply explicitly in relation to patent law.

By comparison, however, the third point of difference is not easy to quantify. Trivially, the scope of copyright can be taken to extend to ‘artistic’ works, while the scope of patent is taken to be limited to inventions. However, while this provides something of an intuitive difference, supplying a normative articulation of the distinction is exceedingly difficult. Even a descriptive account of this difference proves challenging, since numerous unintuitive counter-examples arise. For instance, it is natural to doubt the ‘artistic’ qualities of reference books or instruction manuals. Indeed, the copyright eligibility of such objects has previously been challenged at law.

Together, Chapters 6, 7 and 8 construct a normative account of the distinct scope of
copyright. This account locates a natural reason for copyright existing independent of patent regimes. Historically, copyrightable objects have been defined in terms of physical media: books, sheet music, records, film, and so on. The account developed here, however, rejects the idea that copyright eligibility ought to be determined based on an object’s physical medium. Rather than endorse the categorisation of classes such as ‘writings,’ ‘books,’ ‘music,’ or ‘film’ as copyrightable, I argue that copyright should be extended exclusively to a specific subgroup of communicative objects. I show that the historical development of modern copyright – from its origins as a response to the invention of the printing press – has led to the understandable but mistaken methodology of categorising objects as copyrightable by medium. This is understandable insofar as objects like novels, music, and films are typically understood to have a unique quality that intuitively separates them from the class of inventions. This unique quality is communicativeness. An object’s physical medium, however, is a mistaken basis for determining copyright eligibility, because it does not closely enough track the kind of communicative action that requires the unique protection of copyright. Even intuitively, there is a substantive difference between a novel (the archetype copyrightable object) and reference manuals. Although each of these objects is written, and each communicates information, these should not both be categorised as copyrightable. There is something unique about the communicative quality of novels that is not shared by reference books, and copyright’s scope is correctly directed when it tracks that unique quality.

The quality which ought to determine copyright eligibility is second-personal communicativeness. A full account of second-personal communication is provided in Chapter 7, but it suffices for now to say that second-personal communications are speech acts which, to be interpreted correctly and meaningfully, must be contextualised as a product of a particular speaker (whether a de re or de dicto authorial identity is established). Not only does tying copyright eligibility to this quality preserve what is intuitive in establishing copyright as a unique system of protections, it also brings together the two other unique components of copyright protection in a rational and cohesive way. I show that the relevance of moral rights, and the automatic qualification for copyright, correctly pertain to and reflect the second-personal communicativeness of justifiably copyrightable objects.

Although it is shown that moral rights hold a special relevance in relation to copyright, existing conceptualisations and implementations of moral rights are also shown to be flawed. This is for two reasons. First, moral rights are typically regarded as individualistic rights which serve the specific purpose of protecting authors (usually by safeguarding their
honour and reputation against the effects of inaccurate attribution). Although that is indeed an important function of moral rights legislation, such an account is nevertheless incorrect insofar as audiences also have an important interest in the preservation of accurate attribution. The force of this error is compounded by the mis-categorisation of moral rights as a subset of intellectual property rights (which are personal rights), when moral rights legislation correctly protects against deception offences rather than property offences.

Second, the prevailing implementation of moral rights legislation reveals a conceptual confusion in that moral rights are only legislated explicitly in relation to copyright. By comparison, most moral rights that are legislated for in connection with copyright are equally applicable in relation to uncopyrightable objects. Regardless of the nature of the labour one conducts – whether it is artistic, inventive, or menially productive – it is always equally appropriate to expect the correct attribution of one’s labour to oneself to be maintained. The only appropriately unique moral right, which should apply specifically in connection to copyrightable objects, is the right to preclude others from altering a copyrightable work even if they become the economic proprietor of the object.

### 1.3 A Visual Representation of the Argument

The argument outlined above contains numerous components that are complexly interconnected. One challenge that this presents is that it is difficult to adequately convey the multiplicity of those interconnections within a linear textual structure. Although direct references to logically related but non-adjacent sections are made regularly throughout the thesis, a diagrammatic representation of the structure has also been included below. This diagram is presented in four parts. Diagram 1.1 functions as a visual representation of the diagnostic account represented in this chapter. It depicts the traditional treatment of the duration and scope problems of copyright as independent issues, but also conveys why those components must ultimately converge if a holistic account of copyright is to be achieved.

Diagrams 1.2 and 1.3 represent most of the content in the thesis. These diagrams are colour coded, such that each of them corresponds with a similarly coloured component within Diagram 1.1. In this way, Diagram 1.2 represents an extended consideration of the possibility (posited in Diagram 1.1) that a “natural rights basis for copyright exists” which “could be shown to supersede” the utilitarian justification of proprietary copyright provisions. The conclusion reflected in Diagram 1.2 – that natural limitations against monopolies prevent a natural law account of IP from superseding a consequentialist
conception of IP as strictly statutory – can therefore be understood to justify the redirection of the ‘philosophical’ approach to the duration problem into an ‘economic’ consideration of the same problem (in Diagram 1.1).

Similarly, Diagram 1.3 should be understood to represent an expanded excerpt of the corresponding element in Diagram 1.1. That is, Diagram 1.3 represents the development of an account of what objects copyright ought to protect (and why), culminating in the conclusion that an essential natural rights component does exist in relation to copyright. Again, this can be seen to justify the progression represented on Diagram 1.1, in that it follows from the conclusion of Diagram 1.2 that the two main arms of Diagram 1.1 (i.e. the ‘duration’ and ‘scope’ arms) must ultimately be shown to intersect.

Finally, Diagram 1.4 summarises the positive account developed over the course of the thesis in response to the diagnosis of the duration and scope problems established in this chapter. Diagram 1.4 thereby reflects the positive account that is developed over the course of the thesis, as that positive account is ultimately summarised in Chapter 9. Throughout the diagrams, reference markers (to Chapter and Section) are included to indicate where each component of the argument is advanced within the thesis.
Diagram 1.1

DURATION PROBLEM
The problem of how long copyright protection should last.

SCOPE PROBLEM
The problem of which objects ought to receive copyright protection.

APPROACHES
The duration problem is approached in two separate ways.

ECONOMIC
Treat the problem of copyright duration as a utility problem.

PHILOSOPHICAL
- Ask the meta-ethical question of whether there is a natural basis for the provision of copyright.
- If a natural rights basis for copyright exists, this could be shown to supersede the economic approach. (See Figure 1.2)
- Without a principled account of what copyright is and should cover, it is impossible to know which (if any) of its protections are natural rights. (See Figure 1.3)
- e.g. It fails to ask the meta-ethical questions of whether there is a natural basis for the provision of copyright.

INTERCONNECTED
There is a profound interconnectedness between the duration problem and scope problem. Until the scope problem receives systematic consideration, responses to the question of duration shall remain inadequate.

DIAGNOSTIC ACCOUNT:
There are well documented problems which arise in relation to copyright. These can be separated into problems of two kinds.

APPROACH
The scope problem is typically addressed only in relation to peripheral ‘problem’ cases like software and computer code. The core domains of copyright (books, music, film, etc.) are assumed to be appropriate.

This amounts to a failure to systematically address what copyright is.

POSITIVE ACCOUNT
(See Figure 1.4)
Diagram 1.2
Diagram 1.3

THE ORIGINS OF COPYRIGHT’S SCOPE:
No adequate, principled account of copyright’s scope has been consistently applied. The historical development of copyright has been largely ad hoc.

PROBLEM:

UNPRINCIPLED BEGINNINGS
The earliest British copyright was not implemented to fulfill any of the functions that copyright is intended to serve today. (6.2)

AD HOC CONTINUATION
Under that system publishers became economically dependent on monopolies, and so were motivated to argue for copyright’s continuance (in the form they were used to). (6.2)

MATERIAL MEDIUM
This set off a tradition of determining copyright eligibility by medium. To secure the status quo, anything printed (i.e. which came off a press) was considered copyrightable. (6.2)

ATTEMPTED SOLUTION:

RECOGNITION AT LAW
British and U.S. Courts have recognized and contended with uninituitive cases arising from the strict application of medium-based determinations of copyright eligibility. (6.3)

IDEA-EXPRESSION DIVIDE
The most prominent proposed solution to uninituitive cases involves drawing a (comcomparative) distinction between an idea and an expression of an idea. The law presently holds that only the latter can be copyrightable. (6.3.1)

FAILURE TO UNIVERSEALISE
While the idea-expression distinction may help to solve uninituitive cases, the application of the principle to otherwise standard cases would require a radical reformulation of the way copyright is enforced. (6.4.1)

PRINCIPLED SOLUTION:

COMMUNICATIVE OBJECTS
The non-physical quality that defines copyrightable objects is their communicativeness. (7.3.1)

2ND PERSONAL COMMUNICATIVE
However, not all communicative objects ought to be copyrightable. Only those communicative objects which must be interpreted as the product of a specific authorial identity should be eligible. (7.4)

MORAL RIGHTS
They are often overlooked, but certain IP moral rights track and protect precisely the second communicative quality that defines correctly copyrightable objects. (5.1)

MORAL RIGHTS ≠ PROPERTY RIGHTS
Moral rights protect against fraud, not theft. They intersect with and limit property rights, but they are not themselves economic rights. (5.2)

THERE ARE NO NATURAL ECONOMIC RIGHTS UNIQUE TO COPYRIGHT
THE DEFINING MORAL RIGHT UNIQUE TO COPYRIGHT IS THE RIGHT AGAINST MODIFICATION

ECONOMIC COPYRIGHT IS STATUTORY
Moral rights provide no avenue for the provision of economic copyright protections. These must remain attributable to the utility concerns of the economic approach to the duration problem.

LIMITED BY NATURAL LAW
The natural, perpetual, and inalienable qualities of moral rights mean that they strictly limit what economic rights can be established via statute.

CONJUNCTION:
Moral rights do not provide an avenue towards the provision of natural economic copyright protections, but they do place natural limits on what statutory economic protections can be established via Social Contract.
Diagram 1.4

1) ECONOMIC RIGHTS

POSITIVE ACCOUNT:
There are two constitutive components which must inform the structure of any just copyright regime.

Copyright’s economic consequences are highly contingent on its duration. Recognition of this contingency motivates contestation about what duration is appropriate.

MOTIVATIONAL PARADOX
Motivated to establish lengthy and profitable copyright terms, proponents have argued for the initial indexation of copyright to the duration of an author’s life. In doing so, proponents explicitly eschew appeals to consider the economic consequences, and rely instead to a notion of natural deontic rights.

FAILURE OF NATURAL LAW
Natural law accounts which establish deontic property rights in relation to tangible objects cannot establish similar rights in relation to intangible objects.

INADEQUACY OF THE ECONOMIC CONSEQUENTIALIST ACCOUNT
Despite being the only apparent alternative to the failed natural law accounts, the consequentialist account is unsatisfactory.

INDISTINCT COPYRIGHT
Under a pure economic account, there is no apparent reason to keep copyright and patent regimes distinct.

STATUTORY ECONOMIC RIGHTS - CORRECT, BUT NOT COMPLETE

2) MORAL RIGHTS

Moral Rights Compliment and Complete the Economic Account

INTUITIVE GAP

DISTINCT COPYRIGHT

MORAL RIGHTS ARE NATURAL DEONTIC RIGHTS
Moral Rights are natural rights, and some MRs provide intentionally personal protections that relate to reputation. The duration of an author’s life therefore presents an intuitive basis for establishing minimum durations for certain MRs (Cf. defamation protections, which only extend to the living).

THE RIGHT OF FIDELITY IS UNIQUE TO CORRECTLY COPYRIGHTABLE OBJECTS
Moral Rights that guarantee attribution apply to the products of all labour. However, the protection against the after-sale alteration of objects is justifiably unique to copyright. This is because that protection is indexed to the second-personal communicative quality of correctly copyrightable objects.

RADICAL REDEFINITION OF THE SCOPE OF COPYRIGHT
Moral Rights must be understood as logistically prior to economic copyright protections, so that the protection guaranteeing after-sale fidelity of second-personal communicative objects correctly defines the appropriate scope of copyright. Thus a radical redefinition of copyright is required at law.
Chapter 2
The History of Copyright

2.1 Introduction

Copyright protection is not an ancient tradition. It is doubtful that copyright can accurately be construed as constituting a tradition at all. At no point has copyright existed in a single unchanging form, for a sufficient length of time, such that it would be appropriate to say that it had ever developed or retained a traditional form. Even when the origins of copyright are located as far back as the Reformation and the Scientific Revolution of Western Europe, the ways in which copyright protection has been conceptualised and implemented across time have persistently shifted in such dramatic fashion, that the version of copyright we have today, bears striking dissimilarity to copyright institutions of centuries or just mere decades past. As this chapter demonstrates, it is therefore wrong to construe modern copyright as a traditional pillar of national or international economies. The copyright institutions presently in place across the world are, instead, largely the product of a nebulous and malleable notion of intellectual property that has been consistently reshaped by a series of ad hoc attempts to further various (and often competing) political; economic; and corporate ends.

To demonstrate this, the present chapter highlights key moments in the history of copyright’s development. These are moments of change: instances in which additions or alterations were made to copyright legislation; or in which clarifications or other declarations as to the nature of copyright were made at law. Where it is evident and available, the reasoning employed at the time to justify such additions; alterations; clarifications; or determinations is provided. However, a central feature of much of copyright’s development is that the justifications for significant legal judgements in copyright cases were either not recorded, or were made simply on appeal to some uncritical sense of intuition. It is the persistence of this critical lack of principle which makes the investigation of copyright’s justificatory basis an imperative task still today.

The present account is, intentionally, United Kingdom and United States centric. This is not because other countries did not develop notable intellectual property regimes, but

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because the United States provides the primary impetus behind most current international copyright arrangements. The United States, in turn, derived its domestic copyright policy (during the drafting of the United States Constitution) largely from the policy of the United Kingdom. However, one critical contribution to international copyright law – *droits morales* or ‘moral rights’ – is decidedly European. Moral rights have a central role in the argument of this thesis, but the examination of the development of moral rights in relation to copyright is taken up in later chapters.

### 2.2 Unprincipled Beginnings

#### 2.2.1 Livery Companies and the Invention of Printing

Text does not have to be published mechanically (or electronically) on a press, to be protected by copyright. Nevertheless, copyright did not exist in Britain until the printing press was introduced there. This is not a coincidence. Reproduction of text before the invention and implementation of the printing press was difficult and extremely time consuming. Although this did not prevent the misappropriation of written works (complaints of which date back to ancient times), such misappropriation could not previously be conducted on the kind of scale that has subsequently become possible through the development of various forms of mechanised reproduction, beginning with the printing press.

Furthermore, although today the central driving forces behind copyright legislation are commercial in nature, the impetus for the introduction of copyrights during the early era of the printing press stemmed from political rather than commercial interests. Specifically, copyright’s original intended function (as a response to the introduction of the printing press) was specifically and exclusively to serve the interests of the British Crown. In a very real sense, everything copyright has since become has resulted as an accident of its initial function.

In understanding the politicisation of the printing press, and thus of copyright, it is necessary to consider the interrelationship between The Crown, Livery Companies, and the public in English society between the Sixteenth and Eighteenth Centuries. While each of these entities still exists today, the nature of their relationships to one another has,

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3 Johns, above n 1, p. 19.
unsurprisingly, changed significantly over time. The hierarchy present in the traditional relationship between the Crown and the public is obvious. However, the Livery Companies have historically fit into this relationship as somewhat intermediary powers, and this has facilitated a change in the dynamic between the Crown and the public over time. Whereas, prior to the Seventeenth Century, the British Crown had vast political power, the democratic nature of British politics today is the result of a transfer of significant portions of that power away from the Crown and into the hands of the public. The contributing factors to this social evolution are so numerous and complex as to be well beyond the scope of the present historical account, but the role of one particular Livery Company throughout this change – the Stationers’ Company – has had an enduring effect on the shape of copyright law.

In general, Livery Companies effectively began as trade guilds, and (still today) are decreed to be Livery Companies only via Royal Charters issued by the Crown. The last time such a charter was issued was to the 108th Company, the Company of Security Professionals, in 2008. Although some all-but-defunct trades still have corresponding Livery Companies which remain focused on delivering philanthropic services (as was always a tradition of every Livery Company), the primary function of the Companies has been to regulate each of the trades they represent. The Gunmakers’ Company, for instance, is currently responsible for ensuring that all guns sold in the United Kingdom can be safely fired. Livery Companies therefore supplied both their tradespeople and their customers a service of significant practical importance, and thus defined their relationship with the public – but they did so under Royal Charters which suggested that their primary purpose was to serve the Crown.

This serving of two masters is what made Livery Companies such ready vehicles for facilitating the change in balance of power within society, and the Stationers’ Company serves as what is probably the most profound example of this. The Guild of Stationers in London became an Incorporated Company in 1557 and a fully-fledged Livery Company in 1559. The Charter they received decreed that participation within the stationery trade was illegal for anyone who was not a member of the Stationers’ Company, and that the Company was responsible for settling disputes between its members – most of which had to do with what has since come to be known as copyright. The system that the Company had in place by which to fulfil this responsibility was one of registration, whereby

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individual stationers would submit to the Company, for approval, any manuscript they intended to print. Once approved, those titles would be entered into a leger, with each title entered under attribution to the stationer who had submitted it to the company. The given stationer thereby established an exclusive right to print and publish copies of that title.\(^8\)

While simultaneously serving the interests of the registered stationers, this process of limiting printing exclusively to members of the Company (and the process of registering individual titles) served a purpose that was just as important to the interests of the State. The regime established by the Stationers’ Company made it significantly more difficult to propagate texts that promoted sedition; heresy; blasphemy; or obscenity, since such content could be discovered in any manuscript submitted to the Company for registration, and publishing rights would be denied in relation to it. The limiting of printing privileges to registered members of the Company also made investigating the illegal publication of any such material much simpler, and so deterred people from printing titles which were rejected and denied registration by the Company.\(^9\) This function was eventually reiterated in law, in 1662, under the Licensing Act (full title: An Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Preses, 1662).\(^10\)

2.2.2 Growing Dissatisfaction

By this stage of the Seventeenth Century the increased ease with which written material could be accessed led reading to become more popular than ever before. With this growing popularity arose a public estimation of quality books as pillars of culture, and out of this attitude emerged some degree of dissatisfaction with the regulation of the stationery trade as dictated by the Stationers’ Company. Segments of the population were coming to regard the stationers’ practices not as a service to the State, but rather as representing “an ambition by this community of traders in knowledge to establish its own code of conduct, independent and in defiance of the state itself,”\(^11\) given that “[c]laiming a prerogative to create and defend property in works of culture required denying that prerogative to the king.”\(^12\)

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\(^8\) Johns, above n 1, p. 18
\(^11\) Johns, above n 1, p. 18.
\(^12\) Ibid.
This conflict saw a competition for dominance between two systems of organisation: the traditional system of registration developed by the Stationers’ Company (and the precursor to modern copyright); and a system of Royal Patent (by which ‘Letters of Patent’ issued by The Crown would provide groups or individuals the exclusive right to engage in various commercial pursuits) that was longer standing, but which had not previously influenced the printing profession. Whereas, under the Stationers’ system, an exclusive right over a title could be garnered by any member of the Stationers’ Company, a Royal patent could only be issued by the Crown (ideally to encourage the development of industry, but not uncommonly issued as personal favours). The new degree of commercialism that accompanied the booming popularity of printed materials motivated certain sectors of the broader literary industry to support the implementation of Royal Patent to govern printing. These proponents considered that, by licensing books in the more direct manner of Royal patents, the Crown could retain its prerogative in publishing. Authors had previously lamented the system of registration, which they considered to have been established only to serve the printers themselves. A sizable number of printers were even suspicious of an apparent oligarchy of influential printers, whom they considered to be abusing their power to make the register disproportionately serve their own interests.

This competition of systems was further complicated by an already prevailing trend towards division of the stationery trade between printers and booksellers, resulting in a disorganised situation whereby people variably and inconsistently conformed to one system while defying the other, and vice versa. This significantly complicated the process of determining what reproductions of texts were authorised or unauthorised, and subsequently hindered the regulation of printing overall. It was from commentary during this period that the word ‘piracy’ was popularised as a term to refer to the unauthorised reproduction of written texts.

This conflict eventually came to a head after 1695, when the last of the Licensing Acts, which were what had previously provided stationers with control over the book trade, came to lapse. Despite concerted lobbying on the part of stationers, no recourse to this absence of legislation would be made until 1710, and even then, the privileges regained by the printers would prove to be significantly curtailed. This sparked the earliest philosophical considerations of the function and justification of sanctioned monopolies within the book trade.

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13 Ibid., p. 28.
14 Ibid., pp. 27-28.
16 Sherman and Bently, above n 9, pp. 11-12.
2.3 Ad Hoc Continuation

2.3.1 Statute of Anne, 1710

In England, during 1710, a legislative Act was passed which reintroduced some degree of order through the stationery trade. The Act was titled “An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned,” but was in practice referred to as the ‘Statute of Anne.’ Although a degree of control over the book trade was returned to the stationers via the Statute of Anne, members of the Stationers’ Company remained dissatisfied due to the limits included in the Act. These limitations, and the reasons for which the stationers remained so dissatisfied, highlight the fact that an important transition had occurred by the turn of the century that was catalysed by the Stationers’ Company’s self-instigated reliance on their own system of registry.

Rather than the perpetual control that was previously assumed over a title entered in the Company’s register by its entrant, the Statute of Anne only provided protection for between 14 and 28 years. This generally took the form of an initial 14 years, with the possibility of an additional 14 years in cases where the text’s author was still alive at the end of the first period; however the term was set at a standard 21 years for books already in print as of the date that the legislation passed. For the stationers, however, the problem remained that, for quite some time, they had belonged to a trade which was associated with an elevated distinction: they were considered custodians of their civilisation’s knowledge itself. And yet, this ostensibly noble calling had been long underscored by a comparatively crass commercial reliance, felt by individual stationers, on the exclusive rights they had to produce specific popular titles. Such a high proportion of the stationers’ financial sustenance was derived from the monopoly sale of a relatively small number of profitable texts (the proceeds from which being what sustained the production of all the less popular titles), that the prospect of those important monopolies being limited in their duration was understandably perceived as a threat to them and their trade. The issue of copyright would inevitably explode into the public forum by the 1730s, when the monopolies afforded under the Statute of Anne, over the majority of the stationers’ staple publications, came to lapse.

18 Ibid.
This situation brought about the first period of popular philosophical consideration regarding the defensible basis for copyright. It was no longer going to suffice as justification, in the public’s eye, that copyright served the will of the Crown. At the same time, the stationers had come to be even more financially reliant on their practice of registry than they had been when copyright’s purpose was unapologetically asserted to be justified by virtue of the service it provided the Crown. Consequently, the first hint of divergence between copyright’s ideological basis and copyright’s pragmatic economic role emerged during this period of public discussion. The stationers who had previously been content to enjoy the benefits of the registry system, without paying consideration to its justifications, were now under pressure to seek a moral justification which might feasibly satisfy public demand for accountability.

Although it was primarily the Stationers who benefited economically from the Statute of Anne, the language of Statute precluded them from being at the centre of a principled argument in favour of perpetual proprietorship. The fundamental objective of the Statute, as conveyed through its full title, was to promote learning by establishing a system of governance over the book trade that would facilitate public access to rich sources of knowledge. Moreover, the system that the Statute was intended to implement was one which began not with printers’ or publishers’ rights, but with the rights of authors themselves. Although the Statute allowed for the proprietor of a piece of written material to be an individual (or a company) who did not originally author of the material, this was only because the author’s original proprietorship was stipulated to be transferrable. That is, any property rights had to originate with the author, but could subsequently be sold to somebody else. In practice (in economically viable cases), such a sale would typically be conducted between an author and a stationer, since stationers ordinarily represented an author’s only practical means to the printing and publishing of their work.

Inconveniently for the stationers, authors had previously been one of the groups who had objected to what they perceived as persistent abuses of monopoly under the previous system of registry. Having considered themselves generally subject to neglect and exploitation under that system (to the benefit of corrupt printers, no less), authors were not necessarily a natural ally to the stationers’ cause. Nevertheless, for stationers to regain the economic security they had lost, they would need to convince legislators that reinstating the previous provisions was necessary to adequately serve the interests of authors. This represents one of the earliest concerted ad hoc attempts to influence the progression of copyright protection based on an ostensibly principled moral basis. Notice, however, that the stationers’ objective was not to establish a principled account and follow it to its natural
conclusion regarding copyright. Rather, it was to locate a convincing justification for re-establishing the monopoly rights they had lost.

2.3.2 Appeal to Natural Law

The philosophical argument that became popular, in serving this end, began with the claim that the Statute of Anne had not conferred any new right of proprietorship to authors; it had merely reinforced the importance of a pre-existing right by affording it additional legal security. William Warburton contributed one of the oldest surviving instances of such an argument. He addressed the following passage from the Statute of Anne:

. . . Booksellers and other persons have of late frequently taken the liberty of printing reprinting and publishing . . . Books and other writings without the consent of the authors or proprietors of such books and writings . . .19

He concluded that the reference within the Statute to authors and proprietors, whose writings had been replicated without permission ‘of late’ (meaning necessarily prior to the publication of the Statute) must have been intended as a reference to a form of proprietorship that had not been established by the Statute. Therefore, he took it to follow that the purpose of the Statute could not have been to introduce a system of property rights via fiat, but must instead have been intended to serve as an acknowledgement and reinforcement of property rights to which authors were already entitled.20

Similarly neither the Royal Charter providing Livery rights to the Stationer’s Company, nor any previous Licensing Act, had ever explicitly established authors’ proprietary rights. These provisions had only given the Stationers’ Company the responsibility of regulating the industry; they had not contained instruction as to how that responsibility ought to be met. This meant that the origin and nature of the rights authors held over their works seemingly remained open to contention. Interested parties, like authors and stationers, therefore launched the argument that authors held a natural right to the perpetual control of texts they produced (a right that, to the satisfaction of stationers, was transferrable); and that no statutory limitations could be imposed upon such rights.

Both the philosophical argument used to support that position, as well as the arguments

19 Ibid.
which were levied against it in response, are complex. An examination of those arguments occupies much of the present thesis. More immediately pertinent to the present chapter, however, is the historical development of those arguments at law. It is important to make this distinction between an examination of the arguments per se and an examination of the legal treatment of such arguments, because the arguments recorded during the process of developing the law have typically not been the strongest possible arguments; or have not represented the strongest possible forms of the arguments presented. Despite (or rather, because of) the suboptimal nature of these arguments, it is necessary to examine their historical development within the context of formulating legislation, in order to contextualise the modern state of copyright law.

2.3.3 Millar v Taylor (1769)

Despite the unprecedented movement of the copyright debate into the public sphere by the 1730s, it was not until the late 1760s that a legal consideration was made regarding the origins and nature of proprietary rights over published objects. The case that finally delivered that consideration was Millar v Taylor in 1769. The plaintiff in the case, Andrew Millar, accused Robert Taylor of encroaching upon an exclusive proprietorship that had been secured over James Thompson’s The Seasons, as per the provisions established by the Statute of Anne.21

Taylor conceded that he had printed two thousand copies of the text, but raised the point that Millar had initially secured his exclusive right to it 30 years prior to the printing of those copies, and that the text’s author had also been dead for 15 of those years. Taylor contended that, therefore, the protection granted by the Statute had already expired prior to his printing of any copies. Implicit in Taylor’s argument, however, was the assertion that the Statute had formed the sole basis for Millar’s claim over the title, and that its expiry left no other basis for a claim. The case turned on this point, as Millar (drawing from arguments introduced in the 1730s, like that of Warburton’s) responded that James Thompson had originally enjoyed, as author, a natural right that had subsequently been transferred to Millar (as publisher). This right, Millar posited, was not a product of the Statute of Anne, and had not been curtailed by it. Instead, Millar argued, that this natural right was a perpetual right, and thus had not expired.22


22 Ibid.
Four judges of the King’s Bench presided over the case: Willies, Aston, Yates, and Lord Chief Justice Mansfield. After considerable deliberation, they delivered a three-to-one majority decision in favour of Millar. The court found that there was sufficient evidence of a pre-statutory right of property for authors; that this right established a transferrable right to the perpetual proprietorship over the written works an author produced; and that such a right had not been limited by the Statute of Anne, nor by any other legislation. The British Court of Chancery therefore decided to continue to restrict Taylor from publishing *The Seasons*. It appeared, then, as though the traditional custodians of the printing and publishing trade had once again secured a great advantage for themselves.\(^{23}\) But their victory was short lived.

2.3.4 **Donaldson v Becket (1774)**

Just one year later, another case was brought in front of British courts. Once again, the case concerned reproductions of *The Seasons*. The plaintiff this time was Thomas Becket, who had also secured the right to print *The Seasons*. Becket had appealed for an injunction against Alexander Donaldson’s printing of the text. On the precedence of *Millar v Taylor*, it was a standard matter of course that the presiding judges decided in favour of Becket and granted the injunction against Donaldson. However, Donaldson launched an appeal that resulted in the case eventually being moved before the House of Lords in 1774. This hearing ultimately saw the precedence be overturned and the decision reversed.\(^{24}\)

Although the Lords were ultimately the presiding authority during *Donaldson v Becket* in 1774, twelve common law judges were also called upon for the hearing, and tasked with advising the Lords on their decision. The common law judges were asked a series of questions, which essentially surveyed their opinions on each of the following matters:

1) whether there was a natural, pre-statutory basis upon which an exclusive right to copy should be acknowledged;
2) whether, if there was, that right should be considered waived upon publication;
3) whether statutory law could supersede any such natural right by the authority of government or judiciary;
4) whether the Statute of Anne had in fact done that; and

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\(^{23}\) Ibid.

\(^{24}\) Ronan Deazley, *Commentary on Donaldson v. Becket (1774)*, in L. Bently and M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, <http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1774>.
5) how an author’s rights, whatever they were deemed to be, could be transferred to second and third parties, such as publishers.

The results of the survey showed that a majority of the common-law judges considered that there was a pre-statutory basis for recognising authors as having an exclusive right to produce copies of their own works. Further, more than half the judges considered that the Statute of Anne should not be interpreted as limiting that right. Nevertheless, the Lords diverged from that conclusion, and instead ruled that only statutory law could serve as the basis for any exclusive right which authors might have with relation to the copying of their works. The Lords also, thereby, contradicted the ruling delivered in Millar v Taylor, and overturned the injunction which had been granted against Donaldson.

Perhaps this decision could have represented the final legal determination in relation to the tumultuous matter of whether authors’ proprietary rights ought to be considered natural or merely statutory. Though the legal situation in Britain had, for a long time, been disputed and untested (and then decided in Millar v Taylor but overturned in Donaldson v Becket), perhaps that question could now have been regarded as closed. The ability for this to serve as a stable international standard was critically undermined, however, by the most important political development of the late Eighteenth Century: American Independence.

2.4 The American Copyright Experience

The period of judicial contemplation which led to Millar v Taylor and Donaldson v Becket was concurrent with the period of extraordinary British-American history that culminated in American independence. America’s newfound political independence, entailing the rejection of a previous authority, naturally necessitated a declaration of law which would represent the newfound American autonomy. The centrepiece of that new legal arrangement was the United States Constitution, which was written in 1787 and ratified in 1788. This included the Constitutional Copyright Clause (Article 1, Section 8.8 of the Constitution).

Despite the American rejection of British authority, it was still natural for American legislators, in writing their own law, to consult and draw from British example and precedent. The influence of the Statute of Anne, for instance, is plain in the final wording

25 Though inaccurate reports were printed, at the time, suggesting that the majority thought the Statute did correctly limit authors’ natural rights. See Ibid.
26 Ibid.
of the Copyright Clause. The Clause was implemented to give Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors … the exclusive Right to their respective Writings.”

James Madison, in *The Federalist* no. 43, cites British precedence as the justificatory basis for the inclusion of the Clause, saying that the matter of copyright’s justification had been “solemnly adjudged” in Great Britain.

The timing of Madison’s determination was critical, however. The fact that the period in which the British consideration of copyright was coming to a legal head overlapped with the American Revolutionary War had the fortuitous effect of contaminating Madison’s interpretation. Although the year was 1788 when Madison deferred to the British adjudication on the matter of copyright – a full four years after *Donaldson v Becket* had been decided in Great Britain – the logistics of communication at that time (especially between two warring forces) meant that Madison’s understanding was founded on his by-then outdated knowledge of the *Millar v Taylor* case. Having not yet learned of the subsequent reversal of the decision reached in that case, Madison was acting on the belief that the ‘solemn adjudication’ under British law was that copyright was a legitimate right under common law.

The culmination of Great Britain’s centuries-long experience with copyright had been almost immediately undone in America. Given the predominance that the United States has subsequently enjoyed when it has come to shaping international copyright arrangements, it is impossible to know how differently history would have progressed if Madison had been aware of *Donaldson v Becket*. As it happened, however, the period of debate that had been manifested in Britain between the 1730s and the 1770s was to be largely played out again in the United States between 1778 (when the Constitutional Copyright Clause was established) and 1834 (when the first instance of American copyright case law was decided).

I return to a discussion of the United States’ reprisal of the copyright debate below (Section 2.4.2). That discussion includes a description of the IP legislation that was subsequently introduced to define how the United States Congress would realise its power to establish copyright (within the parameters of the Constitutional Copyright Clause). Before that, however, a note must be made about an additional component of the Constitutional Copyright Clause.

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29 Ibid.
2.4.1 The American Extension of IP to Patents

Although it ostensibly diverges from the history of copyright *per se*, an important note must be made regarding the American introduction of patent protection. The introduction of patent protection within the United States is relevant to the history of copyright because it marked a critical point of arbitration in the development of IP law. In subsequent chapters, this arbitration is shown to be fundamentally unprincipled. Important corrections to the way IP regimes are implemented— including copyright—therefore turn on the reworking of the distinction between the concepts of copyright and patent.

The notion of patents was first introduced to the United States via the same Constitutional clause as copyright. The respective concepts appear side-by-side (though neither are so named) in the following passage:

[The American Congress shall have the power to] promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.\(^{30}\)

Madison, in explaining the inclusion of inventors and their discoveries within the clause, provided no separate justification to that which he stated in defence of providing for copyright. He only added that “[t]he right to useful inventions seems with equal reason to belong to the inventors,”\(^{31}\) when compared to the rights that authors are due in relation to their writings. This alleged equivalence depends on several critical conceptual assumptions, which must each be defended if the claim is to be sustained. Centrally, it requires the demonstration of a conceptual equivalence between writers (and their writings) and inventors (and their inventions); and the further demonstration that this equivalence entails that the provision of IP protections is justified in the case of both, or not in the case of either (i.e. it cannot be justified for one but not the other). At the same time as it would be necessary to demonstrate this shared equivalency, however, it would also be necessary to demonstrate a substantive non-equivalence between the two, such that the protection of writings and inventions as part of two distinct regimes (copyright and patent, respectively) would be justified. After all, if writings and inventions (and authors and inventors) are strictly equivalent, then it would seem appropriate to grant them both protection under a single, unified system.


\(^{31}\) Madison, above n 28.
Demarcating the conceptual boundaries around these classes of IP protection therefore requires a concerted consideration of the essential features of the objects to which the protections respectively extend. Historically, however, no such consideration has ever explicitly informed the development of IP law. As seen later (Chapter 6), this error is compounded by the expansion of copyright into non-written objects, such as photographs; sculptures; and film. In each of these cases, the expansion of copyright’s scope has been led seemingly by uncritical intuition. Such intuitions are shown to fail, however, in relation to numerous prominent ‘problem’ cases of IP, such as software and computer code. An analysis of the respective essential properties of copyrightable and patentable objects is then undertaken in Chapter 7. That analysis is used to construct a justificatory account of copyright that, when applied, systematically resolves the ‘problem’ cases in which our intuitions otherwise fail.

2.4.2 An Act for the Encouragement of Learning, 1790 (and Act of 1831)

The very first Act regarding copyright in the United States was enacted in 1790, and was titled An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned (henceforth ‘The Copyright Act’). The Copyright Act extended to authors essentially the same privileges as had been extended, in Great Britain, under the Statute of Anne. That is, the Act provided the exclusive right to reproduce one’s copyrighted texts for a period of 14 years. Upon the expiry of that term, an author’s copyright could be extended for another term of 14 years, provided that the author was still alive (this ability to extend the term was indexed to the life of the author even if the copyright had been transferred to another party). In 1802 a legislative amendment was made to the Copyright Act, which extended protection to a wider array of objects such as pictures. That legislation prevailed until 1831, during which (under the notably enduring behest of Noah Webster, of Merriam-Webster fame), a significant revision was made to the law.32

By the 1820s Noah Webster had already enjoyed great successes via the business of writing and printing reference books about the English language. In the 1820s, however, he turned his attention towards compiling An American Dictionary of the English Language. He hoped that the profits he would realise from his dictionary would suffice to ensure a financially secure future for himself and his family. He estimated, however, that the copyright provisions on offer to him at the time would be entirely insufficient for him to

achieve that end. In Webster’s estimation, only a perpetual copyright protection would do for such a work, given the measure of labour involved in such a project; and because of the invaluable influence he anticipated that the work would have on discourse across the nation.33 The project would, after all, require Webster (who eventually completed the project, working unassisted), to compile and arrange the definitions of some 70,000 words.34

After more than a decade of lobbying, Webster was successful in having legislative changes implemented by the courts. However, a qualification in the Constitutional Copyright Clause, which requires that Congress only establish copyright protection that lasts for ‘limited times’ prevented Webster (along with any other author) from being able to secure a perpetual copyright. Instead, under the 1831 Copyright Act, the duration of an initial period of copyright was doubled from 14 to 28. An author who survived that initial term (or, for the first time, a surviving widow or children of a deceased author) could still subsequently extend the term of protection by 14 more years.35 In addition to this change, the range of copyrightable materials was extended to include engravings musical compositions.36

In this period from 1790 to 1831, then, two simultaneous expansions of copyright occurred:

1) The maximum duration of copyright in the United States was expanded from 28 years to 42 years (if the relevant author survived an initial term of 14 years and 28 years, respectively).37

2) The scope of copyright had been expanded, such that instead of applying strictly to authors’ writings specifically, it provided protection (additionally) to printed material of all forms (including of pictures, maps, and charts); as well as to engravings and musical compositions.38

The record of the House debate, prior to these expansions being incorporated into the 1831 Act, indicates that the arguments for and against them were once again structured around the notion of whether copyright represented a mechanism for the protection of common law rights; or whether copyright was entirely statutory. These arguments, while varied and complex, largely echoed the arguments that had been presented in Britain by people such as William Warburton. A substantive consideration of that question (which draws from both the British and American experiences with that dialogue) is undertaken in subsequent

33 Ibid., p. 340.
34 Ibid., p. 335.
36 Ibid., pp. 340-41.
37 8 Congressional Debate, (1831) 422-424.
38 Ibid., 423.
chapters – especially Chapters 3 and 4. 39

By comparison, the record of the House debate reveals very little about the motivation that was had for expanding copyright’s scope. Prima facie, the motivation behind the expansion of copyright to other media (beyond strictly writing) might be explained by the intuitive similarity of the processes behind the reproduction of those media and the reproduction of writing. Printed maps, charts, and sheet music can (and could at the time) be mechanically reproduced in much the same way as printed writing. Importantly, this meant that unauthorised copies of those objects could be made with similar ease as unauthorised copies could be made of, for example, books. It might seem pragmatically sensible, then, to extend a system designed to regulate the copying of objects (e.g. copy-right) to such objects as well. In a similar vein, the process of engraving has much in common with the process of writing: it seems correct that two authors should be equally able to claim copyright protection if the sole difference between their works is that one of them etches text into a surface, while the other author places their text onto a surface in ink. The same kind of extension is made today in relation to electronic text.

One important contribution to the consideration of copyright’s scope was not made until a legal case decided in 1879. Although other important copyright case law was decided earlier than 1879 (to which I return below), the relevance of the 1879 case to the present subject of copyright’s scope makes it worthwhile to consider immediately. That case was Baker v Selden (1879). 40

2.4.3 Baker v Selden (1879)

In the previous section, several similarities were noted between written objects; non-written printed objects; and etchings. It was speculated that these similarities may have formed the unstated basis for the 1831 expansion of copyright’s scope in the United States. In the case of Baker v Selden, however, the appropriateness of these similarities as a basis for determining copyright eligibility was challenged by W.C.M Baker.

The case concerned a book, printed by Charles Selden, in which a novel system for effective bookkeeping was presented. As part of the content of his book, Selden had included various blank accountancy forms which he intended to form a material component of his system. Because of the utilitarian functionality of Selden’s bookkeeping system, it

39 Ibid., 422-424.
40 Baker v Selden 101 US 99 (1879), 103.
(and the blank forms which were a part of it) seemed as though they should naturally be patentable; indeed, Selden had applied for patent protection over his system. However, because Selden’s book, and the forms it contained, were also printed objects, they were also considered to be categorically copyrightable. This dilemma represented the central contention in the case, and *Baker v Selden* therefore came to be the first major United States legal case in which a Court acknowledged that substantive challenges had resulted from the way in which copyright’s scope had come to be defined in terms of physical media. With the Court asked to consider the *differences* between written works and non-written printed materials, rather than only the *similarities* between those objects, the case demonstrated an eventual limit to the historical basis that had been used for determining copyright eligibility.\(^4^1\)

The Court’s attempt to solve the dilemma presented in *Baker v Selden* involved the recognition that copyrightability must be established on the basis of some non-physical quality of certain (copyrightable) objects. The Justices attempted to represent this solution in what has come to be characterised as the ‘Idea-Expression’ distinction, by which the object of Selden’s book (an expression) was intended to be conceptually separated from the object of Selden’s bookkeeping system (an idea). By this distinction the Court intended to permit copyright protection only in relation to expressions where that would not also extend protection to any idea described within it. I demonstrate in Chapter 6 that solution is insufficient. I then argue in Chapter 7 that the non-physical quality which should instead replace the historically physical basis for determining copyright eligibility is second-personal communicativeness.

2.4.4 *Wheaton v Peters (1834)*

While a consideration of *Baker v Selden* is specifically useful in informing the construction of a justificatory account of copyright’s scope, several broader foundational considerations related to copyright were raised during the very first copyright case to be heard in the United States Supreme Court. The case, *Wheaton v Peters (1834)*, was referred to the Supreme Court on appeal by Henry Wheaton, after the case he brought against Richard Peters Jr. was initially decided against him in the Circuit Court of the Eastern District of Pennsylvania. In much the same way as the British cases *Millar v Taylor* and *Donaldson v Becket*, the case of *Wheaton v Peters* contended centrally with the question of whether copyright constituted a natural right, or merely a statutory right. This represented the

critical opportunity for the Supreme Court to either confirm James Madison’s assertion (as he took Great Britain to have affirmed) that copyright arose as a product of natural law; or to establish copyright as a strictly statutory regime, thereby aligning the United States’ policy with the contemporary British position that had been upheld in *Donaldson v Becket*.

In addition, several other key questions arose during the case. For example, consideration was given to the question of when, or under what conditions, a possessive claim could be understood to entail a proprietary claim. Further, the Justices were required to deliberate on the matter of whether objects constituting part of the public record could be considered copyrightable. Throughout this process, the Justices remained committed to promoting a certain practicality in the implementation of copyright. For example, they were determined that, for sectors of the public system to function, no segment of the public record could be allowed to be privately owned by individuals; and that this was to hold regardless of the strength of any ideological reasons that there may otherwise have been to grant private proprietorship over the record (e.g. even if private labour was the only means by which the public record had been preserved). Although this practical-mindedness generally directed the Justices towards correct conclusions, it unfortunately meant, as explained below, that some of the ideological propositions articulated during the case were not even addressed, since the Justices had predetermined that nothing turned on the success or failure of such claims.

Some contextualisation is required for modern readers to make sense of the case that developed between Wheaton and Peters. This is because it is simply unfathomable that a case of the same nature could arise today. Specifically, it was only possible for the case to arise because the practice of Supreme Court recordkeeping between 1789 and 1831 differed so drastically from any process of recordkeeping to be found in the developed world today. Any court decision that is made in the United States today is officially recorded, across multiple media, as an integrated part of the judicial process. During the nation’s infancy, however, no records of any case law decisions were officially recorded or published, even within the Supreme Court.

Unsurprisingly, this lack of recordkeeping presented a serious obstacle to proper judicial procedure in the United States. Theoretically, the role the Supreme Court was always to represent the highest legal authority in the country, and therefore to serve in establishing precedents that the lower level courts could follow and replicate. The practical implementation of such a model, however, was rendered functionally impossible by the fact that there existed no means by which to disseminate knowledge of the Supreme Court’s
supposedly precedential decisions to legal professionals elsewhere in the country. For anybody not physically present at the Supreme Court during the oral delivery of a decision (such as legal professionals in other states or cities), it would have been difficult if not impossible to know what decision had been made, or even what the case was about. Remarkably, the legal system in the United States persisted in this manner for more than a decade after the Constitution had been ratified.

This difficulty was eventually mitigated, first, by a man named Alexander Dallas. Dallas, operating alone, recorded and compiled volumes of the legal decisions that had been delivered in the Supreme Court. This was not an official or sanctioned position, but rather one that Dallas took on entrepreneurially. The prospective reward which spurred Dallas was the anticipated ability to profit directly through the sale of his volumes to practicing lawyers and other legal professionals. Eventually, however, the labour demanded by the task, combined with high production costs, discouraged Dallas from continuing his endeavour. A second reporter, William Cranch, subsequently attempted the same undertaking, but encountered similar difficulties; he also quit.

In addition to frustrating the entrepreneurial attempts of Dallas and Cranch, the laborious and expensive process of reporting also frustrated legal professionals. The labour intensity involved in writing and compiling decisions made it common for the publishing of reports to be delayed by five years or more. The cost of printing the volumes also meant that they were available only at a considerable price to legal professionals. In 1815, however, Wheaton took up the task of reporting and was revolutionary within the position; he took up the task under the promise of releasing up-to-date volumes of decisions at least annually.42

In response to Wheaton’s success, the United States government resolved to officially recognise and institutionalise the position of the Reporter’s Office. This came complete with a $1000 salary for Wheaton, payable on the condition that 80 copies of the Office’s reports were made available for government use in addition to whatever number of reports were produced for private sale. Although this was an improvement for Wheaton, the private-sale component nevertheless remained by far the more lucrative part of his operation. Despite the developments he had pioneered, Wheaton ultimately reached the same assessment as his predecessor, and deemed the return on labour not to be worthwhile; he resigned in 1827.43

42 Joyce, above n 32, pp. 344-349.
43 Ibid., pp. 351-353.
The next person to fill the Reporter’s Office was Richard Peters, Jr. Much more so than any of the previous reporters, Peters brought to the position a particularly pragmatic and business-like focus, which proved valuable in his pursuit to maximise the profitability of the position. For instance, where his predecessors had insisted upon printing using materials of sufficient quality to reflect the important nature of the work, Peters did not allow an idealisation of the position to steer him away from austere production values. Perhaps this quality of Peters’ was the product of necessity, given that a new legislative act, pertaining to the Court Reporter’s Office, was introduced in 1827. That legislation required that volumes of reports be published half-yearly, at an individual cost of no more than five dollars per volume.

In addition to meeting the requirements of the 1827 legislation, Peters resolved to also revisit the reports made by his predecessors, and compile them into similarly affordable volumes. Specifically, he intended to format a collection the previous reports as a collection of no more than six volumes, to be made available for no more than thirty-six dollars in total. This would necessitate condensing the previous reports (especially those of Wheaton’s, whose quality and detail of work surpassed the work of Dallas and Cranch), and printing the volumes in a smaller type and a generally lower standard. Despite these compromises, Peters regarded the endeavour to be of great public value, and the idea was met with broad enthusiasm by legal professionals.44

Not everybody was happy with Peters’ project, however. While the reissued reports would benefit the public and profit Peters, the surviving past reporters did not view the project positively. Peters reached a settlement with Dallas early on, but no such arrangement was made with Wheaton, who continued in his objection. Wheaton understood that his own publications would be greatly devalued if Peters successfully reissued the reports onto the market. Indeed, when Peters did publish his Condensed Reports, the volumes were enviably consumed. The third volume of Peters’ reports was published in 1831, and, being that it was the first volume to catalogue cases which had first been recorded in Wheaton’s reports, Wheaton brought a suit against Peters in that year. Wheaton lost the case in the Circuit Court, but appealed the decision to the Supreme Court, where it was ultimately decided.45

The escalation of the case to the Supreme Court meant that the case was decided in the same place that both Wheaton and Peters had sat as reporters. Moreover, it meant that it

44 Ibid., pp. 354-356.
was to be presided over by Justices with whom each of the reporters had developed close personal acquaintanceships. The Justices, who confessed they were pained in having to preside over a case being contested between two of their legal peers, were called to consider two main questions in relation to copyright:

1) Whether there existed a common-law, pre-statutory basis for copyright in the United States, and whether statutory law could justifiably constrain common law copyright; and

2) Whether copyright could legitimately be held to apply to documents such as the court records Wheaton had compiled.\textsuperscript{46}

The Court’s determination regarding the former question – which clearly mirrored the central question considered in the British cases of \textit{Millar v Taylor} and \textit{Donaldson v Becket} – concurred with the British precedence. That is, it was decided that no common law basis to copyright existed, and that statutory provisions represented the only viable avenue through which authors could secure copyright protections. It was the latter question, however, which ended up proving more determinate in the outcome of the case; it was decided that a certain class of objects, to which court documents belonged, could not be copyrighted. The reasons behind each of these decisions shall be considered in turn.

Whereas, in Britain, the notion of common-law copyright was introduced with the aim of bringing into question the validity of statutes placing \textit{temporal} limitations on authors’ proprietary rights, in \textit{Wheaton v Peters} the notion was introduced to challenge the validity of introducing statutory formalities as prerequisites to copyright protection. Specifically, it arose because Wheaton required a defence to the allegation that his reports were not subject to copyright, since he had failed to provide notices of copyright within his published reports. It also arose in relation to the fact that Wheaton had failed to deposit a required copy of his volumes with the Secretary of State. In response Wheaton argued that authors held a natural and automatic right to exclude others from producing copies of their works, and that statutory laws could not legitimately restrict the automatic applicability of that natural entitlement by means of such conditions. Although the Court finally rejected Wheaton’s response, it did so as the result of a four-to-two division between the Justices.\textsuperscript{47}

On the matter of whether judicial reports could be subject to copyright, the Court ruled that they could not; but this did not leave Wheaton’s publications entirely unprotected. It was determined that Wheaton’s publications were eligible for partial copyright protection, because of an important material difference between his reports and the reports of his

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid., pp.380-381.
predecessors. When Wheaton took over the position, the Supreme Court Justices had informally agreed (eager to assist in improving the accuracy and expedience of the publications), to make available to him “any written opinions they might prepare, or notes they might take, in connection with their oral opinions.”48 In addition, Wheaton largely sequestered himself away with the Justices in his private life, since the Justices boarded in the same lodging to isolate themselves from the politics of society.49

This proximity and level of engagement with the Justices enabled Wheaton to achieve something no other reporter had. Not only were his publications precise and expeditiously published, but he took the unprecedented step of affixing extensive scholarly annotations to his reports. These additional comments provided readers with comprehensive overviews of the areas of law pertinent to the cases reported.50 Critically, however, that original component of his reports was deemed to be conceptually distinct from the core portion of the reports (being the Justices’ opinions, specifically). This was important because, by Wheaton’s own testimony, he was indisputably the owner of his original annotations, being “the Summary of Points decided[,] of the Statements of the Cases prefixed[; and] of the analytical Indexes at the end of each [volume],”51 but the more contentious point had always been whether or not he held copyright over the record made of the Justices’ opinions themselves.

The Justice’s opinions, of course, contributed the fundamental component of the reports; especially in Peters’ Condensed Reports, where any supplemental material his predecessors had attached was largely stripped out to lower costs. The Court concurred with Wheaton regarding his ownership of those supplementary components of his reports, but decided against him in relation to his owning of the Justices’ opinions. This was despite two arguments presented by Wheaton. First, Wheaton (somewhat meekly) suggested that an ownership of a significant portion of his reports (i.e. his supplemental material) ought to be sufficient in establishing property in the whole object. When this argument failed to convince the Justices, his counsel Elijah Paine produced a particularly inventive argument in support of Wheaton’s claim, which entailed some peculiar metaphysical assumptions.

Paine’s argument was that the Justices’ manuscript opinions,52 having had to have belonged initially to somebody, had either first belonged to Wheaton or to the Justices themselves. If to Wheaton, then the case was trivial; and if to the Justices, then they had gifted that

48 Ibid., p. 349.
49 Ibid., pp. 349-350.
50 Ibid., pp. 349-352.
51 Ibid., p. 366.
52 That is, the written record of their opinions.
property (as was their right) onto Wheaton. The first assumption upon which this argument turned (other than the central matter in question, being whether the opinions could be considered property in the first place) was that the oral opinions delivered by the Justices were distinct from the manuscript opinions published by Wheaton. This assumption was critical because the Justices’ oral opinions were regarded (and Paine agreed) to belong to all citizens, *qua* objects of public record. Thus, to be eligible as private property, it had to be shown that there was a non-equivalency between Wheaton’s manuscript opinions and the Justices’ oral opinions. Paine argued that, since the Justices discharged their duties through the delivery of their oral opinions alone, the additional discharge of a manuscript opinion (which, by comparison, was not requisite in their discharge of duty), represented a point of non-equivalency between the two; the drafting of Wheaton’s reports must therefore have constituted the delivery of a distinct object.\(^{53}\)

The second assumption Paine relied upon was that the original ownership of the Justices’ opinions (if it originated with the Justices) could be transferred to Wheaton. Supposing the oral and manuscript opinions were distinct, Paine’s argument turned on the idea that the delivery of oral opinions satisfied the public record even without the publication of any manuscript opinions. That being the case, the suggestion was that, since the Justices did not owe the manuscripts to the public record, the citizenry could not be thought to have any claim upon them, and thus they must instead be eligible for consideration as private property.\(^{54}\)

A central challenge to Paine’s argument regards an inequivalence between a Justice’s written opinion as it exists before it is published, and the ‘same’ written opinion as it exists after it is published. This is a dimension of a class of objects (which includes court opinions) that is not common to all literary objects. The complication is that, because of the nature a Justice’s appointed position, a Justice’s oral opinion transitions from a purely (private) locutionary act, to a public illocutionary act, when it becomes published in manuscript. That is, although Justices may form opinions privately (about all kinds of things, including the basis on which they believe certain legal cases should be decided), this kind of private propositional thought has no legal implication. When the same thought is externalised, however, as in the case of Wheaton’s manuscripts, this alters the way in which the public record (of the case decisions) must be interpreted. It is therefore of great practical importance that these externalised opinions not only be understood to affect the public record, but also to form *part* of the public record.

\(^{53}\) Joyce, above n 32, pp. 369-71.

\(^{54}\) Ibid.
Although this distinction between a Justice’s private locutionary opinions and their public illocutionary opinions might seem informative only in the case of objects that are produced in some official capacity (that capacity being the source of the illocutionary power), this observation points towards a general quality common to all copyrightable objects. That is, authored objects must be understood to be simultaneously attributable as one person’s (qua property), while being simultaneously attributable to a different person as the source of its provenance. For example, an artist may legitimately boast, at a gallery auction, that a specific piece of art is *theirs*, if they created it. At the same time, an art collector may legitimately boast that that same piece of art is *theirs*, if they won the auction to buy it. These agents can simultaneously claim that the object is theirs because the claims they are making upon the object are distinct and non-contradictory. The collector advances a proprietary claim, and the artist advances a claim on the artwork’s provenance.

*Wheaton v Peters* demonstrates just one case in which delineating these separate claims is critical. Paine’s argument that the Justice’s opinions were originally theirs is trivially true in the sense of the provenance of the opinions; everybody’s opinions are their own. The notion that such a claim on provenance could translate to a claim of proprietorship, however, was not established by Paine. Moreover, it is difficult to see how such a claim could have been defended. In any exchange that could be described as somebody ‘selling’ their opinion (e.g. freelance film or food critics), the transaction is more accurately characterised as a provision of service rather than as a transfer of goods. A person who is ‘paid for their opinion’ is paid to disclose it; not to transfer it.

The implications of treating the sale of an opinion as the transfer of an object, rather than as the provision of a service, bears out its absurdity. Consider that changing one’s own opinion is a perfectly standard phenomenon. This cannot be taken to mean that, after the sale of an opinion (as in the case of an expert critic), the ‘purchaser’ of that opinion can claim it as their ‘own’ in such a way as would allow them to change it. Indeed, the very value of such an opinion – including to the purchaser – is inherently located in its continued indexation to the person by whom it was formed. That is, what the opinion *is* as an object is contingent on its being second-personally indexed.

This is also true in the case of Wheaton’s commentary. *Wheaton*’s legal opinions regarding Supreme Court decisions, being that he enjoyed no authority over such decisions, bore no more legal impetus than that of any other private citizen. The value of Wheaton’s additional commentary, if that was what sustained its market value, was in the fact that it encapsulated
the Justices’ opinions. If the Justices could be said to have ‘gifted’ their opinions to Wheaton, then this can only sensibly be interpreted to mean that they provided a service (insofar as they performed some action that Wheaton could capitalise on and profit from) with no expectation of remuneration; not that they transferred a proprietary object. As can be seen later chapters (especially Chapters 5-8), this distinction between providential ownership and proprietary ownership sets a basis for the recognition of discrete copyright protections that apply depending on the form of ownership that is claimed.

Despite the complex conceptual matters raised through Paine’s argument, the Court decided the case on more direct utilitarian grounds. Thus, although the Justices correctly (and unanimously, alone of all the decisions in the case), found in favour of Peters on the matter, they did so extemporaneously. Though the Justices agreed that Wheaton had a legitimate claim to copyright over his annotations and appendices, they concluded that no copyright could be held over the opinions of the Court or its individual members (whether oral or manuscript). This was evidently motivated out of concern for the public good, and the prima facie observation that it was important not to artificially restrict public access to records of court opinions.55

Wheaton v Peters ultimately delivered two central developments in the history of copyright. First, the decision of the Supreme Court affirmed the conclusion, which was also the prevailing position in Britain, that there existed no common-law basis for the recognition of copyright. Although the notion of perpetual common-law copyrights continues to resurface in public dialogues, the ruling by the Justices in Wheaton v Peters consistently prevails at law. Second, Wheaton v Peters saw the preclusion of a class of objects (comprised of enactments of Congress and court opinions) from copyright protections. Although ostensibly the effect of this preclusion seems limited, being that restricts only a narrow range of objects from being made proprietary, an examination of the underlying principles that are capable of sustaining that determination also hints towards broader implications for copyright.

### 2.5 Twentieth Century Expansions in Scope and Duration

In view of the number and variety of case law decisions that had been established in the United States during the century after the 1790 Copyright Act, U.S. legislators in the early Twentieth Century considered it necessary to consolidate the changes in copyright (and take the opportunity to correct what were seen to be prior errors in the development of

55 Ibid., p. 382.
copyright law) by means of a comprehensive revision of the Copyright Act. The first such revision was achieved in 1909. Several subsequent revisions also introduced additional changes in the Twentieth Century. Prominent among these changes, in each case, were increases to both the duration of copyright; and a broadening of the scope of objects deemed eligible for copyright protection. Less prominent throughout the Century, however, were clear and unambiguous principles used to sustain such substantive changes.

2.5.1 Copyright Act of 1909

The Copyright Act of 1909 represented the first major contribution to United States copyright law of the Twentieth Century. As the House Committee on Patents reported, those “familiar with the copyright laws of [the United States] have urged the necessity of a complete revision.”56 The Committee also cited the summation of copyright by President Roosevelt, who said of the laws in 1895 that:

They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships on the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than 12 acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential.57

There are two especially noteworthy points to be taken from President Roosevelt’s assessment. First, it points to the ambiguity as to the appropriate scope of copyright, insofar as the passage alludes to “many articles which, under modern reproductive processes, are entitled to protection” – without supplying a justificatory basis for the inclusion of such articles, except, apparently, for their replicability under modern processes. Second, the passage also alludes to the general justificatory basis of copyright by invoking the notion of the “fair protection of the public,” which is implied to represent a just limit to the provision of protections to copyright proprietors.

These were both central points with which the House had to contend in constructing the

57 Theodore Roosevelt, cited in Ibid.
1909 Act. Regarding the appropriate scope of copyright, the Committee began with a consideration of the terms ‘author’ and ‘writings’ – being that those formed the original verbiage used in the Constitutional Copyright Clause. The Committee observed that Congress and the courts had always “given a liberal construction to the word ‘writings,’”\(^{58}\) noting that the very first Congress included maps and charts within the scope of copyright; and that the 1831 amendment to the original Copyright Act expanded copyright protection to musical compositions and cuts.\(^{59}\)

In addressing the subject of copyright’s scope, the House Committee also referred to specific commentary that was offered during *Burrow-Giles Lithograph Company v Sarony* (1884), which was a case that dealt with the copyrightability of photographs. The Committee quoted Justice Samuel Freeman Miller’s assertion, from that case, that the United States’ early instances of copyright legislation…

…certainly answer the objection that books only, or writing in the limited sense of a book and its author, are within the constitutional provision. Both these words are susceptible of more enlarged definition than this. An author in that sense is ‘he to whom anything owes its origin; originator; maker’ one who completes a work of science or literature’ [Here, Miller was quoting Joseph Emerson Worcester’s *Dictionary of the English Language*]. So, also, no one would now claim that the word ‘writing’ in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to actual script of the author and excludes books and all other printed matter. By ‘writings’ in that clause is meant the literary production of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist.

Two salient points stand out in Miller’s argument. First, he is presumably correct in his conclusion that, had photographs existed when the first copyright acts had been implemented, they would have been included among the classes of objects deemed copyrightable. The nature of photographs is such that their classification as copyrightable objects seems intuitive. The second thing to notice in Miller’s testimony, however, is that his articulation of what that nature consists of is extremely limited.

In extending the notion of *author* to non-textual objects, Miller appealed to a regular

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\(^{58}\) House Report on 1909 Copyright Act, above, n 56, p. 2.

\(^{59}\) Ibid., pp. 2-3.
dictionary definition – but that definition was surely too broad; it captures more than Miller intended. For instance, if the law was to define an author as ‘anyone to whom anything owes its creation,’ then it would have to follow that bricklayers be considered authors of walls; and walls to be copyrightable. Obviously, even Miller intended a narrower conception of ‘author’ than this, according to which writers and photographers would both qualify, but bricklayers would not. Although this seems, at least initially, like an intuitive point of distinction, an articulation of that intuition is ultimately required.

Ostensibly, one way to account for this intuitive point of distinction would be to appeal to a notion of artistry, by which artistic work (like literature and photography) is eligible for copyright protection; and unartistic work (like bricklaying) is ineligible. However – placing aside the difficulties involved in defining the qualities that mark ‘art’ – such a conception would surely preclude the inclusion of unartistic objects such as (some) reference texts and charts. Further consideration of such possible accounts, and their consequences, is provided in Chapters 6 and 7.

In relation to President Roosevelt’s second prominent point – the appropriate basis of copyright, generally – the House Committee confirmed the prevailing view, established in *Wheaton v Peters*, that no natural law basis for copyright existed. Instead, the Committee considered that the statutory provision of copyright was maintained “upon the ground that the welfare of the public will be served” through the provision of (temporary) monopolies; and that “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.” The Committee therefore concluded that:

> In enacting a copyright law Congress must consider … two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.

Although this may have been the first time the social utility formulation of copyright was officially affirmed by the Legislative Branch (rather than the Judicial Branch), the application of this basis was implemented inconsistently throughout the remainder of the House Committee’s recommendations. This is apparent, for instance, in connection with the 1909 implementation of special protections for authors of dramatic works. This example is worth considering, since it involves the intersection (or rather, lack of intersection) between copyright’s expanding scope and copyright’s theoretical justificatory basis.

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60 Ibid., p. 7.
61 Ibid.
62 Ibid,
basis.

The unique concern identified by the House Committee, in relation to dramatic works, was that the authors of such works often intended to realise profits through the provision of *performances* of the work, rather than *copies* of the work *per se*. That is, the Committee considered that:

It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale. He does not usually publish his work in the ordinary acceptation of the term, and hence in such cases never received any royalty on copies sold. His compensation comes solely from public representation of the work. It has sometimes happened that upon the first production of a dramatic work a stenographer would be present and would take all the words down and would then turn the manuscript over to some one who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority whatever from the author, would give public performances of the work. It needs no argument to demonstrate how great the injustice of such a proceeding is, for under it the author’s rights are necessarily greatly impaired. If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law.63

Despite the Committee’s assertion to the contrary, an argument *is* required to demonstrate that the extension of copyright protection to (performances of) dramatic works is justified. Moreover, such an argument cannot rely on an appeal to an inherent injustice against the author’s rights in the way the Committee implied, because this:

1) Begs the question: The argument attempts to justify the extension of statutory copyright by appeal to an ‘obvious’ injustice that – if copyright has no basis in natural law – cannot be considered an injustice prior to the provision of the statutory protection being argued for; and

2) Indexes copyright’s function to the benefit of the author, rather than to the benefit of society.

The failure of the Committee to construct a justification of this extension on a social utility basis (even if such a basis would theoretically have been available) betrays a conceptual inconsistency that permeated the formulation of early Twentieth Century copyright law.

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63 Ibid., p. 4.
In addition, the argument presented in favour of extending copyright protections to authors of dramatic works, in such a way as would restrict others from performing the ‘same’ work, is complicated by the precedent supposedly established in *Baker v Selden*. Insofar as copyright is taken to extend protection only to the tangible expressions of authors’ ideas; and not to the ideas themselves, it is difficult to justify the House Committee’s recommendation that copyright be extended in a way that would exclude an author’s potential competitors from producing their own performances of the original author’s dramatic work. Although a competitor’s performance would represent a tangible expression of the first author’s narrative idea, that performance would nevertheless be strictly distinct the first author’s own performance (i.e. the tangible expression of their idea). The competitor’s performance could only be characterised as an infringement, then, if the sameness of the underlying *idea* was taken to mark an offence; but that would require recognising the original author as having an exclusive right to the use of the idea itself.

Inconsistency regarding justificatory bases was also evident in connection with the most consequential revision incorporated into the 1909 Act: the increase of copyright duration from a maximum of 42 years to a maximum of 56 years (consisting of two terms of 28 years). The House Committee presented the view that the term of copyright prior to 1909 was frequently insufficient, and ought to be increased so that “there would be no probability of its being taken away from him in his old age, when, perhaps, he needs it the most.”

Once again, however, this appeal to the interests of authors cannot be taken to have any inherent moral force, given the social utility basis for copyright that the Committee simultaneously endorsed. In arguing for an extension to the maximum duration of copyright, the Committee should instead have been moved to demonstrate some benefit which the extension might provide the public.

It might be thought that the Committee could have represented the provision of further guarantees to authors (especially in their old age) as being instrumentally valuable to the promotion of social utility (i.e., if those guarantees would motivate more authorship). However, a plain reading of the Committee’s assertion that the previous term of 42 years had been “in many cases insufficient” reveals that the Committee was occupied with the consideration of instances in which the act of authorship had already been realised (i.e. the authors had received copyright protection; it just did not persist long enough). On the social utility account, however, the protection afforded in those cases must be regarded as necessarily sufficient, since the authorship demonstrably occurred. Furthermore, if the

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64 Ibid., § 23.
65 Ibid.
Committee had intended to reference the prevalence of cases in which authorship had *not* successfully been incentivised, there would have been no way to specify whether those cases numbered “many” or few.

Although the House had set out to establish a holistic revision of copyright law, the principles guiding the 1909 legislation were applied inconsistently. Rather than managing to escape the disorder and confusion of the previous Century’s copyright development, the House’s positions continued to be a product of that legislative environment. The implementation of the Copyright Act of 1909 did not settle copyright matters, and it was not long before there were calls for further revision.

### 2.5.2 Copyright Acts of 1962 to 1976

Although major calls for revision of the Copyright Act of 1909 were prevalent from the 1920s to the 1940s, another systematic review of copyright was not completed until the 1960s. Another House Committee report (1961), prepared ahead of the Copyright Act of 1962, provides an expanded commentary regarding several of the issues raised in 1909. It would take more than a decade for substantial revisions suggested to be finalised, however. This delay was important, because the timing of the legislature’s renewed interest in copyright – arising in the early 1960s – was not coincidental. The year 1965 would mark the 56th anniversary of the Copyright Act of 1909; the same length of time as the maximum term of copyright. Until a ‘permanent’ expansion of copyright could be legislated, Congress therefore used a series of Interim Acts to temporarily prevent the expiry of copyrights which were otherwise due to expire. Interim Acts were implemented in 1962; 1965; 1967; 1968; 1969; 1970; 1971; 1972; and 1974, before the Copyright Act of 1976 eventually provided more enduring legislation.

The House Committee report of 1961 included a more detailed theoretical account of copyright than had been presented in the report accompanying the 1909 legislation. That theoretical account attempted (in part) to address several of the theoretical difficulties that were flagged as problems in Section 2.5.1. The theoretical account attempted to clarify or solve three main issues:

1. What function, in principle, is copyright supposed to serve?
2. How long should copyright endure to best fulfil its function?
3. What kinds of objects ought to be copyrightable?

In relation to the first question, the report departed from the historical claim that copyright’s
sole purpose was to serve a social utility function. Although the report maintained that the promotion of social utility was “the primary purpose” of copyright, it also introduced – as a distinct notion – the idea that copyright ought to provide authors with ‘due reward’ for their labour. Unfortunately, although this distinction was introduced with the intention of solving inconsistencies within the House’s theoretical conception of copyright, it only really served as an acknowledgement of that inconsistency, because the proposition was never defended.

It is apparent that the House Committee intended to resolve certain theoretical problems through the proposal of this secondary function of copyright, particularly in relation to justifying its duration. For instance, it was seen in Section 2.5.1 that an author’s potential increased ‘need’ for copyright in their old age was used as a justificatory basis for the provision of expanded copyright terms, despite that carrying no inherent moral force under a social utility account of copyright. Indeed, the closest the Committee came to a defence of this proposed secondary function of copyright was to emphasise the instrumental connection it might have with the social utility function, saying:

Although the primary purpose of the copyright law is to foster the creation and dissemination of intellectual works for the public welfare, it also has an important secondary purpose: To give authors the reward due to them for their contribution to society. These two purposes are closely related. Many authors could not devote themselves to creative work without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of the intellectual works.

It should be clear that this alleged relation is theoretically fraught. First, the passage involves a critical transition from the phrase ‘the reward due’ to the phrase ‘the reward afforded by the market.’ Copyright functions as a regulation on markets (by limiting competition within markets), which means that the reward afforded by the market is contingent on the version of copyright that is enacted. On an optimised ‘social utility’ version of copyright, the market reward that is artificially sustained, through such regulation of the market, would be the lowest reward that is sufficient to still incentivise the production of socially valuable objects. It is therefore disingenuous to introduce the notion of ‘due reward’ as some threshold other than the lowest reward capable of

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67 Ibid.
68 Ibid., pp. 5-6.
incentivising creative authorship, while attempting to demonstrate a ‘close relation’ between the two values.

The practical consequence of introducing this delineation in copyright’s function, as the 1961 House Committee intended it, was to enable for the case to be argued (or at least asserted) that the duration of copyright should be increased. On this point the Committee reported to “believe that the benefits of copyright should be available to an author for his lifetime and to his dependents if he dies prematurely.” In addition to there being no defence given of the general claim that a ‘due reward’ should be guaranteed independent of the social utility function of copyright, the Committee also provided no argument for the claim that, assuming a guarantee of that kind was in fact justified, the appropriate value of the reward should be established as whatever an author could realise via a lifetime-spanning term of copyright. This was a bare assertion.

A further House Committee report, produced to inform the 1976 Copyright Act, attempted to downplay concerns about the potential friction evident between the social utility function and the ‘due reward’ function of copyright. That Committee commented that:

Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author’s expense.

This attempt to demonstrate that the provision of ‘due reward’ was not in conflict with the social utility function of copyright can be challenged. The notion of ‘harming’ authors (especially as opposed to abstaining from benefiting authors) implies the existence of a positive duty that has not been established; that is precisely what is in question. Furthermore, insofar as commercial exploiters of authored material (i.e. publishers and other distributors) represent the sole beneficiaries of works entering the public domain, it stands to be argued that this is a product of industry trusts which develop precisely because of the consolidation of monopoly rights under copyright. In fact, the development of exactly that situation was discussed by the 1909 House Committee, in relation to the music industry, as the basis for establishing compulsory licensing provisions as an anti-trust measure. The same concerns, of course, dated back to as far as the perceived trust

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69 Ibid., p. 49.
established within the Stationers’ Company in Seventeenth- and Eighteenth-Century Britain.

On the substantive question of how long copyright protections should last, the opinion of the House shifted significantly between 1961 and 1976. Although in both years the House reported the opinion that copyright should persist for the whole duration of an author’s life (and be able to supply an author’s dependents, in the case of an untimely death), the preferred means by which to achieve that had changed. In 1961, the House Committee reported that two alternatives had been taken under consideration. The first method, preferred by the House at that time, was for a fixed term of copyright which would begin upon first publication of a work. The House estimated that a term of 76 years would be sufficient in achieving its desired end. The alternative system, which the Committee did not recommend, was a term indexed to the death of the author. The term of copyright under consideration on that model was the lifetime of the author, plus 50 years.

The 1961 House Committee’s reasons for preferring a fixed-term system over the variable system indexed to an author’s death were multifaceted, but included the clarity afforded by being able to record the expiry date on published editions; and the uniform applicability of the term to corporate and anonymous works. Nevertheless, by 1976 the House had come to recommend the implementation of a copyright term consisting of the length of an author’s life, plus 50 years. The weight of opinion was so strong on this point, in fact, that the Committee noted that the “Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill.” This was subsequently the term that was enacted in the bill.

The final major matter considered by the 1961 House Committee, and which was revised in the Copyright Act of 1976, was the scope of copyright. In 1961 the Committee acknowledged several of the shortcomings present in the 1909 Act. Most notably, the Committee identified the need to explicate several otherwise implicit general requirements which objects ought to meet in order to be considered copyrightable. The Committee explained that:

…basic requisites of copyrightability are not mentioned explicitly in the [1909] statute. While they are generally recognized by copyright specialists, the absence

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72 House Comm. on the Judiciary, above n 66, pp. 50-51.
73 Ibid., p. 45.
74 Ibid., p. 48.
75 House Report on Copyright Law Revision, above n 70, p. 133.
76 Ibid.
of any reference to them in the statute seems to have led to misconceptions as to what is copyrightable matter. We believe it would be desirable for the new statute to mention these basic requisites in general terms.\textsuperscript{77}

In view of contentions raised in later chapters (especially Chapters 6 and 7), it is likely that the copyright specialists referred to in the quoted passage did not have a good critical conception of what the basic requisites of copyrightability ought to be. They did, however, likely have an intuitive understanding of what should be copyrightable, and that intuition would have closely approximated a good critical conception much of the time. The House Committee demonstrated the same intuition in making its own recommendation that new legislation:

\ldots should be broad enough to include not only those forms in which copyrightable works are now being produced, but also new forms which are invented or come into use later. At the same time, we do not think that the language of the statute should be so broad as to include some things – typography, broadcast emissions, and industrial designs are possible examples – that might conceivably be considered the ‘writings of an author’ but are not intended by Congress to be protected under the copyright law.\textsuperscript{78}

This concern mirrors the potential objection identified in Section 2.5.1 in relation to the potential classification of a bricklayer being considered the ‘author’ of a wall. The Committee’s recommendation to explicate the general requisites of copyrightability were intended to add substantive definition to those guiding intuitions.

The 1961 report recommended the adoption of three specific principles in determining general copyright eligibility. These were:

1) That the object must be ‘written,’ in the historical sense that it must be fixed in some tangible form (although, as noted below, the intended sense of ‘tangible’ was still ill-defined);
2) That the object must be original, in that an author must have produced it through their own intellectual effort, and not merely copied it; and
3) That the object “must represent an appreciable amount of creative authorship.”\textsuperscript{79}

To make sense of the third requirement, the notion of ‘creative authorship’ must be taken

\textsuperscript{77} House Comm. on the Judiciary, above n 66., p. 9.
\textsuperscript{78} Ibid., p. 11.
\textsuperscript{79} Ibid., p. 9.
to be the component that grants eligibility to books and music; while restricting the extension of copyright to typography, industrial designs, and walls. This means that the term ‘creative,’ in this context, does not refer just to the bringing of something into existence (since, in that sense, building walls is creative). Instead, ‘creative’ work must be understood as work that is emotively or expressively artistic. Unfortunately, by not fully articulating the nature of ‘creativeness,’ the House failed to alleviate the need to appeal to intuition in determining copyright eligibility. The general guiding principles intended to be explicated therefore remain implicit.

Eventually, the Copyright Act of 1976 defined the scope of copyright by stipulating that:

(a) 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. Works of authorship include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works; and
7. sound recordings.\(^8\)

In 1980, Congress amended this list further, to include software.\(^8\)

In addition to stipulating what kinds of objects were copyrightable, the House recognised that instruction was required regarding what copyright (as a protection against ‘copying’) ought to entail in relation to certain kinds of objects. As the House recognised, this need arose from the apparent tension (also highlighted in Section 2.5.1) between the claim that copyright was to exclusively protect expressions of ideas fixed in tangible media; and the allegedly ‘obvious’ injustice of allowing competing expressions of the same idea in certain contexts (such as competing performances of a stage play that express the same story).

The 1961 House Committee report once again offers the most extensive commentary on this issue, but this proves unsatisfactory once again. In attempting to resolve the central point of tension, the Committee tried to draw a distinction between the ‘ideas’ expressed

\(^8\) Copyright Act, 17 U.S.C 1976, § 102.
in copyrightable objects, and a quality of copyrightable objects that the report termed “essential substance.” 82 The notion of what constitutes the ‘essential substance’ of a copyrighted work, however, was left critically underdefined.

The non-copyrightability of ideas was explicitly reiterated in the 1961 House Committee report. The Committee asserted that an author’s enjoyment of copyright “does not preclude others from using the ideas or information revealed by the author’s work,” and that “anyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author’s form of expression.” 83 At the same time, however, the Committee characterised the law as correctly protecting literary, dramatic, and musical works against “the making of new versions,” and against their “reproduction in any transcription or record.” 84 The simultaneous espousal of these claims represents a conceptual contradiction. A restriction against the production of ‘new versions’ must function as a restriction against alternative expressions of the same idea; and restricting the production of a transcript or record (as in the case of the stenographer taking notation during a play) was already shown (Section 2.5.1) to be at odds with the Idea-Expression divide.

The House Committee recognised this tension, noting that the word ‘copy’ had historically been used in a broader form than would refer merely to the physical manifestation of an object. The Committee attempted to explain away this apparent tension by saying that, “[w]hile anyone is free to use the ideas disclosed in a work, and to use the same source material in creating another work, the reproduction of the essential substance of an author’s expression constitutes ‘copying,’ even though his work is altered in the reproduction or is reproduced in a different medium or form.” 85 This leaves two problems, however. First, it means that, although copyright is only extended to objects which are affixed in tangible forms (and so objects are categorised as copyrightable or uncopyrightable based on their media class), the tangible form of a copyrighted thing is in no way the object of copyright protection. It is therefore neither the metaphysical object (the idea) nor the physical object (the material embodiment of the idea) that copyright purportedly protects. Second, insofar as the ‘essential substance’ of an object is intended to mark what is protected, the term is not sufficiently defined. It is unclear what the essential substance of an author’s work consists of, if not the author’s ideas.

82 House Comm. on the Judiciary, above n 66, p. 22.
83 Ibid., p. 3.
84 Ibid., p. 21.
85 Ibid., p. 22.
Compared to the commentary produced in 1909, a more explicit and detailed theoretical account of copyright was attempted by the House in 1961, which eventually influenced the Copyright Act of 1976. The account acknowledged several conceptual problems and inconsistencies that had been present in the legislation since 1909. The report demonstrated that these problems and inconsistencies had obscured the understanding of the intended function of copyright; and of what copyright was intended to apply to. Despite the articulation of the problems, however, the proposed solutions were lacking; often turning on poorly defined conceptual notions.

2.5.3 Sonny Bono Copyright Term Extension Act (1998)

The most recent legislative action that effected an increase in the duration of copyright, in the United States, was the implementation of the Sonny Bono Copyright Term Extension Act (1998). Whereas Acts that had previously increased the term of copyright in the United States had also implemented other significant revision as well, the Sonny Bono Act was drafted with the exclusive intention of increasing the term of copyright by 20 years. With the enactment of the extension, the term of copyright was increased to the lifetime of the author, plus 70 years. All other copyright terms (such as for corporate works or ‘works-for-hire,’) were extended by 20 years as well. For instance, the term for corporate works became 95 years from the date of publication; or 120 years from the date of creation (whichever is shorter). These increases were applied retroactively to copyrighted objects that had not already entered the public domain.86

The central reasons cited for providing this extension were that life expectancy had increased since the provision of the life-plus-50 term in 1976, and that it would serve a pragmatic usefulness in standardising copyright conditions internationally.87 The legislation was soon challenged, however, in a legal case that was escalated to the Supreme Court: Eldred v Ashcroft (2003). The lead counsel for the plaintiff, Professor Lawrence Lessig, advanced two arguments alleging the unconstitutional nature of the Sonny Bono Act. First, that the extension represented a violation of the limit set on Congress, in the Constitutional Copyright Clause, to establish copyright for “limited Times.” Second, that the retroactive extension of terms for an additional 20 years violated the First Amendment.88

The claim advanced against the constitutionality of the Sonny Bono Act, by appeal to the restriction placed upon Congress (that copyright was only to be establish for limited terms), was based on the allegation that the provision of a term that could be perpetually extended would amount to a form of protection that was functionally without limit. Subsequently, the assertion went, retroactive extensions of copyright ought to be considered unconstitutional; especially because such an extension could not be construed to promote progress in science or the useful arts. The majority opinion of the Supreme Court, however, was that the term of life-plus-70 represented a finite term, and that finite terms – even very long finite terms – satisfied the condition of being a limited term. This was a familiar stance, in that it was also adopted by Congress during the drafting of the Sonny Bono Act. In fact, Mary Bono (whose husband, Sonny Bono, sponsored the Copyright Term Extension Bill) urged Congress that it should, in absence of the option to establish perpetual copyright, pursue Jack Valenti’s proposal to limit copyright’s term to “forever less one day.”

Lessig’s second argument, which alleged a contravention of the First Amendment, characterised copyright as a limit on free speech. The contention was not that copyright presented a violation of the Amendment generally; the point Lessig intended was that, by providing Congress the power to extend the term of existing copyrights, Congress was provided the power to determine who had the right to speak. As Lessig accounts, a consideration of this argument was not demonstrated in the Justices’ written opinions.

The challenge levied against the Sonny Bono Act in Eldred v Ashcroft was not successful; the constitutionality of the Act was affirmed by the Supreme Court. Lessig attributed the outcome to a failure he saw as his own. Whereas several Justices indicated that their opinions turned on whether previous extensions in copyright could be demonstrated to have had a negative material impact on progress in the sciences and useful arts, Lessig considered such pragmatic questions to be immaterial to the principled basis upon which he believed the case ought to be decided. Therefore, even though he considered such material harms to be easily demonstrable, he refused to deign to direct his answers towards those concerns, and instead redirected the Justice’s questions to what he saw as the principle of the matter: the imperative to limit the powers of Congress. By Lessig’s estimation, the answers he provided were correct, but were not the right ones to give.

89 Ibid.
90 Ibid.
92 Lessig, above n 88.
93 Ibid.
2.6 Conclusion

The history of copyright’s development is a history of inconsistency and confusion. It is a history which involves the persistent retrofitting of (purportedly) principled accounts to existing systems, by agents already invested in those systems. Moreover, where justificatory accounts of copyright have been offered, they have routinely been made on appeal to intuitions that have not been adequately articulated. Nevertheless (and with increasing regularity) those under-articulated accounts have been allowed to serve not only as a basis for maintaining copyright; but for consistently expanding it. That expansion has been twofold: both the duration of copyright, and the scope of the objects to which copyright applies, have been extended without clear principle.
Chapter 3
Assessing Locke as a Basis for Natural Copyright

3.1 Introduction

In Chapter 2 it was shown that, throughout the development of copyright in both Great Britain and the United States, a recurring point of social and legal contention was the question of whether there existed a natural law basis for the provision of copyright; or whether copyright could only exist via fiat. Through Donaldson v Becket (1774) and Wheaton v Peters (1834), both nations respectively established that there was no natural basis for the provision of copyright. Nevertheless, it is reasonable to question whether those determination were correct. After all, the decisions had not come simply or unanimously; and other influential legal decisions regarding copyright have been shown to be erroneous.

Furthermore, even if one accepts that the arguments presented in favour of recognising natural law copyright were correctly dismissed when tested in court, it might be the case that those arguments did not reflect the strongest available form of the argument. Indeed, most popular arguments for natural law copyright (and copyright expansionism) have, historically, lacked philosophical rigour – and this remains true today. Although such accounts typically enjoy some intuitive appeal, the intuitions that they test are ultimately left under-examined. Those accounts are thus unable to withstand even moderate scrutiny. The purpose of this chapter is therefore to explicate a strong natural law account of property, which can be tested (in Chapter 4) as a basis for sustaining a natural law justification of copyright.

Subsequently, the argument developed in Chapter 4 is that when even the most compelling labour-based natural desert account of property is considered, it proves incapable of supporting an account of natural economic copyright. This is prefigured in the present chapter by a consideration John Locke’s labour theory of property. Although Locke articulates a more rigorous and compelling account than has been presented at law or in popular commentary, while successfully incorporating all of the defining components of those inferior accounts, it shall be shown that a Lockean account is incompatible with a natural law account of IP.
3.2 Lockean Theory

Despite the underdeveloped nature of most popular natural law arguments for copyright expansion, several themes are common throughout them. Centrally, they all take the form of ‘desert’ or ‘fairness’ accounts; and they identify labour as the basis of desert or fairness. I therefore refer to these accounts as naïve desert accounts. In their simplest form, naïve desert arguments affirm the ostensibly uncomplicated view that people ought to have the right to enjoy what they produce through their own labour; secure against appropriation by others. In seeking the strongest form of that argument, it is essential to consider the property theory of John Locke.

Several natural law property accounts exist other than Locke’s. These include notable accounts by Hegel; Kant; Grotius; Pufendorf; and Aquinas. Lockean theory is preferred here, however, for two reasons: First, the labour-centrism of Locke’s account makes it analogous to the popular desert accounts that are deployed in arguing for expansive copyright protection. Second, Lockean property theory has enjoyed a preeminent historical influence in connection to the development of modern property law in both Great Britain and the United States; and is regularly regarded within academic literature as being important to IP law.⁹⁴ Therefore, insofar as underdeveloped accounts of natural law copyright can be attached to an established and rigorous philosophical account, they appear most naturally to attach to a Lockean account of property. Moreover, an account of copyright that is attached to a Lockean account should also be expected to remain legally (and in principle) consistent with prevailing property law.

On the other hand, it is important to note that Locke did not develop his account with anything other than material property in mind. The application of Lockean theory to intellectual property is therefore not straightforward. As such, one of the central functions of the explanatory account of Lockean property theory that follows is to make prominent the qualities of the account that are critical to assessing its extensibility to IP. This shall contextualise a subsequent account, provided in Chapter 4, which demonstrates that Lockean property theory precludes, rather than establishes, a natural basis for proprietary copyright.

It should be noted that the treatment of Lockean theory given here is not intended to

persuade proponents of competing property theories (e.g. Hegelian, Kantian, etc.) that the Lockean account of property is correct. Rather, the explication and analysis of the Lockean model (presented across this chapter and the next) is intended only to demonstrate that proponents of Lockean property theory cannot ground a defence of natural law proprietary copyright on that basis. Furthermore, if proponents of popular desert arguments object to the features of a Lockean account that prevent it from establishing natural proprietary copyright, then those proponents carry the burden to demonstrate the relative superiority of their account over Locke’s.

3.2.1 The Naïve Desert Narrative

Popular arguments for expanding (or at least not restricting) the terms or provisions of copyright typically invoke a naïve desert narrative that lacks philosophical substance. They are also frequently presented by celebrities (often with a vested interest in IP law outcomes), or by politicians. A 2016 example, offered by Australian author Jackie French, is illustrative. An alternative example, offered by Joseph Biden, demonstrates an equivalent example framed in terms of fairness.

French, in a one-page open letter composed in response to a report issued by the Australian Productivity Commission, defends a rudimentary desert account of IP. She intends this account to reveal the injustice of the Commission’s recommendation that Australia restrict the duration of copyright to be to (approximately) 15 years. Under the heading ‘Theft and the Failure of Economics 101,’ French contests the Commission’s assertion that authors “rarely write for financial reasons,”95 and suggests that writers are treated unjustly as compared to other property holders and people who derive income by different means.96

By way of comparison to the 15-year proprietary period recommended by the Productivity Commission, French points out that if she “had spent [her] time renovating houses, or investing in shares, [she] would own them. So would [her] heirs.”97 She then presents a series of five rhetorical questions, including (and each similar to) the inquiry, “[i]f you built a bicycle or a house, would you give it to anyone who cares to grab it, in 15 years’ time?”98

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95 The actual claim made by the Productivity Commission is that “Few, if any, creators are motivated by the promise of financial returns long after death, particularly when the commercial life of most copyright material is less than 5 years.” See: Productivity Commission, Intellectual Property Arrangements, Inquiry Report 78, Canberra, 2016, p. 8.
97 Ibid.
98 Ibid.
Each of these questions is intended to function, without further comment or explication, in support of French’s objection against the Commission’s suggested copyright term.

French’s argument is unconvincing because she attempts to demonstrate an analogical similarity between traditional physical property and IP, without considering important differences between those objects. Her comparison of a book and a bicycle loses force, for example, when one considers that, although owners of physical objects like bicycles own those objects perpetually, inventors of objects like bicycles only enjoy the patent rights for a fixed term. This represents a difference in the way ownership of types is treated differently (under IP) than the ownership of tokens is treated under traditional property law. Without considerably expanding her account, French is unable to demonstrate that there is good reason to treat the ownership of types identically to the ownership of tokens.

Despite its significant lack of rigour, French’s letter belongs to a tradition of arguments which often evoke public sympathy, and that even enjoy some legal success when presented in court. It is therefore worth highlighting the defining features of this kind of naïve desert argument. This can serve to demonstrate the prima facie similarities between these popular accounts and John Locke’s much more substantial and rigorous labour theory of property. To do that, however, it is also necessary to consider one more way in which naïve desert accounts can be framed.

Rather than being expressed in terms of what an author deserves on the basis of their labour, the favoured notion of people pursuing a naïve desert account of copyright is often fairness. An argument for expanding copyright protection was presented in this form, for instance, by United States Senator Joseph Biden in 2002. Acting as Chairman in a Congressional hearing on IP, Biden opened accounts with an appeal to fairness by arguing that, even if a musical band was incentivised enough to continue playing music for the public while their recordings; videos; and merchandise were distributed for free, it would not be fair for the band to have to do so.99

Like French, Biden’s objection regarded the proposition that authors are not primarily motivated by economic reward. However, whereas French attacked the accuracy of the proposition, Biden’s objection was against its pertinence. That is, Biden’s argument was that, even if it were granted that creators of copyrightable material are not predominantly driven by economic reward (and that they would create content even without the prospect

of economic gain), that fact would be immaterial to the question of what right they ought to have to extract economic gain if they were to choose to. To highlight the desert component of Biden’s claim, it can be restated: Even if authors knew ahead of time that they would not receive economic compensation for producing a work; but were motivated by other factors to produce the work anyway, that willingness on the part of authors would not vindicate society in withholding from them the economic reward they deserved.

Whether stated in terms of desert or fairness, naïve desert arguments share common core components. Specifically, naïve desert accounts locate the basis for proprietary desert in the acts of labour by which objects are produced. French, for example, argues that building a bicycle ought to generate ownership rights over that bicycle; and that (by implicit analogy) writing a story ought to generate ownership rights over that story. In this way, insofar as a naïve desert account of property is intended to be extended to copyright, no conceptual difference is acknowledged to exist between tangible and intangible objects. Whether one’s labour produces a bicycle or a story, the fact of the labour is taken to beget a natural proprietorship over the object thereby produced.

The central tenet of the naïve desert narrative is mirrored in Lockean property theory. Insofar as such desert theories regard tangible objects (e.g. French’s bicycle example), they should be expected to agree with traditional Lockean theory. Specified in Locke’s account, however, are important limits which are placed upon natural proprietorship. These limits are implemented by Locke through two provisos: one which prohibits waste; and one which prohibits the monopolisation of resources. Close examination (see Chapter 4) reveals that these provisos prohibit the possibility of natural proprietorship in relation to authored works. This is because of the way the provisos intersect uniquely with non-physical objects that are infinitely replicable and do not expire.

3.2.2 The Rigorous Lockean Account

Locke’s famous contribution to property theory comes via his second essay in Two Treatises of Government; through a short chapter titled ‘Of Property.’ The objective of that chapter is to account for the process by which humans could have originally come to justifiably own property. To that end, Locke begins by imagining a hypothetical state of nature, wherein private property does not already exist. The argument then proceeds upon the claim that, under such conditions, each person would be entitled to an equal claim to the resources of the world. Locke therefore characterises the Earth’s natural resources as existing in a commons, from which all people have a natural right to extract objects that are
useful in furthering their own projects and guaranteeing their continued survival.  

Locke uses the concept of labour to explain the process by which objects can be extracted from the commons and made into private property. According to Locke’s labour theory, humans are unlike other things, in that they do not form part of the natural commons. Instead, humans (including their bodies) are subject solely to their own authority, and, in this sense, belong only to themselves. Locke even goes so far as to say that holding this authority over oneself makes a person “master of himself, and proprietor of his own person.” On the Lockean account, this exclusive self-mastery is what subsequently substantiates all legitimate claims of exclusive proprietary ownership.

From the fact that each person enjoys exclusive authority over themselves and their own body, Locke extrapolates that each person must also be permitted to enjoy a unique claim over anything that is produced through the application of their person or body. He explains why this is so in terms of a ‘mixing’ metaphor: When a person exerts themselves in work, they are able to ‘mix’ their labour with objects located in the commons, and can thereby extend the exclusive right they have in their bodily labour to the object with which it is mixed. For example, if an individual cut branches from a tree (located in the commons), with the intention of using the material to construct a shelter, then they would thereby have mixed their labour with the branches through the cutting. In doing so, the person would secure an exclusive right to the use of the branches, and any attempt by another to use them without permission would constitute an offence against the labourer.

It is important to Locke’s account that adherence to this principle serves a pragmatic function. This is because Locke takes the central challenge to an account of private property to be the tension that ostensibly exists between one’s own alleged property rights, and the fundamental natural right, that others have, to use the resources of the natural world for self-preservation. Locke suggests that an individual’s assertion and exercising of an exclusive right to the use a natural resource seems, initially, to contradict the obligation that all human have not to interfere with other peoples’ pursuit of subsistence. He says that:


101 Locke does make allowances here by, for instance, conceding that parents hold a temporary authority over their young children (Ibid., p. 147); and by permitting for the dutiful representation of the interests of mentally incapacitated individuals, unable to exercise reason in their condition (Ibid., p. 150). It is beyond the present scope to assess the merits of these peripheral scenarios.

102 Ibid., p. 123. Invoking the notion of proprietorship in this way is a mistake on Locke’s part. In inherent quality of property rights is that they can be waived or transferred, but it is evident that this is now what Locke intends, given the position he takes on slavery. On slavery, Locke contends that “a man … cannot by compact or his own consent enslave himself to [anyone], nor put himself under the absolute, arbitrary power of another…” (Ibid., p. 114). This demonstrates that, in whatever way a person may be master of themselves or their body, this mastery cannot be voluntarily transferred, and so is not proprietary.
[If] we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence … it seems to some a very great difficulty how any one should ever come to have a property in anything.\textsuperscript{103}

For labour to serve as a just basis for proprietorship, then, it must be shown to facilitate people’s ability to justly secure their own preservation (i.e. without unduly preventing others from doing the same). It can be understood to achieve this function through the instrumental value it provides when exerted upon common objects. It is apparent that, within the state of nature, many objects in the commons would obviously be indispensable in the fulfilment of one’s self-preservation obligations. Moreover, it is also clear that, for the potential value of these objects to be realised, labour must be exerted upon them. Indeed, Locke wrote that, if we consider what portion of the value an object offers “is purely owing to nature, and what to labour, we shall find that in most of them ninety-nine hundredths are wholly to be put on the account of labour.”\textsuperscript{104}

This value which labour contributes, combined with the personal cost involved in performing it, is what establishes it as a just basis for the generation of private property rights. Since it would be generally counterproductive to a person’s pursuit of subsistence, for them to labour without reaping a return, the principle of assigning ownership of an object to the person who ‘mixed’ their labour with it, is well founded. Such a principle addresses the obstacle that would be presented against the preservation of life, if there was to develop a convention by which some people waited for others to labour, with the intention of using the proceeds of that labour for themselves.

Freeriding would harm those who laboured, so its occurrence would naturally discourage people from labouring. In this way, each person would inherit the perverse incentive not to labour, in view of the risk of falling prey to freeloaders. Furthermore, people would be motivated to seek opportunities to freeride themselves. This would introduce a competitive component to the pursuit of the perseverance of life, which would be in clear contradiction to what Locke observed as the natural obligation to not, where possible, promote one’s preservation or subsistence at the expense of the preservation or subsistence of others.

Lockean property theory therefore represents a natural law desert account. The natural fact

\textsuperscript{103} Ibid., p. 133.
\textsuperscript{104} Ibid., p. 141.
of the value added by labour means that the people who add value deserve to benefit from it. Insofar as a labourer’s ability to realise such a benefit is contingent on the object of their labour not being used by other people, an exclusive right over that object ought to be guaranteed to them. That right constitutes proprietorship.

Although the Lockean account can be characterised as a desert account, it is quite dissimilar to the naïve desert accounts considered previously. What separates Lockean theory from rudimentary labour accounts, like French’s and Biden’s, is a rigorous consideration of the characteristics of the natural commons that informs critical limitations against the freedom of individuals to appropriate objects from it. As is seen in Chapter 4, those limitations critically affect the extensibility of Lockean theory to intangible objects.

3.2.3 Characteristics of the Natural Commons

By the time Locke wrote about property, people had already come to question what the existence of a natural commons would entail, if all people were to be taken to share an equal claim regarding the contents within it. Two competing account had been advanced, which found favour in different natural law theories.105 According to one account, every person must be considered to have an equal negative right to extract (and use) objects from the commons. According to the alternative account, every person must be considered to have an equal positive right to extract (and use) objects from the commons.

On the negative-rights view, people are entitled to extract anything from the commons, without limit, and to claim it as private property when they do. This operates on a strictly ‘first-come’ basis, in that one’s right to extract from the commons is not considered to limit, or to be infringed by, anyone else’s extraction of objects from the commons. Therefore, if somebody discovered that a resource they had intended to extract from the commons had already been depleted, they would be owed no recourse, since they had never secured any right in the use of it.106

The positive-rights account also contends that everyone has the right to claim private proprietorship over any objects they extract from the commons. Unlike the negative-rights account, however, it also holds that everyone has a prior right to enjoy an equal portion of the commons; even before they extract their portion from it. This means that, in extracting objects from the commons, care must be taken not to extract so much as to deny the fair

106 Ibid. p. 45.
opportunity of others to extract their own share of natural resources.\textsuperscript{107} 

Lockean theory affirms the positive-rights view of the commons.\textsuperscript{108} This view is conceptually more complex than the negative-rights view. This is because holding the positive-rights view requires a further determination to be made about how the pre-existing (pre-labour; pre-extraction) right to a portion of the commons should be conceptualised. After all, it is not immediately clear how an individual could extract objects from the commons and remain confident that they had only extracted the share naturally allotted to them.

One way of conceptualising the equal positive right to a share of the commons, for instance, would be by regarding every person as being entitled to an equal share of each individual object in the commons. That is, for a population of size $n$, all persons would be entitled to an $n$th of every acorn, and an $n$th of every raindrop – and so on. Under such a system, however, it is hard to see that anyone could ever come to own enough of anything to be make any object useful at all. Locke acknowledges as much, noting that it would be utterly unfeasible, under such an arrangement (especially in the state of nature), to consult with every other claimant, and to thereby negotiate the kind of multilateral transfer of claims that would be needed for a person to ever own any whole object.\textsuperscript{109}

Instead, one might take the view that each person’s positive claim to a portion of the commons must manifest as a right to use whole objects. The challenge in that case, however, arises in determining how different whole objects are to be allocated fairly between different people. If one’s right to make use of the commons was to be understood as a right to use a specific subset of the objects within it, then it would be unclear how a person could determine which objects belonged to their personal subset. This would make it impossible for anyone to know where they could justifiably direct their labour, and thus also an entirely unpracticable solution.

Locke resolved this difficulty by explaining that nobody has a pre-existing positive right in relation to any specific objects that are in the commons (either in whole or in part), but that they instead have, in the words of Peter Drahos, “merely the right to be included in the commons for the purpose of exercising the natural rights of survival and subsistence.”\textsuperscript{110} In this way, Locke generalised the equal positive right so that it could be understood as

\begin{itemize}
  \item \textsuperscript{107} Ibid., p. 46.
  \item \textsuperscript{108} Locke, above n 100, p. 135.
  \item \textsuperscript{109} Ibid. p. 117.
  \item \textsuperscript{110} Drahos, above n 105, p. 46.
\end{itemize}
affording the ability to make use of natural resources (whichever ones prove useful), as long as the extent of one’s use of them would not inhibit the ability of others to use the same resources in pursuit of the same ends.

On this conception of the positive right every person has the right to access the commons and extract from it objects that would improve their condition. However, in making such use of natural resources, every person is obliged to leave enough in the commons as is necessary to ensure that everyone can pursue survival and subsistence with resources of equal quality and usefulness. This is expanded upon and made more explicit in Locke’s account when he introduces the first of two provisos which limit the process of property acquisition in different ways.

3.2.4 Natural Limitations: The Two Lockean Provisos

Two complimentary formulations have just been provided as to the role of labour in Locke’s theory of property. On one formulation, the power of labour to establish private property stems from the natural and exclusive self-mastery that every person enjoys. From this self-mastery, one derives an exclusive claim to one’s labour, which in turn can be mixed with objects located in the natural commons to extend an exclusive claim to those as well. On the second formulation, labour is what makes common resources useful, and so a collective regard for labour is necessary in preventing a natural free-rider problem from arising (which would obstruct people from fulfilling their obligations of self-preservation and subsistence). Within this framework, however, Locke regarded one’s ability to employ labour towards the acquisition of private property to be fundamentally limited in two critical ways. These are described as two Lockean provisos.

The first proviso Locke establishes in ‘Of Property’ requires that individuals, in appropriating common objects as private property, must leave in the commons enough of the resource they appropriate (and of equal quality to that which they appropriate) as might be needed to service the needs of any person who may also want to make use of that resource. This is known as the as good and as much proviso, and represents an explicit protection against any appropriation of common objects that is so extensive as to inhibit the ability for other people to pursue their own sustenance and self-preservation with equal opportunity. This proviso, in effect, represents a natural protection against the establishment of monopolies.

111 Locke, above n 100, p. 134.
Locke’s second proviso prohibits waste. This waste proviso limits property acquisition by prohibiting labourers from allowing the objects they have extracted from the commons to expire uselessly under their proprietorship. An offence against this proviso would occur, for example, if an individual picked fruit (and thereby removed it from the commons), but subsequently allowed it to rot before it was consumed.

Both Lockean provisos can be justified as natural products of the dual formulations of the role of labour in Locke’s account. Consider, first, the ‘as good and as much’ proviso. According to the self-mastery component of the Lockean account, the power that labour has in garnering private property stems from the sovereign mastery that a person enjoys over themselves and their own body. The exclusive right to the use of one’s body can be extended, through the ‘mixing’ of labour, to objects naturally located in the commons. Recall, however, the difficulty which Locke encountered in determining whether the equal claim held by all people in relation to the commons constituted a negative or a positive right. The ‘as good and as much’ proviso resolves this problem, in favour of the positive-rights account, by eliminating the potential for competing claims to arise in relation to objects which are in the commons. This is because, as Locke explains, whoever “leaves as much as another can make use of does as good as take nothing at all,” and thus cannot reasonably be taken to infringe upon the equal share owed to anyone else. He gives the further example that:

Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his first. And the case of land and water, where there is enough of both, is perfectly the same.

An explanation of the ‘as good and as much’ proviso can be equally well produced with reference to Locke’s formulation of labour as correctly generating private property because of the value it adds to natural objects; and because of the role it therefore plays in enabling the fulfilment of self-preservation and subsistence. By identifying the obligations of self-preservation and subsistence as mutual obligations, common to all humans, Locke identifies a natural basis for requiring that people not unnecessarily (or exploitatively) impinge upon the ability for other people to pursue those mutual ends. The ‘as good and as much’ proviso represents a collective embodiment of that limitation, since reciprocal adherence to it ensures that any strategy selected by an individual, in pursuing self-

112 Ibid., 118.
113 Ibid.
preservation, is guaranteed to be compatible (i.e. non-competitive) with any possible combination of strategies employed by all other people engaged in the same pursuit.

It is worth noting that the ‘as good and as much’ proviso represents a natural basis for establishing arguments for the prohibition of market phenomena like monopolies; trusts; and price gouging. The act of creating a monopoly (or agreeing to act in trust), to artificially raise the market value of objects; or the act of arbitrarily raising the market prices of base necessities during a state of emergency, could reasonably be perceived to represent an undue obstruction against one’s peers in their pursuit of self-preservation and subsistence. In that case, these actions would constitute natural offences on the Lockean account.

In the case of the waste proviso, the two aspects of labour’s role in generating private property and even more intertwined. According to Locke:

… he that so employed his pains about any of the spontaneous products of Nature as any way to alter them from the state Nature put them in, by placing any of his labour on them, did thereby acquire a propriety in them; but if they perished in his possession without their due use – if the fruits rotted or the venison putrefied before he could spend it – he offended against the common law of Nature, and was liable to be punished: he invaded his neighbour’s share, for he had no right farther than his use called for any of them, and they might serve to afford him conveniencies [sic] of life.114

The reference in this passage to ‘offending against a neighbour’s share’ reiterates that, for Locke, humanity’s collective claim upon the commons is to be enjoyed equally by all. It is only by the usefulness that individual labour contributes, when applied to natural objects (which owe “ninety-nine hundredths”115 of their usefulness to labour), that labour can serve as a basis for the private apportionment of the commons. However, because the sole justificatory power that labour has in warranting private appropriation arises by appeal to this contribution it makes to the usefulness of objects, the neutralisation of that usefulness (e.g. by allowing one’s property to expire uselessly in one’s possession) would therefore logically invalidate the natural basis on which the proprietorship was originally justified.

One may question why, on Locke’s view, waste is characterised as an offence against a neighbour’s share, if we are to assume that the appropriation was otherwise undertaken in accordance with the ‘as good and as much’ proviso. After all, waste should not affect one’s

114 Ibid., pp. 139-140.
115 Ibid., p. 122.
neighbour, if the taking of the wasted object originally amounted to ‘the taking of nothing at all.’ The waste of what amounts to nothing at all should, it seems, amount to the waste of nothing at all. The effects of waste on third parties aside, however, the investment of labour represents a cost that, if conducted for nothing (because the product of the labour was permitted to expire uselessly), would be counterproductive to self-subsistence. On the Lockean view, this would be enough to constitute a natural offence. As explained in Chapter 4, however, the effect of waste on third parties may have a special relevance in relation to intangible objects.

3.2.5 The Two Types of Value that Objects Can Have

A final aspect of Locke’s account, which relates to the value of objects, must be considered. It is necessary to distinguish between two separate kinds of value that objects can have. These types of value shall be called natural and conventional value. The consideration of the difference between natural and conventional value intersects importantly with the Lockean waste proviso. It can be shown to critically impact the way in which a Lockean account, if it is to remain consistent, must regard intellectual objects (see Chapter 4).

Locke considers that the objects of most value to human life are those which generally perish after a short time, such as fruits; meats; and other foodstuffs. He also considered that the value of these objects is both obvious and inherent, but that, since their value expires when they perish, it would be foolish and dishonest to appropriate more of them from the commons than one has a use for (as reflected by the waste proviso). At the same time, however, Locke suggest that a second class of objects exist (and existed in the state of nature), which consists of non-perishable objects. This category includes objects such as precious metals and gemstones. Unlike perishable items, Locke did not consider non-perishables to have real value, but says of them that they are “things that fancy or agreement hath put value on, more than real use and the necessary support of life.” I shall refer to the value typically represented by perishable items as natural value; and the value established by agreement, in relation to non-perishables, as conventional value.

Locke understood that objects of conventional value intersect uniquely with the waste proviso (or, rather, have no intersection with the waste proviso). Because of their non-perishable nature, objects of conventional value never expire after they are removed from the commons, as so cannot expire uselessly under a labourer’s proprietorship. This also

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116 Ibid., p. 144.
117 Ibid.
makes the perpetual accumulation of more and more conventionally valuable objects not wasteful.

Locke used this observation regarding the unique quality of conventionally valuable object to rationalise and account for the existence of money. On this view, a centralised currency – consisting of tokens of a precisely defined conventional value – would enable people to accumulate property of persistent value. These could then be exchanged for naturally valuable, whenever the token holders came to require them. This would motivate individuals to labour in the production of more than was immediately pertinent to their needs, and thereby to lead to a capital economy. It is on this basis that readers like C.B MacPherson interpret Locke as providing an account of the way in which the state of nature (wherein the Lockean provisos rightly apply) is transcended via the establishment of capitalist systems capable of effectively eliminating the restrictions represented by the Lockean provisos. In the next chapter, consideration is be given to the way in which IP regimes fit within the range of proprietary systems that are developed under such capital economies.

### 3.3 Conclusion

Naïve desert accounts are often invoked in an attempt to demonstrate a natural basis for copyright. These accounts are aimed towards establishing labour as a basis for natural (and perpetual) proprietorship. However, naïve desert accounts fail to grasp how labour accounts of property properly function. Rather than simply dismissing such claims, this chapter considers whether it is possible to construct a Lockean natural law basis for copyright.

Three critical components of Locke’s account have been identified. The first component is the conception of a natural commons of objects, to which every individual has an equal claim. This equal claim takes the form of a positive right; but instead of being entitled to a pre-defined portion of the commons (as had been previously theorised), Locke theorises that one’s claim upon the commons is realised through an avenue that remains equally available to all: labour.

The role of labour in establishing private property is twofold in Locke’s theory. First, labour represents a natural extension of the exclusive self-mastery that individuals enjoy over themselves and their bodies. By metaphorically ‘mixing’ their labour with natural objects,

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Locke contends that people can convert their self-mastery into mastery (i.e. proprietorship) over those objects. Second, Locke identifies labour as necessary in overcoming what is, essentially, a coordination problem. If an equal claim to the commons is taken to be a right to some material portion of the commons (prior to the application of labour), then a difficulty arises is discerning to whom which portion belongs. Since being unable to clearly and unambiguously apportion the commons fairly would inhibit the ability for each person to fulfil their natural obligation of self-preservation and subsistence, Locke presents labour as a necessary natural basis for the implementing a practicable (equal) division of the commons.

Finally, it was shown that a Lockean natural labour account of property includes two constraints on the application of labour (and thus the appropriation of objects from the commons), in the form of two ‘Lockean provisos.’ These are the restriction against over-extracting from the commons (i.e. the as-good-and-as-much proviso); and the restriction against allowing extracted objects to spoil (i.e. the waste proviso). The provisos place natural limits on the role of labour, and act to ensure that every person’s claim upon the commons remains equal, by ensuring that everybody continues to be afforded the opportunity to pursue their own self-preservation and subsistence.

In the next chapter, it is demonstrated that the limitations posed by the Lockean provisos bear upon intangible objects in unique ways. Because of the underdeveloped quality of naïve desert accounts, this difference goes largely unappreciated in popular arguments for natural copyright. Nevertheless, the key consequence of this difference, which is revealed through the application of a rigorous labour account in relation to intangible objects, is that intangible objects cannot be naturally appropriated as private property.
Chapter 4
Lockean Labour Theory Cannot Deliver Natural Copyright

4.1 Introduction

Chapter 3 described the Lockean labour account of property. The description highlighted that several of its key tenets are absent in less rigorous desert accounts of property. The purpose of the present chapter is to demonstrate that those key components of the Lockean account preclude it from serving as the basis for natural law copyright. At most, Lockean social contract theory can provide an avenue for the provision of statutory copyright protections, but only if those protections answer to questions of social utility.

A common motivation in the application of naïve desert accounts in relation with copyright is the notion that, if an account of labour succeeds in demonstrating that physical labour ought to establish natural proprietorship over physical objects, then it should be expected that ‘intellectual’ labour ought to establish natural proprietorship over ‘intellectual’ objects. Such an extension of a physical-labour account to an intellectual-labour account cannot succeed, however. There are two related reasons for this.

First, such an extension of a physical labour account to an intellectual labour account relies on a common misapprehension about the nature of labour. Although it is ordinary, in everyday parlance, to distinguish between physical and intellectual labour, that distinction is merely conventional. When examined analytically, all labour is revealed to have an intellectual component. For this reason, a substantive conceptual distinction between physical labour and intellectual labour cannot be sustained. This represents an important challenge, since it precludes an alleged difference between the qualities of ‘physical’ and ‘intellectual’ labour from sustaining a differentiation between instances of labour that ought to establish protection over a type of object (as in IP) and other instances of labour that ought to establish protection over a token instance of an object (as in conventional property).

Moreover, this is indivisibility of ‘physical’ and ‘intellectual’ labour is reflected in the proprietary objects that labour produces. Insofar as labour produces distinct ‘physical’ and ‘intellectual’ objects, these designations merely track (broadly) the distinct tangible or intangible nature of those objects. However, no appeal to a physical-intellectual labour
distinction is required to account for the tangible-intangible distinction. Once that distinction is accounted for, however, the difference between tangible and intangible objects can be shown to critically impact the way in which the proprietorship of those objects is differently affected by the Lockean provisos against monopoly and waste.

The reasons that the Lockean provisos affect tangible objects differently than they affect intangible objects is because the provisos function on an assumption of exhaustibility. That is, on the Lockean account an object’s usefulness is understood to be exhausted through either the use of the object; or by the natural deterioration that affects unused objects over time. While this is true of the tangible objects with which Locke was concerned (not withstanding objects of purely conventional value), the usefulness of intangible objects does not exhaust in the same way. Section 4.4 demonstrates that, due to this inexhaustibility, the Lockean provisos are much more restrictive in relation to intangible objects than they are in relation to tangible objects.

Through this chapter it is therefore demonstrated that, because of the way the Lockean provisos intersect with the intangible quality of ‘intellectual’ objects, natural IP rights cannot be established via an appeal to Lockean labour theory. Nevertheless, this is not to preclude a conventional (statutory) IP system from being established. It is shown in Section 4.4 that the Lockean account provides for the development of laws via social contract (this being, after all, the process by which humanity was able to quit the state of nature), and a just IP regime can be established by exercising that option.

However, Locke prescribes several principles for ensuring that the outcomes of social contracting are morally justifiable. By the close of the chapter it is demonstrated that adherence to those principles requires that the appropriate duration of copyright be determined as an empirical economic matter (centred on social utility acquisition). There are initial reasons to expect that such an economic determination shall rightly preclude copyright durations as extensive as those currently in place.

### 4.2 Labour is Never a Solely Physical Process

Despite the predominance of labour in various attempts to justify the institution of private property (not necessarily copyright), the notion of what constitutes labour is often not explicitly defined. This is certainly true in the case of Locke’s account, and many subsequent attempts to interpret it. Because he traces the origin of labour to (at least ostensibly) the human body, Locke is typically read as characterising labour as a physical
process; as being directed towards physical objects; and as thereby garnering natural property rights over physical things. This notion of physical labour is popularly contrasted with a notion of non-physical – or intellectual – labour. Indeed, if one accepts this interpretation of Locke, then it might be thought that an adequate way of extending the account to accommodate intangible objects (such as ideas) would be to provide an account of intellectual labour that characterises it as an intellectual process; directed at intellectual objects; and which garners intellectual property.

It does seem initially plausible that, if people deserve to enjoy property in the physical objects that they labour to extract from the commons, then it must also be plausible that they deserve property rights over the ideas (intellectual objects) that they labour to develop. The success of such a view would obviously have fundamental ramifications for copyright theory. Such an approach cannot succeed, however, because labour in general cannot be divided into separate categories involving exclusively physical or exclusively intellectual processes.

The fact that labour is never a solely physical process can be demonstrated within the framework of Locke’s account. This is because Locke implicitly requires that labour involve intention, knowledge, and planning. To illustrate this requirement, consider Locke’s traditional case of an individual who picks acorns from trees for later eating. Through this picking – by the metaphorical ‘mixing’ of their labour – the acorns have been made useful; turned into a convenience for the labourer to consume at any time. Similarly, consider that, under the pre-statutory state of nature, a person may use wood they isolated from the commons to construct a novel tool, such as a wheelbarrow. These are very ordinary cases of property acquisition for Locke.

In these instances, Locke is standardly understood to be concerned with physical labour (i.e. the picking; the building) and physical objects (i.e. a collection of acorns; a specific wooden barrow). Indeed, Locke’s motivation was to justify property rights in relation to just these kinds of objects (and especially land). However, it must be that, even in these cases, the physical acts which secure property (e.g. the picking or the building) are done with an idea of that process – and of its rewards – held in mind. That is, a labour act is always an act which is intended to bring about a pre-conceived future state of affairs – for example, the future possession of an object of value. Without the pairing of that relevant propositional attitude to the act, the causal link between a physical exertion and the alteration of an object’s state (i.e. its extraction from the commons) is not enough to establish property rights over the object.
This can be illustrated by example: A tree climber who inadvertently shakes acorns free from tree branches (perhaps even without realising they have done so) cannot thereby be said to have property rights over those acorns. Of course, if the climber notices the fallen acorns, and subsequently resolves to collect them, then that act of collection would qualify (separately) as an act of labour. In that case, it would be the *resolution to act*, coupled with the *act per se*, which would mark the collecting as an instance of labour. Similarly, if the additional resolution was deliberately made to shake more acorns from the branches – in physically the same way as before – then *that* shaking would also qualify as labour. Although the person’s physical interaction with the environment would be the same both times, the proprietary outcomes would be different, owing to the addition of the correct propositional attitude.

It is worth emphasising that the climber’s lack of proprietorship over the acorns, after incidentally dislodging them, leaves them able to be freely appropriated by others. An observer who saw the acorns come loose of the tree, and who understood the climber to have no designs upon them, would be justified in collecting them. Even though the observer’s exertion against the acorns (in collecting them) would be preceded by the climber’s exertion against the acorns (in shaking them from their branches), only the observer’s collection would correspond temporally with the correct propositional attitude to suffice in establishing proprietorship. If, after the observer had collected the acorns, the climber came to the realisation that it was by their climbing that the acorns had been removed from the tree, they could not retroactively attach a propositional attitude to the act of climbing (or shaking branches), to sustain a proprietary claim.

What this establishes is that, for a person to perform the standard kind of labour considered by Locke, they must develop the correct ideational conceptualisation of the process they are presently engaged in. Notice that this amounts to the necessitation of the development of an *idea*, or ‘ideational object.’ Critically, however, despite the necessity of that accompanying idea, the proprietorship generated by labour, under Locke’s account, never (naturally) extends to the idea. Labouring to collect acorns establishes property in the collected acorns; not in the *idea* of collecting acorns.

### 4.2.1 Labour and the ‘Productive Capacities’ of Intentional Agents

The intellectual component involved in all labour processes has previously been
acknowledged in accounts of copyright and other forms of IP. This quality of labour has also served as the central justification for using labour as the basis of property in non-Lockean accounts of property. Bryan Cwik, for example, recognises that labour, “as an activity, is linked with all the ways in which human beings are intentional agents.” He notes that, “in laboring, the laborer intends to bring about some end; labor is action done with the purpose of bringing about some change in the world,” and that a labourer “exercises her capacities intentionally and with forethought.”

Moreover, Cwik identifies this intentionality as the impetus for attributing property based on labour performed. On this, he says that:

…what is distinctive about labor is that labor involves the use of individuals’ productive capacities, which involves decisions (potentially stretching across a significant chunk of an individual’s life) about how to utilize time, energy, resources, skills, and what opportunities to forgo, in the pursuit of ends. The more control individuals have over the exercise of these capacities, and the more they are able to benefit from their decisions, the more control they are able to have over significant portions of their lives, and the more they are able to live their lives in accord with their own freely and reflectively chosen ends.

Cwik thereby identifies IP protections as justifiable because they secure for labourers an important freedom and autonomy in their lives. His argument is therefore that, by using IP rights to expand the freedom and control labourers have in conducting their lives, as guided by their own values, the more those people are able to live “a free, valuable, profitable, and even meaningful life.”

In this way, Cwik avoids the difficulties involved in accounting for the Lockean conception of labour ‘mixing’ (which Robert Nozick has famously suggested ought to as easily involve the loss of one’s labour through its being mixed with objects one has no property in, as compared to establishing property rights in those things, by the act of mixing one’s labour with them). This represents an improvement over accounts in the Lockean tradition, but

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121 Ibid. p. 685.
122 Ibid., p. 689.
123 Ibid., p. 686.
importantly does not represent a strictly *natural* account of IP. For instance, Cwik summarises what he sees as a virtue of IP systems, by saying that they are “conducive to creating the economic conditions for a more *liberal* political society, in the old-fashioned Millian sense of a society that allows individuals maximum space to order their lives in accord with their own (freely and reflectively chosen) ends.”¹²⁵ This is indeed a compelling function of systems like copyright – if it bears out as true.

Although I take Cwik to be correct in this assessment of the function of copyright (especially, it might be pre-empted, with relation to second-personally communicative objects), it should be noted that this is effectively an empirical question that stands to be tested. Moreover, insofar as the efficacy of IP systems in achieving these ends can be assessed, they ought to be assessed over a range of possible IP arrangements. As Cwik acknowledges, there are important questions about the ‘level’ of protection a system like copyright should afford, even if there is effectively not an open question about whether *some* level of protection ought to be afforded. This plays further into the positive normative account developed in Section 4.4.

### 4.3 Exhaustibility and the Lockean provisos

If it is not already clear why natural proprietorship requires labour acts to contain an ideational component; and why natural proprietorship cannot reasonably extend to that ideational component of labour acts, then a consideration of the appropriate application of the Lockean provisos should confirm both matters. To the first point, any practicable application of the waste proviso must preclude physical acts from establishing proprietorship whenever they are not accompanied by the appropriate propositional attitudes. To the second point, the ‘as good and as much’ proviso naturally precludes the extension of private property rights to ideational components of labour. I shall consider each in turn.

#### 4.3.1 Waste Proviso

Recall that the Lockean waste proviso prohibits the useless expiry of objects once they have been appropriated from the commons. Such a prohibition, in the context of a theory of labour which construes labour to occur *any* time a person interacts physically with an object in the commons, would have astounding implications. If labour was conceived of as occurring even without the accompaniment of an appropriate propositional attitude, then

¹²⁵ Cwik, ‘Labor as the Basis for Intellectual Property Rights’, as above n 120, p. 694.
the waste proviso would be rendered absurd. This is because it would appear impossible to refrain from offending against it.

Given that, under such an arrangement, any exertion upon a common object would establish proprietorship over that object, individuals would routinely and unavoidably establish property rights over objects they had no intention (nor even any subsequent knowledge) of appropriating and owning. For example, someone who accidentally kicked an acorn mid-stride would, thereby, unwittingly own the acorn. If the acorn (or whatever other object) then expired uselessly, this would constitute an offence on the part of the person who (unknowingly) acted upon it. It should be clear that a person’s ignorance of such an interaction with an object, being entirely natural and justifiable, must exempt them from any obligation to make use of it.

This absence of obligation also follows naturally from (and is the antecedent to) there being no property rights derived through such unintentional exertion. Consider the previously described example (Section 4.2) of the tree climber who, in their ascent, unwittingly shakes acorns from the branches of the tree. Since it was shown that (without a second, intentional effort) they gained no basis to claim a right to the possession of the acorns, it must follow that the climber is thus not constrained by the waste proviso in relation to them. That is, it follows from the climber having no right to count the acorns as their possessions, that the climber also must not be treated as having obligations towards them qua objects ‘in their possession.’ It would be unjust to deny someone the right to possess an object, while nevertheless saddling them with the obligations that such possession would have entailed.

4.3.2 ‘As Good and As Much’ Proviso

If, when one laboured, the proprietorship established through that process was understood to extend not only to the physical object against which labour was exerted, but also to the ideational component (i.e. the propositional attitude) that designated that action as labour, then the Lockean ‘as good and as much’ proviso would also prohibit most labour. Consider again the typical Lockean case of collecting acorns from the commons, but under an interpretation in which ideas are treated as natural objects of property. In this case, the fact that collecting acorns is predicated on the idea of collecting acorns would mean that, through arriving at (or at least acting upon) that idea, an individual would naturally prevent their peers from being able to also justifiably pick acorns. This is because, to pick acorns, the first acorn collector’s peers would have to arrive at the same idea: *collect acorns*. This idea, however, having first been developed through the labour of another, would be
considered that person’s natural property. The unpermitted use of it would be an offence.

The consequences of such a view would be dramatic, due to the ‘as good and as much’ proviso. The first person to pick an acorn, rather than removing that single object from the commons, would functionally be removing every acorn from the commons. This would be entirely incompatible with the mutual fulfilment of each person’s obligation towards self-preservation and continued subsistence, since it would place too great of a restriction on other people’s pursuits. It would therefore be a clear violation of the ‘as good and as much’ proviso.

This is not only true in relation to the kinds of objects Locke classically considered. The consequences are most obvious in relation to the kinds of objects Locke considered, since the logical conclusion of such a view stands in such stark contrast to the conclusions Locke intended. However, the consequences of such an interpretation are just as damaging in relation to copyright. If the ideational propositions represented in copyrightable objects were taken to be eligible for private appropriation as property, this would establish unnecessarily exclusive rights, in contravention of the ‘as good and as much’ proviso. This is a result of a fundamental differences in the exhaustibility of tangible and intangible objects, which ought to be given consideration in some depth.

4.3.3 The Comparable Exhaustibility of Tangible and Intangible Objects

These preclusions pertaining to the ideational component of labour are the product of a general difference between tangible and intangible objects. This difference becomes visible through an examination of the restrictions that modern copyright (as well as patent, and other IP) protections place on non-owners, compared to the restrictions placed on non-owners by traditional property rights. For example, if Judy owns an acorn tree (a traditional instance of physical property), then she has the right to exclude Aaron from picking acorns from its branches. Judy’s proprietorship would not, however, grant her the right to exclude Aaron from growing his own acorn tree and picking its acorns.

By contrast, consider a case, under modern IP law (in this case, patent law), in which Judy cuts down her own tree and fashions the timber into a wooden tool of her own invention – say, a wheelbarrow. In this case, not only would Judy have the right to exclude Aaron from using the wheelbarrow she made from her timber, but she could also secure the right to preclude Aaron from using any wheelbarrow, even if he fashioned one out of the timber of his own tree. By extending Judy’s proprietorship not only to the wheelbarrow, but to the
idea of wheelbarrows, this would function as a proprietorship over a type, rather than a
token. If ownership over the type ‘acorns’ cannot (naturally) be established by the picking
of a token instance of an acorn, due to its contravention of the ‘as good and as much’
proviso, then Judy’s ownership of her token wheelbarrow should not (naturally) establish
an exclusive right to its corresponding type either.

Although the previous example pertains to patent law, the same is true in the case of
copyright. Under modern copyright law, if Judy pulped her tree to create paper, and then
penned a creative work onto that paper, she would enjoy a proprietary right over not only
the paper she made (and the markings upon it), but also over any reproductions of those
markings (hence copy-right). Again, Judy would not only thereby own the token instance
of the text she created; she would be extended the exclusive right to use (or even produce)
any object of its type. From what has so far been demonstrated, this extension of
proprietorship from token to type can be shown – in the case of both copyright and patent
– not to be a product of natural law.

This demonstration turns on the exhaustibility of tangible objects, and the comparative
inexhaustibility of intangible objects. Consider the way it would affect Judy, if someone
else were to cut down her tree, or collect all the acorns from it. These actions would prevent
Judy from enjoying the free use of her tree and its products; their usefulness would have
been exhausted by such an imposition, and they could no longer benefit Judy. Similarly, if
Judy had fashioned either a wheelbarrow or a tangible book out of her tree, then the
unpermitted appropriation of the wheelbarrow or the book would, for the duration of that
appropriation, prevent Judy from employing them usefully towards her own ends. This
demarks the exhaustibility of tangible objects; they can typically only support the ends of
one person at one time. Objects subject to this condition have also previously been referred
to as ‘rival goods.’

By comparison, ideational objects are intangible, and as such are not subject to the
exhaustibility of physical objects. If a person was to recognise the value that Judy had
realised through the ownership of her tree (through its use as a book or a wheelbarrow),
and was thus motivated to copy the idea of planting a tree (or writing a book; or building a
wheelbarrow), their doing so would not prevent Judy from continuing to realise the value
of her tree or the products made from it – exactly as she had previously. This copying of
the type ‘wheelbarrow’ or ‘book’ could only represent a natural limitation to Judy’s use of
her own objects insofar the copying procedure required the copier to make temporary use

of her original token (e.g., throughout the duration of the transcription of her original text; or during an examination required to reverse engineer her machine), since Judy’s ability to use them would be restricted during that time. If the content or mechanism of an object could be discerned without a copier requiring direct use of the original, then the usefulness of the object to its original creator would not naturally be exhausted or otherwise limited due to its being copied by someone else. These kinds of objects can therefore be categorised as ‘non-rival goods.’

A consequence of this natural inexhaustibility of intangible objects is that, unlike tangible objects, they can simultaneously serve multiple people equally well in their pursuit of self-preservation and subsistence. In accordance with the Lockean conception of humans as having a natural obligation to pursue those ends without unduly interfering with the ability for their peers to do the same, it would be naturally unjust to arbitrarily obstruct someone in their pursuit to copy an idea. Although a person would not be compelled to make their tangible property available for examination, if doing so would interfere with their useful implementation of it, any copying of an idea that does not require such examination of an object would be naturally unobjectionable.

A response to the above account might seem apparent. It might be thought that intangible objects are not truly dissimilar to tangible objects in any practically relevant way, since the usefulness of intangibles qua marketable objects can be exhausted (or at least limited) via market competition. That is, one might conceive of an idea’s creator as only being able to derive the full value (i.e. the full usefulness) of their idea for as long as they remain the only person marketing it. By making simultaneous use of the idea, and bringing a competing product to market, a copier may exhaust (or at least limit) the value that the idea holds to the original labourer. The fact of this market exhaustibility (or limitation) must be conceded. Even traditional consequentialist arguments for copyright are motivated by precisely that acknowledgement; it represents exactly the free-rider problem that consequentialist copyright proponents endeavour to solve.

Redrawing the analogy to acorns should make clear, however, that this appeal cannot succeed in demonstrating natural copyright. In much the same way as the creator of a book or a machine could most benefit from their ideas if they were afforded the exclusive right to market all new implementations of those ideas, the person who first arrived at the idea to pick acorns would have been most able to benefit from that idea if they were afforded the exclusive right to profit from its future implementation. Nevertheless, on a Lockean

127 Ibid.
account, the matter of what protections a labourer is afforded is not decided simply by appeal to what the labourer would prefer; it is decided based on what best promotes the ability for all people to mutually pursue their self-preservation and sustenance.

This limitation is also present (although it is natural to describe it in different terms) in the labour accounts constructed by theorists such as Cwik. Cwik argues that IP rights should not be understood to serve primarily in excluding others from using ideas (as traditional property excludes people from using objects), but as reserving certain uses of ideas to those who produced the ideas. In the style of the response described above, Cwik intends ‘certain uses’ to mean commercial uses. He provides an illustrative example:

Suppose … we have a forest that is so large, that no matter how many individuals have timber rights, the forest will never be used up. The forest is so big, that if all the users start logging at $t$, by the time they’ve cut down all trees that are standing at $t$, enough trees have regrown that there is still timber to be removed, and by the time those have been cut down, another swath of forest has regrown, and by the time that swath is cut down … and so on. In short, the sheer vastness of the forest ensures it will never be used up, and thus the right to remove timber will never lose all of its value. However, if a portion of the value of the timber rights derives from the fact that there is demand for timber, and thus the right to log is not just a usus right (that is, the right to use the forest in a certain way), but also a fructus right (the right to profit from that use, then the more people who have timber rights, the less valuable those rights will be. At some point, the timber rights will only have personal value: the only value having timber rights will have is the value derived from satisfying one’s needs for wood. All commercial value that the timber rights had from the potential to profit off selling wood to others who didn’t have the rights will be depleted.

This example is particularly useful, in connection with a consideration of Locke, because Cwik’s example of a functionally limitless forest is a paradigmatic case of a commons in which Locke would take the satisfaction of the ‘as good and as much’ proviso to be guaranteed. But Cwik points out that this limitlessness is only guaranteed with respect to personal value (or what a Lockean theorist may call natural value) rather than commercial value (or what a Lockean theorist may call conventional value).

Although Cwik intends for a distinction to be drawn between certain use-cases of copyrighted or patented objects that are permissible for non-IP holders to engage in; and

128 Ibid., p. 477.
129 Ibid., p. 479.
other use-cases (commercial uses) that non-IP holders are not permitted to engage in, this is not a straightforward distinction to defend. This is because the commercial use of an object is typically realised by way of the sale of that object to purchasers who intend to use it to derive personal value. Therefore, the non-commercial use of objects (which Cwik seems to take non-IP holders not to be excluded from) can still functionally reduce the commercial value that objects have to IP-holders. The difficulty of this distinction arises, for example, in connection with the disparate (and contested) legal treatment of fan-fiction, compared to the legal treatment of derivative works produced by professional film studios (this example is also discussed in Section 6.4.1).

4.3.4 The Link Between Scarcity and Commodification

In understanding the essential differences between tangible and non-tangible objects, and the way that difference must impact their treatment under a Lockean conception of property, it is necessary to consider the link between scarcity and commodification. Further to the point made in the previous section, the objection based on an appeal to the potential commercial use of ideas also fails because it presumes that intangible objects are naturally marketable, and proceeds to the conclusion that an agent who develops such an object ought to be regarded as having the (natural) sole right to market it. On the contrary, however, the functional importance of copyright is derived precisely from the fact that intangible objects are not naturally marketable commodities; copyright artificially establishes the market conditions that make intellectual objects commodifiable. Attempting to justify the mechanism that makes certain objects marketable, by appeal to the marketability of those objects, trivially assumes the point under contention.

Moreover, to accept the presupposition of the objection is to critically misconstrue the essential nature of commodification. Commodity markets only develop in response to commodity scarcity. The reason that precious metals are valuable, for instance, is because they are simultaneously sought after and rare. In some cases (such as gold) the scarcity of a commodity is natural; there is only so much of it that can be procured. In other cases – for example, as infamously established by the *De Beers* diamond monopoly130 – a commodity may not be naturally scarce, but may nevertheless have its supply intentionally limited to produce an *artificial* market scarcity.

Copyright involves the generation of an artificial scarcity. Because ideational objects are

intangible, and the implementation of intangible objects is infinitely replicable, they typically do not have any natural market scarcity. Rather than recognising and protecting the natural scarcity of ideational objects, then, copyright functions as an apparatus for artificially establishing a scarcity, which allows protected objects to be commodified. It should be noted that this is not a normative claim; it is purely a description of the effect copyright has. Its confusion as a normative claim would be an understandable error, however, since copyright today is typically implemented specifically to fulfil that function; it is usually understood to be either morally required or morally justified (depending on the strength of the normative claim) because it fulfils that function. However, copyright still has the effect of making intangible objects commodifiable via the establishment of artificial scarcity, even if that effect is incidental to the reason it is implemented. The British Monarch’s earliest implementation of a rudimentary copyright regime demonstrates this point.

When the British Crown placed restrictions on the copying of text in the Seventeenth Century, in response to the invention of the printing press, the intended function of the restrictions was to secure the Crown’s control of the medium of print. This, in turn, was intended to allow for the censorship of seditious; blasphemous; and obscene texts. The purpose of copyright, at that point, had nothing to do with promoting the commodification of books and other writings. Nevertheless, once the restrictions were implemented, the printing industry became economically dependent on them. Printers objected to the repeal of that system because, without the Crown’s restrictions placing an artificial scarcity on their most profitable publications, their market value (determined by their natural scarcity) would become much lower.

It would be natural to think that the Crown’s interference in the market was what had created the conditions by which book producers had become economically dependent on monopolies. After all, producers of books had previously fared well enough without market regulations; their struggles only arose in the time after the Crown imposed its restrictions. This, however, is to conflate the impact of the printing press with the impact of the Crown’s legislative response to the printing press; the former alone was sufficient to generate the booksellers’ historically unprecedented dependence on statutory monopolies.

The printing press provided an avenue for radically overturning the previous natural scarcity of books and written materials. Prior to the availability of the printing press, the scarcity that enabled the commodification of writing was natural. Whereas the labour intensity involved in producing original authorial works has remained relatively consistent
across time, the labour intensity of copying those works has been dramatically reduced. The labour intensity involved in transcribing texts by hand, prior to the printing press, resulted in supply-side pressure that ensured books remained relatively scarce. With the invention of much faster, automated printing, the natural scarcity resulting from labour intensity had been largely overcome.

Although it was not what motivated the Crown, the provision of monopoly printing rights to the Stationers’ Companies inadvertently substituted the then-dissolving natural scarcity of books with controls that established an artificial scarcity. The market conditions established by the Crown did not cause an economic dependence on monopolies within the print industry, but the revocation of those conditions prior to the Statute of Anne revealed that such a dependence had come to exist.

4.3.5 Alternative Accounts in Lockean IP Literature

In contrast to the account provided here, proponents of natural law accounts of intellectual property sometimes argue that, when it comes to ascertaining whether the appropriation of an idea would conform to or contravene Locke’s ‘as good and as much’ proviso, a different baseline than the one I’ve suggested ought to be used for comparing the accessibility of an idea before and after IP rights are assigned in relation to it. Adam Moore, for example, considers an increasingly complex series of potential baselines for considering whether a person is harmed by the creation of an object, that did not previously exist, if that person is subsequently excluded from accessing that object due to the applicability of IP law.

Moore concludes that none of these relatively complicated baselines work. Without examining any of them here, I shall assume for the sake of argument that Moore’s criticism of each of them succeeds. Instead, Moor argues that the simplest baseline is the strongest and most defensible to use. He concludes: “Prior to [the] act of creation, the [object] did not exist, so there was no way for others to be worsened by lack of access. After [the] creation, others are still without access, so there has been no lessening of flourishing or well-being.” However, an examination of the “simplest of cases” of intellectual property acquisition – which initially leads Moore to this conclusion – reveals a fatal equivocation.

Moore lays out what he describes as the ‘simplest case’ as follows:

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131 Moore, above n. 94, p. 1082.
After weeks of effort and numerous failures, suppose I come up with an excellent recipe for spicy Chinese noodles – a recipe that I keep in my mind and do not write down. Would anyone argue that I do not have at least some minimal moral claim to control the recipe? Suppose that you sample some of my noodles and desire to purchase the recipe. Is there anything morally suspicious with an agreement between us that grants you a limited right to use my recipe provided that you do not disclose the process? Alas, you did not have to agree to my terms, and no matter how tasty the noodles, you could eat something else.133

Again, Moore’s argument is that, since the noodle recipe did not exist prior to his creation of it, his interlocuter is not harmed by the recipe becoming the object of (intellectual) proprietorship, since it is not less accessible under proprietorship than it was when it did not exist. This argument turns, however, on an equivocation of the word ‘access.’ This is revealed by considering that, although Moore suggests that the recipe was inaccessible prior to its creation, that exercise in creation inherently was an act of access. We know from the very fact that Moore now has access to the recipe, when it did not previously exist, that the non-existence of the recipe did not render it inaccessible.

A distinction must therefore be drawn between what might be called discoverable access (involving, for example, ‘weeks of effort and numerous failures’) and what can be called teachable access (involving, for example, being told or seeing how to do something). Moore’s interlocutor might not have had teachable access to Moore’s recipe, but Moore provides no reason to think that his interlocutor would not also have been able to access the recipe via discovery. Despite this, intellectual property regimes preclude access to objects in a way that also denies subsequent individuals the same opportunity to discover the same objects independently.

This should inform an analysis of Moore’s ostensibly rhetorical question as to who would deny the inventor of a recipe “at least some minimal” claim over control of that recipe. Specifically, even if we concede the claim that everyone would grant some such minimal control (which is contestable), by no means would this suggest that the minimum guarantees that Moore has in mind would be ones that anyone else would affirm. As demonstrated above, Moore appears to consider the appropriate minimum to involve the natural right of an inventor to restrict another person’s discoverable access to that recipe. But a much more minimalistic claim of control can be articulated. Rather than the positive right to exclude others from discoverable access, as Moore proposes, it is an improvement

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133 Ibid.
to conceive of an inventor’s natural right as a negative right that protects them against having to explicate their invention; it is a right to refuse *teachable access*.

On this more minimal account, I would not be able to compel Moore to divulge his recipe after I sampled it. After all, this would amount to me making a demand on Moore’s time, and would involve me compelling him to exert effort for my gain. However, if Moore generously agreed to share the recipe – or if he proffered the recipe unsolicited – then this would not (as it should not) establish for him the natural right to exclude me from pursuing the same object. To preclude me in this way would make me worse off than when I could pursue the same object (possibly through weeks of effort and multiple failures).

Breakey makes a similar point when he criticises the inconsistency that he identifies in Lysander Spooner’s absolutism regarding private property, and Spooner’s simultaneous advocation for strong intellectual property rights. Breakey identifies Spooner as maintaining the claim that, in relation to conventional tangible property, “if I create wealth on someone else’s property then they – and not I – have rights to that wealth”\(^{134}\) on the basis that one must not be able to foist duties or obligations onto others through uninvited actions. On Spooner’s view, for example, if a person tills (and thereby improves) their neighbour’s farmland; but tills when the tilling was never requested, then that act of tilling establishes no right for that person in any of the future products of the land, nor obligates the owner towards the tiller in any way. Breakey contends that this is inconsistent with Spooner’s view on intellectual property, since Spooner permits, in effect, that property be established on an idea not only when it resides in their own mind (their own property) but also when it resides in the minds of others.\(^{135}\)

Breakey also defeats a separate line of argument that some authors mount in favour of the claim that the Lockean ‘as good and as much’ proviso does not prohibit the natural appropriation of ideas as property in the way I have suggested here. These authors suggest that the proprietary appropriation of ideas does not contravene Locke’s proviso because, even though such appropriation prohibits other people from using *those* ideas, it nevertheless leaves them in a position where they are free to make abundant use of *other* ideas that are equally capable of advancing their condition. Breakey identifies this line of argument as ostensibly parallel to an argumentative manoeuvre that is used to justify the appropriation of conventional property where that property is finite (and of which appropriators therefore cannot leave ‘as good and as much’). For example, although there

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\(^{135}\) Ibid., pp. 132-3.
may have been a plentiful supply of land from the perspective of those living in the initial state of nature, such that their securing of private lots would have appeared to leave plenty in common, that is clearly not the case today. From the modern perspective land is scarce, and the prior appropriation of lots has rendered others without access. This observation of this ostensible failure in relation to the Lockean proviso is often answered with the claim that, although land has been made scarce through private appropriation, the way the land has been employed by earlier appropriators has given rise to an economic environment that offers people (however unable to appropriate land) a far more enviable access to resources by which they can better themselves than would have been possible of the appropriation of land had never been permitted.\textsuperscript{136}

Breakey demonstrates that this line of reasoning fails in relation to intellectual property because, rather than functioning analogously to the land-ownership (and other tangible property) case, the permission of strong natural proprietary rights over ideas directly interferes with the success of that same initial argument in relation to tangible property. This is because, as Breakey argues, the success of the argument in relation to the appropriation of land and other physical objects only succeeds on the basis that “greater technology, knowledge and know-how make each person’s limited physical resources enormously more productive and efficient,” and that “the development and distribution of substantial intellectual resources (ideas and information) grants people assets allowing them to make a living in modern market economies.”\textsuperscript{137} Therefore, if these ideas and technologies can also be exclusively appropriated at the same time as land and other limited tangibles, then this undercuts the basis on which the appropriation of land and other limited tangibles was to be permitted in the first place.\textsuperscript{138}

\textbf{4.4 A Positive Normative Account Via Locke}

\textbf{4.4.1 Natural Limitation on Monopolies}

The Lockean account of property should be understood, fundamentally, as an attempt to demonstrate natural law restrictions against monopolies. Locke begins ‘Of Property’ by highlighting an apparent incongruity between the notion that all the natural objects of the world ought to be taken to ‘belong’ to all humans to make use of ‘in common;’ and the need to privately appropriate those objects before they can be useful.\textsuperscript{139} The project Locke

\begin{footnotes}
\item 136 Ibid., p. 231.
\item 137 Ibid.
\item 138 Ibid.
\item 139 Locke, above n 100, pp. 115-116.
\end{footnotes}
subsequently undertakes is therefore to demonstrate a way by which people can justifiably appropriate common objects as private property, without offending against their peers’ natural claims upon the same objects. While Locke identifies labour as the means to achieving that end, he establishes the two Lockean provisos as mandatory constraints upon the labour process.

The ‘as good and as much’ proviso, especially, functions as a natural provision against the monopoly control of natural resources. For Locke, labour succeeds as a basis for establishing property because of the usefulness that it places upon common objects. If, however, an act of labour was useful to the labourer only because it established a monopoly which they could exploit (at the expense of their peers, who naturally enjoy a common claim over the same objects), then that act would constitute an offence against natural law. Rather than representing the avenue by which humanity could make collective use of the objects in the commons, the establishment of monopolies would represent an obstruction against that end.

The main achievement of Locke’s property account is typically taken to be the demonstration that labour is an appropriate basis by which to establish private property. It is more instructive, however, to recognise Locke’s primary achievement in ‘On Property’ as being the preservation of humanity’s collective claim upon the commons, despite the pragmatic necessity of private appropriation. This achievement is made, in significant part, through the demonstration of natural prohibitions against monopolies. Perceived this way, the prima facie expectation that an extension of Lockean theory to intangible objects should demonstrate that intellectual labour ought to establish intellectual property (as a parallel to the way in which physical labour establishes physical property) is unreasonable. Instead, given that institutions such as copyright are already understood to function via the establishment of monopolies, and Lockean property theory functions as a demonstration of natural limitations against monopolies, one’s initial expectation ought to be that a Lockean conception of property is not a natural fit for the justification of copyright. Lockean theory is essentially aimed at preventing the establishment of monopolies, while copyright is essentially aimed at establishing monopolies. Therefore, Lockean theory might initially be expected to preclude copyright.

4.4.2 Copyright via Social Contracting

There is, however, an avenue towards copyright that is available within Lockean theory.
Within his broader political philosophical account, Locke details the way by which individuals could exit the state of nature through the formation of societies. This would involve a process of *social contracting*, by which the mutual waiver of some natural individualistic rights would be negotiated, for the mutual benefit of a society’s members.

Locke held unequivocally that, as a natural fact, all people begin their existence both free and equal, in that each person has the same right not to be “subject to the will or authority of any other man.”

Indeed, on the Lockean account it is precisely this perfect authority over oneself that gives way to one’s ability to appropriate common objects through the application of labour. Yet, despite this, Locke also acknowledged that individuals could ethically leave this condition and make social agreements in order to establish communities, even where those communities were hierarchical and involved members submitting to an external authority. More than this, Locke considered people to have good reason to do so.

In his chapter ‘Of the Ends of Political Society and Government,’ Locke raises the question of why a person would voluntarily “part with his freedom … and subject himself to the dominion and control of any other power” to participate in a society. The answer he provides is that:

> … the enjoyment of the property he has in this state [of freedom] is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates …

The essential idea expressed here is that, although all persons hold a genuine moral claim to certain entitlements, so long as ethically unscrupulous individuals refuse to heed others’ rights, those rights are of little practical use within the state of nature. Rights and freedoms are only valuable to us insofar as we can realise them. For this reason, it would be reasonable for a person to limit or entirely surrender some of their natural rights if doing so would enable them to bolster their ability to benefit in other ways. This option becomes increasingly attractive the higher the chance that one would not otherwise be able to realise the rights being forfeited.

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140 Ibid., p. 127.
141 Ibid., p. 134.
142 Ibid., p. 184.
143 Ibid.
144 Ibid.
The same premise can be used to explain why the members of a group, having made agreeable concessions to become a society, would then agree to comply with further social contracts and thereby establish a system of copyright protection. If the waiver of one’s natural right to the unlimited use of certain inexhaustible objects (in this case, certain ideas) could be shown to be more beneficial to self-preservation and subsistence than one’s assertion of that right, one would have good reason to contract the right away. Moreover, if that arrangement would be mutually beneficial, and therefore equally agreeable to all the members of a society, then the statutory provision of a copyright regime could justifiably be implemented to effect it.

The framework that this establishes for the provision of copyright clearly approximates the consequentialist social-utility account. It is here that the link between scarcity and commodification (described in Section 4.3.4) takes on a normative component. This is because, for the implementation of copyright via social contract to be sensible, the establishment of a system of monopolies must be shown to have some mutually beneficial effect that would persuade the contractors to agree to it – and the standard argument offered for how copyright provides such a benefit regards the incentivisation that is generated through the artificial establishment of scarcity.

On this view, the fundamental function of copyright is to resolve what can be characterised as a scarcity paradox. Ideational objects are naturally scarce insofar as, before they are created, they do not exist at all. Once they are created, however, they are often able to be replicated with such a degree of ease that they subsequently retain almost no natural scarcity. While this is not problematic in most cases (such as in the case of the idea to pick acorns), it importantly intersects with two interconnected processes, which I shall call production and reproduction. These concepts are critical to an understanding of the function of copyright and other IP systems, because reproduction represents an especially efficient means of procuring value (and increasing social utility), that is dependent on the much more arduous process of original production.

4.4.3 The Social Importance of Production and Reproduction

‘Production’ and ‘reproduction’ are related processes that play a critical role in social anthropological development. Due to the social utility that they contribute, consideration of these processes should be central in social contract negotiations regarding copyright. Within that negotiation it is important to have a clear conception of what production and
reproduction are, and how they relate.

Production as it is used here is a portmanteau term referring to the original creation of an object. These objects can be categorised variously, depending on the medium in which they are formed: e.g. inventions, literature, artwork, music, and so on. These are instances of intellectual content – various ideas and thoughts – that are generated and applied (in a tangible form) for the first time.145 People who perform production also enjoy a similarly diverse array of titles: e.g. inventors, designers, authors, composers, and artists. In more quotidian examples of production, however, a producer may receive no specific honorific descriptor (as in the case of menial labourers).

Reproduction, by comparison, is the process of implementing intellectual content that already exists into new tangible instances. In this way, each new implementation generates a discrete token of the same type. For example, I own a reproduction of Tolstoy’s War and Peace, published in London by Random House. It is heavy and thick, and I can hold it in my hands – and it is my property. Also counted among my property is a reproduction of one of Sony Corporation’s smartphones, manufactured by Sony or under contract to Sony. These reproductions are my property, and yet are naturally described as being Tolstoy’s and Sony’s. This attribution persists because the objects reproduce intellectual content that was originally produced by Tolstoy and Sony (notice the similarity between this ownership-attribution distinction and the case of ‘owning’ the opinions of Supreme Court Justices, as considered in Wheaton v Peters (1834) and discussed in Section 2.4.4).

The combined social role of production and reproduction is central in human development and flourishing, since reproduction allows for individuals to benefit from the achievements of their peers, rather than only from their own direct contributions to their self-preservation and sustenance. This is the basic observation which underlies the standard consequentialist justification of statutory IP protections. For instance, various medicines, while critically beneficial to the individuals who use them, would nevertheless be prohibitively expensive (in terms of labour or money) for the specific people who need it to produce by themselves. In cases where the development is feasible, those who stand to benefit from a medicine’s production are rarely the same people who are best equipped to successfully achieve its production. One of the benefits of exiting the state of nature and entering a society is the

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145 ‘First time’ is admittedly over-simplistic here, in that it fails to account for identical productions delivered through independent producers. For communicative clarity, I have left aside complications regarding simultaneously or independently delivered identical productions – but a more nuanced definition would be informed by the discussion in Section 7.3.2, in which ‘embodied’ ideas are compared to ideas ‘qua abstract propositions.’ That discussion is used to explicate the differing degrees of reproducibility, and potential for independent reproducibility, between different kinds of objects.
division of labour, and reproduction is essential for that to be possible.

At the same time, however, once a medicine is produced, it typically requires only a comparatively low level of investment to make reproductions of it. That means that it would be personally worthwhile for many people to pursue the reproduction (or, more practically, to purchase reproductions from commercial reproducers), and the social utility of that reproduction would be significant. Under natural conditions, however, the opportunity to engage in the reproduction of complex but socially beneficial objects like medicines is rare, because the process of original production (on which reproduction is inherently contingent) is not anticipated to be rewarding enough to undertake.

One contractual solution to this problem is to generate an incentive to engage in production through the agreement by non-producers to waive their natural right to subsequently make reproductions of those productions. By securing to producers the (artificial) exclusive right to make reproductions of their productions, it is possible to allow creators to recoup their investment costs by selling reproductions at a price that cannot be undercut by competitors (who would otherwise only need to recoup reproduction costs; not the much higher production costs). In this way, potential producers are given the ability to promote their own self-preservation by means of production, and other members of society are advantaged in their pursuit of self-preservation through the access provided to objects that would not otherwise have been produced.

Although the example of medicine has been used here to demonstrate the social importance of production and reproduction, which should be understood as pertinent to patent protections rather than copyright, the same demonstration can be constructed in relation to copyrightable objects like literature. Insofar as printed literature has potential social value, either for its informative or entertaining qualities, the ability to reproduce pieces of literature that were created by other people is essential in realising that potential value. Because the original authorship is a much more demanding process than the mechanical reproduction of (pre-existing) literature on a press, realising a worthwhile return from authorship could be prohibitively difficult if the only benefit an authored object provided to an author was the direct natural value it offered through use (e.g. the entertainment a novel provides). If the author could also sell copies of their production, then the return on labour could sufficiently promote an author’s self-preservation and subsistence to motivate them to produce, and then society more broadly could also realise the value of the authorial objects produced; but without a system of copyright in place, the ability to realise sufficient returns could be easily undercut by other reproducers who have much lower overhead costs.
to cover.

Notably, this equivalence between medicine and literature presents a challenge to existing conceptions of copyright (and IP more broadly). This is because, given that the same analysis applies equally to both patentable and copyrightable objects, it is not immediately clear why distinct regimes are necessary to facilitate the production of different objects. A purely economic theory of IP, based only on this incentivisation account, seems compatible with a single regime under which presently copyrightable and patentable objects are both afforded the same protections. I return to this issue in Chapter 5.

4.4.4 Only Conventional Copyright

It should now be clear that the conception of copyright that is delivered through the application of Lockean property theory to intangible objects is far removed from the conception of natural (and perhaps perpetual) copyright that advocates of naïve desert accounts typically seek to establish. Rather than establishing a natural basis for economic copyright, Lockean property theory represents a natural basis for the prohibition of the monopolies copyright produces. Fortunately for copyright proponents, Locke nevertheless provides an avenue towards conventional (i.e. statutory) copyright; however, this should be expected to be socially contracted based on the provision of a mutual benefit that copyright provides. Determining what contract ought to be negotiated (i.e., what contract would be most socially beneficial) is a largely economic, rather than predominantly philosophical matter. As such, I do not attempt to answer that question in this thesis, but a common economic proposal is that the socially optimal form of copyright would provide exclusive rights to authors for somewhere in the region of 15 to 25 years.146

It should be noted that the contracting of socially valuable provisions does not necessarily need to be restricted to a consideration of the values conventionally used to justify statutory property provisions. For example, a society could mutually contract towards protections that were anticipated to maximise the space that its members would have to order their lives in accord with their own free ends – per Cwik’s assessment of the appropriate function of IP. In this way, the contractual process does involve the philosophical task of assessing which are the appropriate values for a contract to pursue. However, it is important to note that even in this case, an empirical economic analysis would be necessary for determining what set of protections (and durations of protection, and so forth) would best promote that end.

146 See, for example: Productivity Commission, above n 95.
A final challenge to this interpretation of Locke, in response to the characterisation of the copyright it delivers as ‘conventional,’ is worth considering. In the previous chapter (Section 3.2.5) it was shown that Locke takes there to be a difference between objects that have ‘real’ value, and objects which “fancy or agreement” place value on. I characterised these as ‘naturally’ or ‘conventionally’ valuable objects, respectively. In view of the account given here, the value of copyrightable objects, being the product of an artificial scarcity that is established through social contracting, is clearly a value generated by agreement. If Locke so clearly prohibits natural copyright, an only provides and avenue to conventional copyright, then it might be thought that we must conceive of copyrightable objects as providing conventional and not natural value.

The practical difference between naturally and conventionally valuable objects (as shown in Chapter 3) is the way in which they are affected by the Lockean waste proviso. In relation to naturally valuable objects, Locke contends that people should not extract more from the commons than they have a perceptible use for, since by extracting the object and not using it, they infringe the common claim upon that object unnecessarily (as it does not serve self-preservation of subsistence). However, because Locke regards conventionally valuable object as inexhaustible, he characterises them as being exempt from this restriction. He considers the private appropriation of conventionally valuable objects to be justifiable, even when no immediate use for them is apparent, because they represent a store of value which can always be realised in the future. It has been argued that Locke therefore places no restriction on the accumulation of stored wealth (and thus provides for the existence of capital).148

By characterising copyright as a form of conventional property, then, it might be thought that the accumulation of property in copyright should not be limited; it should always represent a potential source of value to copyright holders. This would suggest the notion of perpetual copyright terms. The problem with this interpretation, however, is that it assumes that conventionally valuable objects are not also naturally valuable objects. On the contrary, in accordance with the theory of socially contracted IP regimes, copyright is implemented to place a conventional value on certain objects (to incentivise their creation) because of the natural value (i.e. social utility) they stand to provide. The conventional value that copyright places on objects cannot justifiably be taken to supersede the imperative to minimise restrictions against the free use of an object’s natural value.

147 Locke, above n 100, p. 144.
148 Macpherson, above n 118.
4.5 Conclusion

In Chapter 3 it was suggested that a reasonable person might think it intuitive that, if a labour account of property successfully demonstrates that physical labour correctly establishes natural property rights in relation to physical objects, then the same account might also demonstrate that intellectual labour correctly establishes natural intellectual property. It has been shown that this extension fails, however, because although a delineation could be made between physical labour and non-physical labour, this is not the same as a delineation between physical labour and intellectual labour (since all labour, physical and non-physical, contains an intellectual component). Instead, a more appropriate initial expectation would be that, if a rigorous labour account establishes natural restrictions against the monopolisation of tangible objects, then its application to intangible objects will likely establish natural restrictions against monopolising those as well. Indeed, this was shown to be the consequence of extending the Lockean labour account.

Nevertheless, it was also shown that the Lockean account is not incompatible with copyright, even though copyright involves the provision of monopolies. Locke’s broader social contract theory presents a means by which members of a society, having exited the state of nature, can negotiate a mutually beneficial system of copyright. This mutual beneficence is important, however. Being a product of agreement, rather than a product of natural law, such a system of copyright can only be justified based on the social utility it provides. In accordance with a rigorous natural-law labour account of property, then, the matter of how to optimally structure a copyright regime becomes an economic question. Particularly, the determination of how long economic copyright should last ought to be made by calculating the duration that would generate the greatest social utility.

\[\text{\footnotesize It is worth noting that non-physical labour, without an accompanying instance of physical labour, cannot establish copyright, since physical action is ultimately required to fix an idea in a tangible medium. For this reason, “purely” intellectual labour, which does not involve a physical process, is not considered any further.}\]
Chapter 5
Moral Rights: A Natural Law Component of Copyright

5.1 Introduction

As demonstrated in the previous chapter, a defensible Lockean conception of property cannot sustain a justification of economic copyright based on natural law. Instead, economic copyright must be derived via convention, through a process of social contracting. It follows that economic copyright must be statutory; and that it is justifiable only insofar as it provides social utility.

Although this account of copyright is correct, it is not complete. This is because, properly understood, copyright contains a non-economic component which must be recognised in conjunction with any economic protections that a society extends to creators. This component regards such entitlements as the right to have one’s name attributed to one’s work; to not have one’s name falsely attributed to the work of others; and to have copies of one’s work (where copies are permitted) to be reproduced with fidelity. Moreover, whereas economic copyright can only ever be statutory, non-economic copyright is a product of natural law.

The purpose of this chapter is to outline an initial account of the appropriate natural, non-economic rights that creators have. This account draws heavily on the notion of droits moral, or ‘moral rights.’ Such an appeal to moral rights is common within academic philosophical accounts of copyright. Despite the previous consideration that has been given to moral rights within academic accounts of copyright, however, their role remains contested. Similarly, although moral rights are represented at law, the formulation and application of the legislation is often misguided and confused.

The approach taken here, to help resolve the contestation surrounding moral rights, involves the consideration of a case study that features Nature Publishing Group. The consideration of this case is intended to highlight a category error that is common within treatments of moral rights, and which occurs whenever offences against moral rights are treated as property offences. Instead, as the analysis of the case demonstrates, moral rights

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offences must be categorised as deception offences. This analysis and argument forms a re-edited version of work I first presented in ‘‘IP’ Moral Rights Breaches are Deception Offences, Not Property Offences: Correcting a Category Error.’ Repairing this conception better enables the understanding of the appropriate relationship between moral rights and economic copyright. Ultimately, this is necessary for understanding moral rights as natural rights, and thus for developing a complete philosophical account of copyright.

This clarification of what moral rights are, and of how they relate to (and intersect with) economic property rights, shall be instrumental in subsequent chapters. Chapter 6 describes the problem of defining copyright’s scope; it highlights that a non-physical basis is required to define what ought to be copyrightable. Chapter 7 contends with that problem by describing the non-physical quality that ought to be used as the basis for determining copyright eligibility (briefly: that copyrightable objects are a unique kind of communicative object). Finally, in Chapter 8 it is explained that existing moral rights accounts represent rudimentary attempts to track the unique defining quality of copyrightable objects identified in Chapter 7. Moral rights legislation can therefore be reformulated, in view of the account constructed across Chapters 6 and 7, to better inform the legal scope of copyright.

5.2 Moral Rights Are Not Property Rights

5.2.1 The Case of Nature Publishing Group

Nature Publishing Group (henceforth NPG), publishers of a number of prominent journals, including *Nature* and *Scientific American*, attracted criticism in March of 2014 in regard to changes it made to requirements enforced upon authors wishing to publish in the organisation’s journals. The controversy surrounded, at least in significant part, the requirement for authors to forgo any moral rights (in connection with copyright) that they might have in relation to their publishable work. The relevant clause of their licensing agreement, in its original form, read:

7. The Author(s) hereby waive or agree not to assert (where such waiver is not possible at law) any and all moral rights they may now or in the future hold in connection with the Contribution and the Supplementary Information.

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151 McKeahnie, above n 119.
In late 2014, presumably in response to the controversy, the clause was revised to read:

7. The Author(s) grant NPG the perpetual right to edit, correct, or retract the Contribution and Supplementary Information if NPG considers (in its reasonable opinion) that such actions are required. The Author(s) hereby agree that they shall not object to NPG carrying out any such actions.\textsuperscript{154}

Although the explicit reference to ‘moral rights’ was removed, the revised clause remains functionally equivalent to the previous version; it does not clearly alter or reduce the demands made of authors. As explained in further detail below, moral rights protect against the editing or alteration of a work where that alteration is not conducted in consultation with, and finally approved by, the original author of the work. This makes the premeditated non-assertion of the right to that process of consultation and approval, through the pre-commitment to not object to edits and alterations made to one’s work, functionally a waiver of one’s moral rights.

Such a requirement therefore raises significant questions about the nature of moral rights, and points to a common category error that is made when moral rights are conceived of as property rights. Moral rights are currently recognised as a component of copyright law and are thereby legally understood to be intellectual \textit{property} rights. Although moral rights intersect with statutory property rights, they in themselves are natural, non-proprietary rights. Whereas property rights are the domain of offences of theft, the claim advanced here is that moral rights offences are acts of deception; specific species of fraud.

This category error can be seen by considering the language of NPG’s original licensing clause; the criticism it sparked; and the response to that criticism from NPG. The clause can be seen to be making an incoherent request of authors, since the truth of an author’s having authored a work is a natural artefact that cannot be modified via \textit{fiat}. It is therefore incorrect of NPG to regard moral rights, which protect individuals against deceptive practices, as rights that are alienable or waivable. Although this is one important consequence of correcting the category error observed, the NPG example is an instance of a more widely pervasive, even systematic, misconception about the nature of copyright. The consequences of the category error, and the implications of recognising and correcting it, hold material importance to a range of contemporary issues.

5.2.2 The False Reduction of Deception to Theft

As explained in Section 4.4, an essential role of statutory property law is to solve free-rider problems. The economic implications of the social value of production (and reproduction) are quite straightforward and well documented: the heavily concentrated individual investment by a single producer can ultimately result in a product that, being easy to reproduce, provides an advantage that is shared between the producer and subsequent reproducers. Because the initial investment cost is borne individually, however, while the advantages of the product are dispersed (rather than concentrated towards the initial investor), there is a natural disincentive to undertake investments which otherwise stand to return exceptional social value. This gives rise to social utility arguments for the introduction of statutory property rights like copyright and patent.

One consequence of the implementation of these statutory responses (e.g. copyright and patent) to free-rider problems, however, is that some individuals become motivated to falsify claims about who produced certain objects. Given that copyright and patent systems afford producers (and only producers) the opportunity to exercise property rights over what they create, the acceptance of falsified claims would unfairly preclude genuine producers from effecting those property rights. Because such falsification affects an original producer’s ability to claim property rights (the option having been ‘stolen’ from them), the falsifier’s offence has the guise of being a property offence: theft. This categorisation is mistaken, however; and the mistake that is made in this instance is one that lies at the heart of a broader error committed in the categorisation of moral rights breaches as property offences.

It is true that a (statutory) property offence occurs in the type of situation described above, provided that a framework of statutory law is in place to make unauthorised reproduction unlawful (which copyright and patent do). But it is also indisputable that the property offence committed, being based on the false claim of production, is facilitated by a deception. Moreover, this deception constitutes an offence prior to, and independent of, the property offence. This is not always obvious, and where the final consequence of the deception is economic in nature, the distinction may ultimately seem trivial. This makes the conflation of the deception and the property offences a simple error to commit.

Unfortunately, this conflation has harmful social consequences. A range of these consequences can be evidenced through the consideration of three closely related instances
of deception:

1) equivalent instances of deception after the expiration of statutory protections, under modern standards;
2) equivalent instances of deception where statutory property provisions were never in place; and
3) equivalent instances of deception in which any non-proprietary ends are facilitated.

What makes these closely related is that deception after the expiration of statutory protections (case one) are functionally equivalent to deceptions where those protections were never in place at all (case two); and both of those cases involve deception intended to facilitate an end that is necessarily non-proprietary in nature (case three). Each is nevertheless worth considering in turn.

An example of deception committed to facilitate statutory theft would be a case in which a person copies the text of a book and sells reproductions of it, while claiming to be its author. Ordinarily, this would be done to profit in an environment where statutory copyright law reserves the right to profit in that way to someone else: the genuine author. But copyright is limited to a fixed term, after which a text enters the public domain and can be reproduced freely. Suppose, then, that an individual rediscovered a long lost and forgotten, yet literarily important, piece of writing – perhaps a lost work of Tolstoy’s. Further, suppose that the finder of this text transcribed and reproduced it; claimed to be its original author; and then distributed the copies they had made. We can even imagine that they did this in the knowledge that they would not realise a monetary return; willingly absorbing the reproduction and distribution costs at a personal financial loss. Having been published so long ago, the lost text would no longer be protected by property law as the law exists today. In addition, the reproducer would be demonstrating no economic motivation for the deception. Nevertheless, such a deception would still be an offence against Tolstoy, and all readers.

Furthermore, we might imagine a different case involving a jurisdiction in which there is no legal prohibition against third-party reproduction of a living author’s work. In this case, the act of unpermitted reproduction would never constitute a property offence; and yet the act of dishonestly presenting such reproductions as one’s own productions (rather than as reproductions) would still be objectionable. This case reveals that this objectionableness must arise from a non-proprietary fact.

Such a deception also does not transition into a property offence simply due to the
introduction of statutory property protections. Within the current statutory environment, several deception cases of this kind are routinely dealt with outside of the property-centric mechanisms of copyright law. There are two major, antecedent classes of such misrepresentations: plagiarism and forgery. Plagiarism occurs whenever an offender claims to be the producer of something to which they are only a reproducer; while forgery occurs whenever an offender claims that something they produced was produced by someone else.

An example of such a deception that is not ordinarily penalised via the mechanisms of property law, is an act of academic plagiarism at the undergraduate level: a student reproduces another person’s essay, attempting to represent it as their own production, to satisfy an assessment requirement and receive a qualification. Such an offence is considered by universities to be serious misconduct, bearing severe penalties. However, undergraduate plagiarism is rarely dealt with in the manner of a property offence. This is notably dissimilar to the quite comparable example of collegial reproduction within a university, whereby a member of staff reproduces a marketable object that a colleague has developed, and then represents it as their own invention for the purpose of patenting it. One would certainly expect this latter crime to be addressed as a property offence.

The dissimilar treatment of the undergraduate plagiarist and the collegial defrauder is motivated by pragmatism, rather than principle. Because the economic interests of an author whose work is plagiarised by an undergraduate student is rarely compromised as a result, the plagiarism is not pursued as an economic (i.e. proprietary) offence. Although a case can certainly be made for the fact that the original author is in some way harmed by the plagiarism (it is worth noting that the author should have the option to initiate action against the plagiarist), the harm against them must affect something like their reputation or agency, rather than their proprietary interests. Indeed, the institution conferring the qualification (which is the direct target of the deception); and the public who would subsequently recognise the degree as legitimate (and who would thereby be deceived in turn), are perhaps more clearly identifiable victims of the offence. This explains why the initiation of proceedings against undergraduate plagiarists, although they could potentially be initiated by the original author, are ordinarily initiated by the institutions themselves. Such proceedings are (rightly) not contingent on the participation of the original author at all.

Additional evidence for the proper categorisation of moral rights can be found by considering instances of unauthorised literary reproduction that avoid being plagiaristic. So long as the reproduction is not performed deceptively, and is incorporated into some
ultimately new, genuine production, a comparable act that would otherwise be plagiarism ceases to be so. Partial copying is common, and indeed institutionalised, within academic writing. It is institutionalised by systems of referencing, which are employed specifically to differentiate between the parts of a text which reflect innovative production on the part of an author; and the parts of a text that reflect only what the author has derivatively reproduced (either directly or in paraphrase) from the productions of somebody else.

Where, in discussing Lockean theory, I quote a passage originally written by Locke, I use citation markers to designate those words as having been reproduced. This separates such passages from the content that is my own original production. If such a reproduction of Locke’s words was a property offence, as in a theft, then it would not become acceptable simply because I had acknowledged the reproduction via referencing. Instead, acknowledgement absolves reproducers of wrongdoing in such cases, because it is the misrepresentation of reproduction (i.e. presenting it as production), rather than the act of reproduction per se, that constitutes the offence in question. That offence can occur in addition to, and even facilitate, a property crime like theft, but it cannot be logically reduced to or conflated with it.

5.2.3 Deception offences are natural offences

It is clear, then, that misrepresenting the nature of an object’s production, by misattributing it (or any of the changes made to it) to a false producer, is the sort of offence that authors and artists are protected against under moral rights legislation. The right to have one’s name attributed to one’s work is not a right to exclude others from reproducing one’s productions, but a right to the assurance that those reproductions will be accurately presented qua reproductions; not misrepresented as being another person’s original productions. This represents a protection against plagiarism. Similarly, the right not to have one’s name attributed to the work of others is an assurance against the fraudulent misrepresentations of productions as containing one’s intellectual content when they do not. This represents a protection against forgery.

The main reason that categorising moral rights as property rights is problematic is because it generates confusion about the natural quality of those rights. Because property rights are typically the product of natural law but can be established via statute; and because moral rights intersect so intimately with property rights, it might initially seem tempting to think that moral rights could reasonably be treated as being statutorily amenable. To the contrary, however, when one understands moral rights offences to be deception offences, the fact
that moral rights are inappropriate objects for statutory amendment or limitation becomes clear. This importantly informs the way we must treat moral rights at law.

A defining feature of property rights, whether they are natural or statutory, is that they are transferrable. Under ordinary circumstances the owner of property, alone, has the right to enforce or waive their claim to exclusivity. They may also sell or gift what they own, which is another way of describing the transferral of property rights from one individual to another. Being individualistic rights, owners also have the sole ability to seek prosecution for, or forgive, past trespasses against their property rights. This is very different to the way in which moral rights ought to be treated.

Once again, revisiting an act of plagiarism highlights the social, rather than purely individualistic, nature of a moral rights offence. The undergraduate student who plagiarises a former student’s work is not relieved of their culpability by obtaining the permission of the former student. Instead, by extending their permission, the former student would become complicit to a fraud. The student who produced the work, and who has the right to have his or her name attributed to it, is not naturally afforded the ability to transfer that right to others. The same is true in cases of forgery. If one attempts to artificially inflate the price of an artwork one produces, by attributing it as the production of a famous contemporary artist, then this deception is not an offence that the famous artist is afforded the power to excuse.

Not only are moral rights limited in this way at the level of natural law, but, as the same case demonstrates, moral rights holders are unable to be effectively provided these powers of transferability; waiver; or forgiveness, via fiat. Even if the transferability of attribution was recognised at law, through statutory provision, the forger’s plan to artificially inflate the price of an artwork would continue to rely on deception. As soon as the statutory arrangement was divulged publicly, the legal fact of the artwork’s attribution would cease to bear on its value. The value would continue to be determined by the natural fact of the artwork’s attribution, which the legal provisions would be absolutely unable to alter. The effect of such hypothetical provisions, then, would merely be to protect ‘permitted’ forgers and plagiarists against prosecution for their deceptions – but these frauds would continue to impart the same negative social consequences as always.

5.2.4 NPG’s Response

The imperative of protecting against deception is emphasised in NPG’s response to the
criticism their publishing clause evoked, as well as in their ordinary daily publishing procedure. The group’s response to the controversy addressed truth and deception in two ways. First, they advanced a negative account intended to reassure against the possibility that they might abuse the waiver they required by perpetrating the kinds of fraudulent deceptions previously identified. Second, they advance a positive account of the way in which they suppose the original waiver facilitated their ability to protect their audiences from deception.

NPG’s response to the controversy was delivered via a blog post. This communication was used to emphasise NPG’s commitment to accuracy and transparency in attribution of works, explaining that they “always attribute articles to authors” and “believe researchers should always be credited for their work,” as well as citing efforts the group has made to “foster disambiguated accreditation.” This is heavily geared towards reassuring authors of the maintenance of their individual interests. The statement made seems sincere; it ought not to be thought that NPG harbours any interest in defrauding its contributors. But the fact still stands that, if the clause is taken to have legal traction, and NPG did decide to offend against their authors in this way, the publisher would have impunity against legal repercussion. While NPG may not present a realistic threat to authors’ interests, legitimising such scenarios by legally treating moral rights in the manner of property rights opens the avenue to eventual abuses of this kind by one party or another. To warrant such legitimisation, a strong case for the social benefit of such a treatment would be required.

NPG’s response supposed that a public benefit was indeed served by the waiver of moral rights. They suggested that this benefit would be realised in extreme cases of disagreement between the authors of co-authored submissions:

We take seriously our responsibility towards the integrity of the scientific record. The “moral rights” language included in our license to publish is there to ensure that the journal and its publisher are free to publish formal corrections or retractions of articles where the integrity of the scientific record may be compromised by the disagreement of authors. This is not our preferred approach to dealing with corrections and retractions, and we work with authors and institutions to try seek consensus first. The right against derogatory treatment is a key aspect of moral rights.156

156 Ibid.
This claim again emphasises an intended commitment to accuracy and truthfulness. The suggestion that if, after publication, two authors of a co-authored text come to disagree about the accuracy of the results – or if journal staff come to regard the contents as inaccurate – then reserving the ability to bypass contributors’ moral rights would enable the journal staff to issue corrections or clarifications that better serve the scientific record. This proposed function of the waiver (which evidently influenced the language employed in revising it) is clearly socially directed, as the integrity of the scientific record is not merely a matter of interest to the authors who contribute to it, but something that affects NPG’s audience, the broader scientific community, and ultimately society generally – closely akin to the consequences of plagiarism.

Such a waiver is not necessary in preserving the integrity of the scientific record, however. Not only is the use of this avenue less than preferable, as NPG concedes, it is detrimental. The preferred method of resolving disputes is outlined in NPG’s requirement that contributing authors inform the journal of any corrections they believe need to be made, with the insistence that corrections to co-authored articles be accompanied by the written consent of all contributors. In cases of author disagreements, the coordinating author must also deliver copies of correspondence between themselves and the dissenting authors.157 This procedure recognises and reinforces the importance of accurately maintaining attribution of contributions to the scientific record. Even where an editor decides, against the opinion of the original contributors, that a redaction or correction is appropriate, it should be simple to explain that the correction is attributable to that editor, and not to the contributors. For the sake of accuracy, we ought to expect that explanation to be made. Neither the integrity of the scientific record, nor the interests of the society that it serves, are advantaged through the inaccurate attribution of scientific statements or retractions.

5.2.5 Moral Rights are Natural, Perpetual, and Inalienable

The erroneous treatment of moral rights as property rights is pervasive. Despite the unobvious nature of the mistake, its consequences are not benign – as the example of Nature Publishing Group demonstrates. Property rights are, by definition, transferrable and can be waived. This is sensible because the harm caused by a property offence, such as in the case of theft, is typically inflicted only upon the rights-holder. Moral rights, however, protect against inaccuracy in the attribution of products to their producers. Offences against them

therefore take the form of fraud, which has negative social consequences even in instances where the person most identifiable as the rights-holder is not harmed. As such, moral rights cannot defensibly be regarded as transferrable or able to be waived.

Moral rights must also, given the function they have of preserving truth and accuracy in claims made about productions, be recognised as natural rights that cannot appropriately be modified by statutory provisions. Unlike other natural rights, such as the Lockean right to make use of objects in the commons, moral rights cannot be negotiated or contracted away. Even if the attribution of a work to a specific person would somehow otherwise have a beneficial social function, if that person was not the genuine author, then no contract could legitimise the claim that they were. There is no moral right to lie, and there is no transferrable property right that confers a right to lie.

Finally, it is important to recognise that moral rights are perpetual rights. Unlike statutory copyright, which can correctly be limited to a specific term to maximise social utility, moral rights must persist perpetually. As considered in Section 5.2.2, the misattribution of a long-deceased person’s work would still be a natural offence against the author and the audience to which the misattributed work was presented. A term consisting of the life of an author plus 70 years is likely too long for economic copyright, based on an economic calculation of potential social utility. However, the same term in relation to moral rights would be inappropriately short – indeed, inappropriately finite – since natural facts do not expire.

5.3 There are No Natural Economic Rights Unique to Copyright

One of the primary matters that stands to be informed by the further consideration of what moral rights are, and of how they ought to be represented at law, is the question of what objects ought to be copyrightable. If statutory economic protections represented all there was to copyright, with the consequentialist end of overcoming free-rider problems the only principle informing the structure of IP law, then it would be difficult to see why there should be any delineation between copyright and patent at all. Insofar as copyright is intended to provide those protections which best incentivise the production of original objects; and patent systems are intended to provide those protections that best incentivise the production of original objects, then insofar as the systems differ in the protections they provide, one is less effective than the other. Intuitively, the less effective system should be reformulated to confer the protections of the other system; or the systems should be amalgamated to provide whatever single set of protections is most effective.
One response to this suggestion might be that it is appropriate to maintain the distinction between copyright and patent because each of the systems provides the best protections to incentivise the different objects to which they respectively apply. If this is so, then it has not been demonstrated. Indeed, as highlighted throughout Chapter 2, the arguments which have informed the structure of copyright law within the United States have not been directed towards supporting the principle of that claim, far less demonstrating its truth empirically. Instead, the primary concern in the formulation of modern U.S. copyright law has been a regard for the (alleged) inherent desert of authors. While it has been asserted that authors naturally deserve to enjoy lifetime (and beyond) economic copyright protections, the same case is typically not advanced in relation to patents. The justificatory bases of copyright and patent are different; however, the difference seems unjustifiable on a purely economic basis.

In addition, if the distinction between copyright and patent is defended on the basis that each system provided the unique protections which best incentivised production of the objects to which they applied, then it is natural to question why further specificity is not encouraged. It seems prima facie improbable that maximally incentivising creation requires that the production of maps and charts be treated unlike the production of mechanical inventions, yet exactly like the production of sculptures; dictionaries; software; and motion pictures. In terms of their economic structure, the various industries which produce copyrightable objects are as unalike to one another as they are (collectively) unalike to industries that produce patentable objects. It seems highly unlikely that the same incentive structure would prove equally effective in the case of all the industries that copyright affects.

Compared to any economic factor, moral rights present a much more viable basis for justifying the preservation of the copyright-patent divide. Insofar as there is an intuitive difference between copyrightable objects and patentable objects, which can sustain their separate treatment under IP law, it is something natural but non-economic. Indeed, the United States House of Representatives has functionally affirmed as much, reporting that “an author’s intellectual creation has the stamp of his personality and is identified with him” in such a way as to make authorial rights “a unique kind of personal rights.”

If a full and accurate account of moral rights can sustain the copyright-patent divide, it is because authorial moral rights define what copyright is. That is, if the copyright-patent divide is defensible, then copyright eligibility ought to be decided based on the unique

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158 House Comm. on the Judiciary, above n 66, p. 4.
applicability of certain moral rights to authored objects. The next chapter describes the historical difficulty of defining copyright’s scope, and by Chapter 8 moral rights are re-examined as a legislative avenue for resolving those difficulties in a principled manner. For that account to function, it is imperative to recognise moral rights as protecting against deception offences, and not property offences.

5.4 Conclusion

Although explicit moral rights legislation is incorporated as a component of intellectual property law, moral rights are not property rights. Rather, the protection of moral rights represents a protection against deception. Because of the way in which they regard truth and accuracy, moral rights must be understood as perpetual natural rights which cannot be transferred; waived; or modified via fiat. This understanding is important for generating a moral rights account that can explain the appropriate scope of copyright. A moral rights account is developed for that purpose in Chapter 8, after a consideration in Chapters 6 and 7 as to what quality of copyrightable objects moral rights are uniquely required to protect.
Chapter 6
A Non-Physical Basis Is Required for Determining Copyright Eligibility

6.1 Introduction

Copyright’s historical expansion in scope has largely been predicated on a series of arguments by analogy that, individually, have each seemed intuitively reasonable. For example, the extension of copyright to musical recordings can ostensibly be understood as a natural extension of copyright’s application to sheet music. However, in more recent expansions of copyright (e.g. the inclusion of computer code within the scope of copyright), this extension by analogy has resulted in largely counterintuitive (and even intuitively objectionable) conclusions. It is not obvious, for instance, whether computer code being written makes it sufficiently analogous to objects like books to be copyrightable, or if the function of most computer code makes it more analogous to (patentable) machines.

The purpose of this chapter is to diagnose this failure in reasoning. I argue that the failure is the result of a critical conflation: it arises when the abstract ideational objects which are deemed eligible for copyright are treated as conceptually indistinct from the physical forms in which those ideational objects are expressed. For instance, many ideas which ought to be eligible for copyright protection are ideas expressed through the medium of books; but this fact has erroneously been used in grounding the view that books should be deemed eligible for copyright protection qua books. Thus, although copyright, in principle, is supposed to protect intangible (intellectual) objects, legislation has traditionally resorted to determining copyright eligibility by appeal to the physical qualities of objects.

The prevailing legal preoccupation with categorising physical classes of objects as either copyrightable or uncopyrightable is a consequence (though avoidable) of copyright’s historical development. Although the frequency with which this method has delivered unintuitive and undesirable conclusions has sharply increased over time (culminating in the present IP landscape), the origin of the conflation which underlies this preoccupation is to be found in copyright’s earliest inception. When Britain’s King William III identified the printing press as a potential threat to social order, his response was to seek control over the physical medium of print. When that practice was abandoned, authors and printers sought a different justificatory basis for copyright, since they had an interest in maintaining the
status quo (the system of monopolies developed under the Crown’s early provisions being of immense commercial value to them). Since change was unsought and unwelcome, the prevailing practice of gauging copyrightability based on an object’s physical medium went unchallenged. The natural temptation of this error was subsequently compounded by the entirely rational requirement that, for an idea to be eligible for copyright, it must first be expressed in some tangible medium.

Resolving this error is important for two reasons. First, determining copyright eligibility based on an appropriate non-physical quality can deliver a version of copyright which avoids the counterintuitive consequences that are encountered when determining copyright eligibility based on physical criteria. Second, establishing a principled non-physical basis for what copyright ought to protect is necessary to provide a sufficient basis for determining what protections ought to be extended in relation to copyrighted objects (especially in terms of non-economic protections).

Section 6.2 contains an analysis of the historical entrenchment of the conflation outlined above. This analysis considers the origin of copyright in Great Britain, and describes how accidental factors of its origin led to the conflation between ideational object and physical expression becoming heavily entrenched into the structure of British law. This incorporates an account of the British Crown’s political motivation for introducing copyright, as well as the stationers’ subsequent economic motivation for retaining that system.

In Section 6.3 I then consider the landmark legal case of Baker v Selden (1879), in which the United States Supreme Court was confronted with, and forced to acknowledge, the conflation already described. Specifically, the conflation had led to a situation in which, if the law was applied as written, types of objects that the Justices considered correctly uncopyrightable would have to have been deemed copyrightable. The Justices responded to this problem by seeking to overturn the historical precedence of determining copyright eligibility based on the media of an object’s expression. To this end, they introduced the notion of an Idea-Expression divide. This divide was intended to distinguish between an author’s ideas, and the tangible form in which those ideas are embodied or ‘expressed.’

Section 6.4 subsequently demonstrates that, although the Supreme Court acknowledged the legal inadequacy at the centre of Baker v Selden, the proposed Idea-Expression divide did not represent a satisfactory solution against that inadequacy. The Court clarified that the Idea-Expression divide could only be applied in relation to what it termed ‘technical’ objects (e.g. tools); not to what it termed ‘ornamental’ objects (e.g. sculptures). The
distinction, per the Court, was that the *essence* of technical objects could be distinguished from the *form* of those objects; but in the case of ornamental objects “their form is their essence.”

This, however, leaves the copyright eligibility of ornamental objects still determinable only by appeal to their physical forms.

The analysis in Section 6.4 demonstrates that, contra the Court’s suggestion, the essence of ornamental objects cannot clearly be reduced to their physical forms. For example, a novel and a film which both convey the same story could conceivably be understood to involve the expression of the same object – the narrative – even though they take distinct physical forms. This presents a dilemma: The way in which United States law is *written* indicates that the copyright protections which extend to ornamental objects ought to attach strictly to their forms. However, the way in which the law is *implemented* treats copyright as attaching to an essential quality of ornamental objects that is not their physical form. For example, when a copyrighted object (such as a book) is adapted without authorisation into another form (such as a film), this constitutes a copyright offence. If the law truly only protected specific expressions, then the formulation of the same narrative expressed uniquely in a different medium would not constitute an offence.

Resolving this dilemma requires changing either the wording or the implementation of United States copyright law. If one is to accept the law as it is currently written, then this entails a much more constricted copyright regime than presently exists in practice. On the other hand, if the prevailing implementation is maintained, and the law is rewritten to reflect such an interpretation, then once again the law is left without a positive account of an appropriate non-physical basis for justifiably determining copyright eligibility.

This chapter therefore demonstrates the way in which the law’s historical preoccupation with the physical forms of objects, when determining what is copyrightable, has led to an inadequate formulation of the copyright-patent divide. Examining certain examples of copyrightable classes of object – such as maps; forms; and computer code – reveals the inadequacy of determining eligibility for copyright (especially as opposed to patent eligibility) by appeal to the physical qualities of different types of objects. This discussion establishes the motivation for Chapter 7, in which an appropriate, principled point of distinction between copyright and patent is described.

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159 *Baker v Selden*, 101 US 99 (1879), 103.
6.2 The Historical Entrenchment of Physical-Centric Copyright

As outlined above, United States law contains a fundamental ambiguity that presents us with an important dilemma in relation to determining copyright eligibility. To understand the origins of this ambiguity, it is necessary to revisit the British introduction of copyright. As described in Chapter 2, the original establishment of copyright in Britain was not conducted pursuant to any notion of authors’ rights or of social utility. Rather, the motivation was simply one of its self-interest on the part of King William III. Having observed the potential for the printing press to transfer political power and influence to the general population, and being particularly concerned that it represented a potential avenue for the spread of seditious and blasphemous ideas that might present a challenge to the Monarch’s authority, the Monarch’s response was to assume control over the medium of print. This was enacted through a system of licenses – i.e. copyrights – which restricted the right to produce printed materials to a limited pool of pre-approved licensees.¹⁶⁰

Already, the division between the physical and non-physical qualities of copyrightable objects is evident in the actions of King William III. Sedition and blasphemy were already crimes; the spreading of seditious and blasphemous ideas was already illegal. What the King’s primitive system of copyright secured was a pragmatic control over printed materials. His strategy was therefore to control the spread of (non-physical) ideas indirectly, by controlling the (physical) medium in which they might be expressed. It is important to note, however, that for the King’s purpose, it was not necessary for the physical objects restricted under copyright to be indexed one-to-one with the ideational objects that were in principle the target of the restrictions. That is, the King was served no worse by extending the restriction to all printed material, even if only a subset of those objects could potentially be offensive or threatening to the Crown.

The British King’s strategy for controlling the spread of certain ideas, by seizing control of print media entirely, may have been effective in achieving his intended objective. By comparison, however, the implementation of that strategy has since had problematic ramifications for the establishment of an ethically well-grounded model of copyright. This is because the justification of copyright does ultimately turn on there being a one-to-one relationship between the ideas that copyright is intended to track and protect, and the physical objects in which those ideas are expressed. Only those physical objects suitably indexed to eligible ideational objects ought to be deemed copyrightable. That component of an ethical justification for copyright has been overlooked, however, because subsequent

¹⁶⁰ Sherman and Bently, above n 9, p. 11.
reasoning regarding the expansion of copyright’s scope has been inappropriately predicated on the acceptance of the British Crown’s original designation of printed material as copyrightable *qua* printed material.

The first British Licencing Act, passed in 1662, effectively extended the Crown’s original copyright system. When that act expired in 1695, the printers who had benefited from the artificial scarcity it had created, and which had enabled monopolisation, sought a continuance. Although the Statute of Anne was eventually implemented in 1710, this only provided a temporary protection (at most 28 years). When the protections established by the Statute began to elapse, stationers once again turned towards establishing a justification of (natural) perpetual copyright.

Although stationers sought a principled justification for copyright during this period, they were not motivated by a commitment to justice for its own sake: they had become economically dependent on the system of monopolies at the core of the industry. As a product of their motivation, the stationers’ discourse did not progress from establishing a justificatory basis for copyright to constructing a legal apparatus that fit the principles so derived. Rather, in the stationers’ minds the conclusion was largely fixed: the arrangement under which the stationers had previously operated was accepted *de facto* as justifiable. The only philosophy to be done was to determine what justification led to that model of protection.\(^{161}\)

The regime established by William III thus anchored the discourse on copyright, even in the decades after the Statute of Anne was enacted. The notion that copyright ought to apply to all printed material never came under challenge. With the Statute of Anne replacing the Royal licensing regime, publishers had inherited the King’s vested interest in controlling printing. Although this was not precisely the same interest – since the King’s had been a political interest, and the stationers’ a primarily economic interest – both had in common the fact that they were well served by a broad conception of copyright that incorporated restrictions on all printed materials.

The effect of this mistaken commitment has historically been exacerbated by the serial expansion of copyright’s scope based on analogies drawn between already-copyrightable media forms and newly emerging media technologies. For example, if the copyrightability of printed objects is assumed, then the expansion of copyright to sheet music is natural, given that sheet music is produced via print. In turn, the analogous qualities of sheet music

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\(^{161}\) Ibid, 12-3.
and recordings of musical performances provides an ostensible reason to extend copyright protection to those recordings. Similarly, on the same assumption, the print-like nature of photographic development makes it natural to extend copyright to photographs; and the production of motion pictures can be understood to simply amount to an arrangement of photographs. Although these objects conceivably share something in the way of an ‘artistic’ or otherwise non-physical quality, their eligibility for copyright protection can be asserted (by analogy) on a purely physical basis, provided that the original categorisation of printed material as copyrightable qua printed material is accepted.

Between 1710, when the Statute of Anne was implemented, and 1787, when the United States Constitution was ratified, the subject of copyright underwent much public debate and legal consideration. Nevertheless, the physical-centric development of copyright since William III’s licensing regime continued uncorrected. As for the contribution of American legislation, the Copyright Act (1790) promoted an even greater preoccupation with physical qualities. In the United States, maps and charts were afforded copyrightable status alongside books and other printed material, in accordance with the historically entrenched preoccupation with the printing press. There was not yet any “recognition or claim of protection in other fields, based on the general principle of rights in the creative product of the mind,” because the concept of copyright remained tied exclusively to the physical products of a press.

In practice, there was a divergence between the ideological motivation for the Copyright Act (1790) and the practical consequences of its implementation. Although copyright discourse preceding the American implementation of copyright was often couched in terms of celebrating the intellectual genius and creative artistry of original authors, the pattern of objects that received copyright was slanted differently. Most objects which received copyright protection in the first years after 1790 (when copyright was not granted automatically) were of a practical or utilitarian nature. For instance, almost half of the first one hundred objects protected in Pennsylvania were either textbooks; manuals; atlases; or commercial directories. This trend was repeated throughout the United States. Although protection was typically sought for substantial novels, original literature and poetry made up just a small minority of copyright registrations. The enduring insistence on tying copyright eligibility to the physical medium of print had thus resulted in “the most commonly copyrighted works ha[ving] very little to do with the stereotypical image of

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162 Oren Bracha, ‘Commentary on the U.S. Copyright Act 1790’ (2008), in L Bently & M Kretschmer (ed.s), Primary Sources on Copyright (1450-1900) <http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_us_1790>.  
163 Ibid.
original authorship in the romantic sense.\footnote{164}

\subsection*{6.2.1 Understanding ‘Romantic Authorship’}

The notion of authorship ‘in the romantic sense’ (henceforth ‘romantic authorship’) that is quoted above is underdefined and requires elaboration. Broadly, it appears intended to pick out authorship that produces objects like fictional prose and poetry, while excluding authorship that produces things like directories and reference books. Unfortunately, although that distinction represents an intuitive difference, articulating the essential dissimilarity between romantic and non-romantic authorship is difficult.\footnote{165} Nevertheless, I intend to show that the distinction is materially important. Whether an object (including non-textual objects) is a product of romantic or non-romantic authorship ought to serve as the central criterion in determining its copyright eligibility.

Demonstrating the appropriateness of this criterion requires refining an account of what is intended by ‘romantic authorship,’ and articulating its essential quality. This task is undertaken in Chapters 7 and 8, but first it is important to consider the nature of the relationship between ideational objects and the physical forms in which they are expressed. In making this consideration, it is worthwhile examining the case of \textit{Baker v Selden} in some detail, since this was a case in which the United States Supreme Court was required to consider the same relationship. To this end, the Justices ultimately introduced the notion of ‘ornamental’ objects, which can be best understood as referring (generally) to objects

\footnote{164} Ibid.

\footnote{165} This difficulty has spurred some theorists to conclude that such a notion is unsuitable for the purpose of informing copyright law. See, for example, Mark Rose, ‘The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship’ (1988) 0(23) \textit{Representations}, 51. Rose concludes that what distinguishes a person as an author is specifically that they are a proprietor by virtue of their authorial acts of creation. Rose uses this conclusion to explain what he takes to be the function of copyright regimes. Rose outlines his claim by saying that: “The distinguishing feature of the modern author … is that he is a proprietor, that he is conceived as the originator and therefore the owner of a special kind of commodity, the ‘work.’ And a crucial institutional embodiment of the author-work relation is copyright, which not only makes possible the profitable publishing of books but also, be endowing it with legal reality, produces and affirms the very identity of the author as author” (p. 34).

On one possible reading of this passage, Rose can be interpreted as simply providing an interesting descriptive account. In that case, it suffices here to say only that the objective of the present thesis is to demonstrate why that view – as taken up in the way Rose describes – is wrong. On the other hand, if Rose is read as normatively affirming this view, then further consideration of Rose’s account is necessary. Insofar as Rose normatively affirms the ‘author as proprietor’ view, however, he does so on a poor basis, which has already been critiqued in earlier chapters: namely, he is persuaded by naïve Lockean natural law accounts of intellectual property.

Rose suggests that, when Lockean discourse is extended in relation to the topic of literary production, it ‘blends readily’ with accounts of the unique qualities of literature and authorship. Because authorship involves labouring to produce original objects; and because the Lockean account of property establishes natural proprietorship on the basis of labour that adds original value of objects, Rose takes the act of authorship to necessarily add original value, which situated in an object, that qualifies the author for natural proprietorship over the thing they produced (p.56). Rose does not consider, however, how the restrictive nature of the ‘as good and as much’ and ‘waste’ provisos should correctly curtail the ability for authors to claim natural, exclusive proprietary rights over the products they produce (see Chapters 3 and 4 for such an analysis).
produced via romantic authorship.

6.3 The Inadequacy of a Physical Basis in *Baker v Selden* (1879)

The case of *Baker v Selden* involved an example of a published book that was ‘practical or utilitarian’ in nature. It was a book that was not the product of the romantic notion of authorship discussed in the previous section. *Baker v Selden* is a notable case because it concluded with the United States Supreme Court largely acknowledging the inadequacy of making an appeal to an objects’ physical form in determining its eligibility for copyright protection. However, the case did not result in the Court adequately diagnosing the *reason* for this inadequacy. A general solution to the problem of the inadequacy was therefore not effected into law.

Ostensibly, the object at the centre of *Baker v Selden* was a book written by Charles Selden, on the topic of bookkeeping. The book contained a description of what Selden considered to be a vastly improved ledger system, including printed examples of blank ledger forms, which Baker was accused of having copied illegally.\(^{166}\) I say that this was *ostensibly* the object at the centre of the case because simply asserting that it was so would be to beg the central question of the case. The core contestation between W.C.M Baker and Selden’s estate (Selden being then deceased) ultimately came down to whether the object Baker was accused of copying constituted Selden’s *book* or Selden’s *system*.

Selden’s lawyer argued, based on the law’s entrenched preoccupation with the physical classification of objects, that the case was clear-cut: the copyright statute offered protection to *books*, provided they contained original contributions to useful knowledge. Selden had produced a book, and it contained his contribution of an original useful system to the art of bookkeeping. Surely, the argument went, this had to qualify the contents of Selden’s book for copyright protection.\(^{167}\)

Baker retorted that Selden’s work was ineligible for copyright protection because its contribution was to the ‘useful arts,’ rather than to ‘science.’ For present purposes (since to define these categories precisely would, again, be to beg the question), we can take

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\(^{166}\) Baker’s defence included a denial of the allegation that he had copied Selden’s work at all. The Court considered there to have been evidence that he had. I make no assessment on the matter because it is inconsequential to the question considered here, which is how the nature of Selden’s object ought to impact its eligibility for copyright in the case that someone *did* aspire to copy it. For this reason, I proceed as though Baker did undertake the copying alleged of him.

Baker’s use of the term ‘useful arts’ as meaning to pick out something approximating the class of objects eligible for patent protection; and ‘science’ to mean knowledge in a broad and general sense (including the sort of knowledge conveyed through fiction and art). Baker’s case seemed bolstered by the fact that, in parallel to claiming copyright, Selden had sought to obtain a patent to protect his innovative bookkeeping system. This had the visage of an implied admission of ineligibility on Selden’s part.

The Court agreed with Baker. It was not the first time such an argument had found favour in case law. In *Perris v Hexamer* (1879), for example, it had been held that, despite being a product of print, a system of symbols used to represent information on a map was not to be considered eligible for copyright.168 Even earlier, in Great Britain (as the Court noted in the decision of *Baker v Selden*), a court had found in *Page v Wisden* (1869) that blank cricket scoring sheets were similarly ineligible for copyright, despite originating from a press.169 Nevertheless, even in view of such precedents, the Court struggled to articulate a legal basis for resolving in favour of Baker.

The Court noted that useful arts could typically “only be represented in concrete forms of wood, metal, stone, or some other physical embodiment,”170 and as Pamela Samuelson explains:

> The Court could not explain why an author could not get copyright protection for a bookkeeping system by applying the then-conventional framework for analyzing copyright claims. Such an inquiry typically proceeded by asking: Was the plaintiff’s work a “book” or otherwise statutory subject matter qualifying for copyright protection? Was the work original? Had the defendant copied a substantial or material part of the plaintiff’s work?”171

The law’s prior practice of deciding IP eligibility on appeal to objects’ physical qualities had ostensibly trapped the Court into the dichotomy of protecting ‘wood, metal, and stone’ in one way, while protecting ‘books’ in another – to the exclusion of any other factors (e.g. a book’s content). The Court resolved to abate this dichotomy by, in effect, declaring Selden’s bookkeeping system to be an atypical instance of useful art that was embodied in *writing* rather than wood, metal, or stone; but which was subject to the same principles nonetheless.172

168 *Perris v Hexamer*, 99 US 674 (1879).
171 Samuelson, above n 167, pp. 175–176.
172 Ibid, 179.
This attempt to move away from relying on the physical qualities of an object in determining copyright eligibility was a positive development in the history of IP jurisprudence. However, the Justices’ attempts to renounce the historically entrenched physical basis of copyright eligibility did not deliver a positive account of what constitutes a ‘useful art,’ or of what (by comparison) ought to be eligible for copyright protection. Neither did the Court’s decision approach an explanation of why, or in what ways, copyright and patent protections should differ. While the question of what protections copyright ought to entail (and why) was not touched upon in Baker v Selden, the Justices did attempt to make some headway on the matter of what constituted a ‘useful art.’ A key distinction was constructed by the Court, in the form of the Idea-Expression divide.

### 6.3.1 The Idea-Expression Divide

The most well-known distinction to come out of Baker v Selden was the distinction between what were, nominally, called ‘Ideas’ and ‘Expressions.’ This distinction needs to be unpacked in two stages, since it ostensibly establishes a false dichotomy. That is, the distinction appears to suggest that expressions are not themselves ideational by nature. The first stage of unpacking the distinction is therefore to determine what the Justices intended by the respective terms ‘Idea’ and ‘Expression.’ The second stage then involves explaining that those concepts – being specific legal artefacts – are different from the concepts typically intended when ‘idea’ and ‘expression’ are used in an everyday sense. I maintain this distinction by reserving the use of the capitalised forms of the words to specify the legal artefacts.

The Justices introduced the notion of the Idea-Expression divide because they saw a need to distinguish between the object that was Selden’s book and the object that was Selden’s bookkeeping system. The difference, the Court attested, was that Selden’s book contained a *description* of his bookkeeping system, without containing the system itself. The Court demonstrated how upholding this distinction was important to the functioning of IP law by describing three other hypothetical cases. The Justices posited that:

1) A book written on the topic of medicines could not, regardless of its venerable qualities as a text, establish for its author a proprietary right in any of the medicines described therein. Even if the author had invented the medicine described, a patent would be required to protect it.

2) A book containing illustrations intended to demonstrate the artistic effect of perspective could not, despite the illustrations being copyrightable, be used as
the basis for claiming a proprietary right to monopolise the artistic use of perspective.

3) A mathematician, having published writings containing original formulae, could not invoke their copyright in such writings to prevent an engineer from using the formulae to design and construct structures.\textsuperscript{173}

Importantly, the Justices held that this principle preceded the appeal to objects’ physical qualities in determining their copyrightable status. Hence, even if an Idea was embodied in the medium of print (as Selden’s was), rather than a medium like wood; metal; or stone, it would not be eligible for copyright protection. Instead, only the written description (the ‘Expression’) of the Idea would be copyrightable. Moreover, the Court also held that copyright could never protect an Idea, even if the Idea was contained in, or could not otherwise be separated from, an Expression.

The Justices regarded Selden’s bookkeeping system to be an Idea inseparable from the Expression that was contained within Selden’s book. That is, the Justices recognised that Selden’s system could not be used “without employing the methods and diagrams used to illustrate the book,” and so regarded the Expression in Selden’s book to be a “necessary incident”\textsuperscript{174} of the Idea itself. As such, because Selden’s Expression constituted a necessary part of his Idea, the Justices determined that protecting his Expression would amount to protecting his Idea. Therefore, it was resolved that neither Selden’s Expression nor his Idea could be the subject of copyright.\textsuperscript{175}

\textbf{6.3.2 ‘Expressions’ and ‘Ideas’ as Strictly Legal Artefacts}

A clarification is needed, regarding the terms ‘Idea’ and ‘Expression.’ Taken by itself, the notion (as expressed in \textit{Baker v Selden}, and later codified into the United States \textit{Copyright Act}) that copyright must never protect Ideas seems to stand in plain contradiction to my previous claim (made as early as Chapter 2, and repeated here) that copyright always protects ideas. This apparent tension, however, is an illusion: It arises due to a conceptual error made in the way the Idea-Expression divide has been characterised. Regardless of how functionally useful the Idea-Expression divide may (or may not) be, it is ill-named insofar as it obscures the fact that expressions are ideas. When a person devises an effective way to describe an object, they have thereby arrived at an idea about how to describe that object.

\textsuperscript{173} Ibid., 178.
\textsuperscript{174} \textit{Baker v Selden}, 101 US 99 (1879), 103.
\textsuperscript{175} Samuelson, above n 167, p. 189.
Expressions, which the Court considered copyrightable, can therefore best be characterised as ‘ideas about how to describe (or express) Ideas.’ That is, copyright protects ideational content in the form of expressions of ‘Ideas,’ but it does not thereby protect the ‘Ideas’ that have been described. However, insofar as copyright protects expressions; and insofar as expressions represent ideas (about how to describe or express Ideas), this still means that copyright is protecting a certain kind of idea.

The legal claim regarding what copyright protects therefore cannot be interpreted to mean that copyright never protects ideas; only that copyright never protects certain kinds of ideas. Specifically, the kind of ideas copyright never protects (i.e. Ideas) are those which are either correctly protected under the scope of an appropriate patent system; or which should not be eligible for protection under any IP system at all. This account clearly begs the question, however, insofar as it functions on a presupposition about which objects ought to be protected under a patent regime rather than a copyright regime. Thus, although the Justices wisely noted that the distinction between copyrightable objects and patentable objects could not be determined based on the objects’ physical qualities, they failed to recognise that the Idea-Expression distinction is insufficient in sustaining an alternative, justifiable basis for determining copyright or patent eligibility.

6.4 The Lack of a Positive Account

Although the motivation for introducing the Idea-Expression divide was to rectify the law’s historical preoccupation with determining copyright eligibility based on the physical qualities of copyrightable objects, the distinction does not present an adequate alternative, because it relies upon a circular presupposition about what ought to be copyrightable and what ought to be uncopyrightable. The principle of an Idea-Expression divide is also inadequate for an additional reason. As demonstrated in Section 6.3.2, the notion that copyright should only protect Expressions cannot be interpreted as meaning that copyright should never protect ideas (since Expressions are ideas, although not Ideas). However, a certain facet of the Idea-Expression inadequacy raises the additional possibility that copyright should (and in practice at least, does) also protect Ideas too. Explaining this requires the consideration of a clarification that the United States Supreme Court felt compelled to issue, specifying in what instances an Idea and an Expression are to be considered indissociable.
6.4.1 The Technical-Ornamental distinction

The Justices presiding over *Baker v Selden* considered it necessary to make one final discernment between what they called ‘technical’ and ‘ornamental’ objects. This was because, although the purpose of the Idea-Expression principle was to prevent the copyright of an Expression from functionally securing a patent-like monopoly over an Idea, the Justices considered that there was a class of objects (ornamental objects) to which that principle was inapplicable. The Justices went to pains to explain that the Idea-Expression divide could not be appropriately applied to “ornamental designs or pictorial illustrations addressed to the taste.”

The Court intended to compare such objects against scientific and ‘technical’ objects which find their end in “application and use.”

In effect, the Court had determined that ornamental Expressions ought to be regarded as eligible for copyright even if that entailed a functional monopoly over the Idea being expressed. In explaining why this distinction was appropriate, the Justices only offered the observation that “it may be said [of ornamental designs] that their form is their essence and their object is the production of pleasure in their contemplation,” where their form is presumably to be taken to be their physical realisation. In view of this description, two potential bases for the stipulation against applying the Idea-Expression principle to ornamental objects could have been intended. Either the principle was not intended to apply to ornamental object because of:

1) The difference between the intended functions of ornamental objects compared to the intended functions of technical objects; or

2) The difference between the way in which the form and essence of ornamental objects intersect, as compared to the way in which the form and essence of technical objects intersect (i.e., because the form and essence of technical objects diverge; but the form and essence of ornamental objects converge).

The Justices presented no compelling case to demonstrate the adequacy of either of these interpretations. The case for applying the Idea-Expression divide to technical objects, but not to ornamental objects, is therefore insufficiently justified.

Regarding the first possible interpretation, the Justices may have intended to convey that objects which are ‘addressed to the taste’ in order to produce ‘pleasure in their contemplation’ are fundamentally different compared to utilitarian objects that are intended for ‘application and use.’ A distinction along these lines would appear to track, at least to

177 Ibid, 104.
178 Ibid, 103–4.
some extent, the distinction between romantic and non-romantic authorship outlined in Section 6.2. For instance, fictional novels and poetry (works of romantic authorship) might be considered ornamental, whereas other works of authorship such as textbooks and reference books might be categorised as technical objects. In this case, however, a much more fundamental redefinition of copyright eligibility is required, which would prevent the copyrighting of often-copyrighted technical works like textbooks. A fuller account of what constitutes ‘romantic authorship’ would therefore be required to systematically determine copyright eligibility, on this interpretation.

If, instead, the second interpretation is affirmed, then the relevant point of difference between ornamental and technical objects is that the essence of an ornamental object is defined by its physical form; whereas the essence of a technical object is distinct from its physical form. Moreover, it is this difference that the Justices must have identified as the appropriate basis for exempting ornamental objects from the restriction against copyrighting Ideas. However, the Justices’ conflation of essence and form in the case of ornamental objects is erroneous: The form and essence of ornamental objects can be as distinct as the form and essence of technical objects. This can be demonstrated by comparing the nature of Selden’s forms and the nature of the fictional book series *Harry Potter*.

Samuelson provides an effective summary of one the core principles exemplified through *Baker v Selden*, which can be used to demonstrate (by example) the falsity of the claim that the essence of an ornamental object can be reduced to its form. Samuelson suggests that the central principle the Court sought to espouse was that “copyright law should allow second comers such as Baker to build upon a first author’s work,”179 and that “authors of functional writings should not have too much control over subsequent adaptations of their work.”180 Samuelson explains that:

Selden’s forms may have been a substantial improvement over the old-fashioned bookkeeping system previously used in Ohio, but they presented only one stage in the evolving art of bookkeeping. Selden’s death meant that any further innovation in this field would have to come from others. Baker advanced the state of the art when he realized that county officials wanted to keep closer track of accounts than Selden’s forms permitted…. Had [Selden’s case] prevailed, further improvements to the “art” of bookkeeping might well have been thwarted until Selden’s copyright expired. This outcome would have disserved both patent and copyright

180 Ibid.
goals because it would have slowed the progress in the useful art of bookkeeping and would even have impeded fellow bookkeepers from explaining better than Selden had how to use his eponymous system. 181

This account of the situation seems correct. As such, insofar as an application of the historically entrenched system would have netted the result of affirming Selden’s case, that system must have been inappropriate. However, while Samuelson’s account accurately reflects the Court’s reasoning, her account is incomplete – although this also accurately reflects the state of the Court’s reasoning. This can be seen by appropriating the framework of Samuelson’s explanation to a different copyright example, involving an ornamental object.

Samuelson’s example assesses Selden’s technical object, but the application of the same method to ornamental objects arguably yields a different result. To illustrate this, I shall consider a counter-factual example that supposes a challenge against J.K. Rowling’s claim of copyright over Harry Potter, and present the resulting assessment as an application of Samuelson’s original argument:

J.K. Rowling’s novels may have been a substantial contribution to fantasy literature, but they represented only one stage in the development of the Harry Potter universe. Rowling’s death would mean that any further innovation in the field would have to come from others. Warner Brothers advanced Harry Potter worldbuilding when the company realised that audiences wanted a cinematic experience of the fictional universe. If Rowling’s copyright prevailed, further improvements to Harry Potter might well have been thwarted for many years. This outcome would have done a disservice to the goals of copyright because it would have slowed progress in the process of Harry Potter worldbuilding, and would even have impeded fellow authors from telling Harry Potter stories better than Rowling had previously been able to tell them.

The extent to which the law might endorse this hypothetical claim is unclear. This issue is notoriously grey in the case of fan-fiction, in which communities of an author’s audience come together to contribute their own worldbuilding efforts. In this case, private individuals publish sequels; re-edits; alternative versions of an original author’s story; or additional stories set in the same fictional universe. It is not necessarily clear that this legal, but the activity is typically permitted – or even encouraged – at least insofar as it promotes

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181 Ibid.
and solidifies fan bases (and is not conducted for profit).^{182}

However, when the fan-fiction writers in the previous scenario are replaced by a corporate entity like Warner Brothers, the legal situation becomes much more determinate. Although Warner Brothers produced the *Harry Potter* films after purchasing the relevant film rights from Rowling, a counterfactual situation can be imagined in which Warner Brothers had produced the films without Rowling’s express prior consent. In such a case, one can reasonably expect that a lawsuit would have been filed against Warner Brothers – and that the suit would have been upheld.

The upholding of such a lawsuit at least initially seems consistent with the position endorsed by the Supreme Court in *Baker v Selden*. As the author of an ornamental copyrightable object, Rowling (or the transferee of her copyright) should have the right to preclude unauthorised copies or derivatives. The Idea-Expression divide does not apply to such objects, and as such it would provide Warner Brothers with no grounds for an exemption. As already noted, the Supreme Court advanced no positive account as to why the Idea-Expression divide should not apply to ornamental objects, except to say of ornamental objects that their form is their essence. There is a considerable challenge, however, in reconciling that notion with an endorsement of the upholding of Rowling’s hypothetical lawsuit against Warner Brothers.

The challenge is this: If the essence of an ornamental object is reducible to its form, then in what sense is Rowling’s *Harry Potter* ‘copied’ when it is adapted into a film? If we take seriously the notion that the form of Rowling’s *Harry Potter* is its essence, then it logically follows that the Warner Brothers’ filmic object *Harry Potter* – being expressed in a different medium, and thus having a different *form* to Rowling’s books – is an *essentially* different object.

This also reveals a fundamental inconsistency between the way the law is written, and the way in which the law is implemented, when it comes to the Idea-Expression principle. The law *states* that only Expressions are to be protected by copyright (not Ideas), yet Rowling’s protections appear to extend not only to the way in which she expressed her Ideas, but also to precluding Warner Brothers from generating their own Expressions of her Ideas. This presents a dilemma: either the wording of the law, or the implementation of the law, must

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be abandoned.

6.4.2 A Consistent Physicalist Formulation of Copyright

One stable solution to this dilemma involves simply affirming the Idea-Expression division but rejecting the exemption for ornamental objects. This would involve accepting that there should be no difference between the treatment of Selden’s and Rowling’s objects. In this case, the Idea-Expression divide should be applied in both instances, and any film adaptation of a book should never be regarded as constituting a copyright offence. This line of reasoning would invoke the fact that copyright can never protect an Idea (e.g. the story of *Harry Potter*), and that Rowling’s Expression of her Idea is not copied in Warner Brothers’ Expression of her Idea, since those Expressions do not take the same form.

This physicalist approach, by which copyright eligibility is determined exclusively on appeal to the physical form in which an Idea is expressed, has several advantages. First, quantifying the similarity or dissimilarity of physical objects is simpler than developing a measure by which to adjudicate on the similarity or dissimilarity of two objects’ non-physical ‘essences.’ This makes determining whether one object is a *copy* of another object (as opposed, for example, to having been ‘inspired by’ another object) a much simpler empirical task, since only physical artefacts need to be compared. Second, adopting the physicalist approach could be expected to increase the number of creative objects to which a society has access. By removing restrictions against derivative works, potential authors (from fan-fiction writers to professional content creators) would have access to a much greater breadth of resources (which would be common objects, on the Lockean account) to employ and make useful in the production of additional valuable objects.

Albeit a matter to be determined empirically, it is also unlikely that the deregulation of derivative works like cross-media adaptations would represent a significant disincentive to original authorship. Given the small proportion of commercially valuable novels that are adapted into film, for example, it seems untenable that denying that prospect to novelists would dissuade them from continuing to publish novels. If some authors were dissuaded from producing original works because they anticipated the publication of unauthorised derivative works, they would likely number few enough that the effect that the disincentive would have on the number of new productions would be more than offset by the motivating effect of increasing the breadth of source material from which authors could legally draw.

Accepting the physicalist account would present other challenges, however. For instance,
a preclusion against copying objects, in the strictest sense, would be too narrow to be practically useful. On the narrowest view, for example, a single trivial change to the text of a book would result in something that constitutes a new object instead of a copy. Altering a character’s name, or deleting a single sentence, cannot reasonably be considered to produce an original (non-infringing) object, if copyright’s function as a solution to free-rider problems is to be effective. Moreover, changing which font a book is printed in, or binding it with a different material, should clearly not impact the determination of whether one instance of a book constitutes a copy of another. On the other hand, any attempt to retreat from this narrow view, to a looser conception of ‘duplication,’ requires an account of why certain physical similarities matter (e.g. which words are printed), while other similarities do not (e.g. the typeface). Such an account would most naturally appeal to some notion as to the way in which that certain aspects carry the ‘meaning’ of certain objects – but that involves a deferral to a non-physical component.

Despite it being clearly necessary to preclude trivial variations from exempting an object from claims of copyright infringement, the only principled basis available for that preclusion, on the physicalist account, would therefore be the economic utilitarian justification that underpins copyright generally. That is, a determination of whether a derivative work infringed copyright (where the derivative work could be anything ranging from a cinematic adaptation of a book, to a textual adaptation involving nothing more than changes to characters’ names) could only be made by establishing whether the author of the first work would still have been sufficiently motivated to produce it, even if they had anticipated the derivation being legal. There would be no natural reason, outside of that consideration, to regard these as ‘copies’ instead of derivative works.

As simple as it is to adjudicate the physical similarities and dissimilarities of two physical artefacts, determining which physical similarities potentially constitute copyright infringements, without further reference to the non-physical qualities of those objects, is impossible. For example, two instances the ‘same’ book, where one is an English language version and the other is a Japanese language version, would contain physically distinct textual markings. It is obvious that copyright law ought to regard the replication of things like distinct narratives and literary devices, rather than the replication of things like the text size and paper weight of a book. Nevertheless, any explanation of the relative importance and unimportance of those respective components, that turns merely on demonstrating the respective incentivising or disincentivising effect of their potential replication, is incomplete and unsatisfactory.
6.4.3 Preliminary Qualities of a Non-Physicalist Account

By comparison, if the current implementation of the law is to be defended (such that an unpermitted cross-media adaptation could possibly be upheld as a copyright offence), then two implications follow. First, it means that copyright protects not only ornamental ideas (i.e. ornamental Expressions), but also ornamental Ideas. Rowling’s copyright does not only secure an exclusive right for her in her Expression, but it secures for her an exclusive right in any Expression of her Idea. Second, insofar as ornamental and technical objects are to be treated differently, the reason for this must be attributable to some non-physical inequivalence between the two. Since ornamental and technical objects can share the same physical medium of Expression, something else must distinguish them.

Because it expands the scope of their rights, by protecting Ideas as well as Expressions, the formulation of such a non-physicalist account is ostensibly to be preferred by copyright holders. That option, however, requires dispensing with (or vastly reformulating) the Idea-Expression principle, and replacing it with an account capable of providing the normative impetus for distinguishing between copyrightable and patentable objects, without appeal to their physical forms. This task is pursued in Chapters 7 and 8.

6.5 Conclusion

Accidental factors relating to the historical origins of copyright – stemming first from a Monarch’s self-interest – have embedded into the development of copyright law a harmful preoccupation with determining copyright eligibility based on objects’ physical qualities. This historical preoccupation was challenged in the case of Baker v Selden, in which the United States Supreme Court acknowledged the inadequacy of the prevailing legal basis for determining copyright eligibility. The Justices of the Court sought to repair (by superseding) the historically affirmed basis for determining copyright eligibility by introducing the Idea-Expression divide.

Unfortunately, the Idea-Expression principle was not adequate in addressing the prevailing problems. At worst, the Idea-Expression divide collapses back into a physical, medium-based apparatus that fails to escape the physicalist preoccupation. At best, the distinction genuinely tracks an important quality that should inform copyright eligibility – the notion of ‘romantic’ authorship – but it fails to establish an adequate positive account of how that quality can be assessed.
The inappropriateness of the historical appeal to the physical qualities of objects, in determining copyright eligibility, is well demonstrated in *Baker v Selden*. However, if this historically entrenched basis is to be overcome, two questions require answers:

1) If there is, in a literal sense, an *essential* non-physical difference between ‘romantically’ authored objects and non-romantically authored objects (or between technical and ornamental objects), then what constitutes the essence of each?

2) Why does the comparative difference between the essences of those respective classes of objects require that they be eligible for different forms of IP protection (i.e. copyright or patent protection)?

Chapter 7 establishes a principled non-physicalist account of the difference between correctly copyrightable and correctly patentable objects, which can feasibly replace the Idea-Expression divide and the technical-ornamental distinction. Chapter 8 then describes how that account can be articulated as a moral rights account, with the advantage that this also appropriately situates moral rights legislation in relation to economic IP legislation. It is demonstrated that adopting a consistent non-physicalist account, however, logically entails a significant reformulation of copyright law.
Chapter 7
A Non-Physical Basis for the Copyright-Patent Divide

7.1 Introduction

The previous chapter established the inadequacy of determining copyright eligibility by appeal to the physical qualities of an object. Indeed, it was shown that, in the case of Baker v Selden (1879), the United States Supreme Court introduced the Idea-Expression divide in an attempt to repair the historically entrenched practice of determining copyright eligibility based on the physical qualities of objects. Although it was ultimately inadequate as a solution to this historical preoccupation with physical qualities, the Idea-Expression divide was well motivated. The proposed division was an attempt to distinguish between the ideational objects which should be the subject of copyright, and the tangible manifestation (or expression) of those ideational objects in physical artefacts. The motivation of the present chapter is the same: its objective is to establish an accurate descriptive account of the essential (and non-physical) quality of objects which ought to be protected under copyright. This is in comparison to objects that should be patentable or otherwise uncopyrightable.

A detractor might argue that no distinction between copyright and patent protection ought to be sustained. Instead, the suggestion may be posited that the two systems should simply be amalgamated into a single unified regime. To be defensible, this would require that any perceived differences between copyrightable and patentable objects must be illusory, or otherwise not substantial enough to warrant different treatment. Instead, I contend that the historically entrenched physical-centric system does track, albeit with limited accuracy, an important intuitive distinction between copyrightable and uncopyrightable objects. Therefore, the positive account of the difference developed here, while intended to replace the physically-preoccupied historical approach, aims to preserve but refine the central intuitive difference between copyrightable and patentable objects. Nevertheless, the account developed is compatible with a version of statutory IP law that involves a significant convergence between copyright and patent protections.

In Section 7.2 I consider the respective relationships that exist between different labour processes and the products that those processes deliver. The motivation for this investigation is the potential thought that the need to locate a non-physical difference
between copyrightable and patentable objects could be avoided by instead locating a
difference between the respective labour processes that produce them. That is, instead of
artistic objects being somehow different to inventive objects, perhaps the process of artistic
creation could be shown to be different to the process of invention in some relevant way.
It is demonstrated, however, that formulating the copyright-patent divide based on a difference
between artistic and inventive products; and formulating the divide based on a difference
between artistic and inventive processes, is functionally equivalent. Despite this, it is also
shown that articulating the difference in terms of differences between the objects produced,
rather than the labour processes that produced them, is to be preferred for pragmatic
reasons.

Given the conclusion of Section 7.2, any essential difference which determines what ought
to be copyrightable and what ought to be patentable must be able to be articulated as a
difference between the objects themselves. Three relevant, intuitive points of difference
between copyrightable and patentable objects are therefore identified in Section 7.3:

1) Copyrightable objects are communicative, whereas patentable objects are useful;
2) Copyrightable objects have a special uniqueness, whereas patentable objects can
   be independently derived by inventors pursuing different means; and
3) We treat copyrightable objects as being non-modifiable, whereas we regard
   patentable objects as being modifiable.

To demonstrate the way these points of distinction currently inform determinations of
copyrightability and patentability, example cases are given in which they are correctly
applied. In addition, however, several examples of well-known problem cases in IP
literature are also examined. These are cases wherein the intuitive principles which have
historically informed the copyright-patent distinction become unclear and contradictory. It
is shown that these cases prove problematic because they involve an insensitivity to these
distinctions.

Although a justifiable account of the copyright-patent divide should largely preserve the
intuitive distinctions described in Section 7.3, a clear and precise articulation of the
principles underlying that distinction allow for its refinement. In this way, the prevailing
basis by which copyright and patent eligibility is determined can be shown to be
inappropriate. This serves to resolve counterintuitive cases in which – guided by the
historically entrenched preoccupation with objects’ physical qualities – intuitively
uncopyrightable objects have been deemed copyrightable. Moreover, it is also shown that
this is not only the case in instances of well-known problem examples; it is also true in
relation to objects that rarely have their copyrightable status challenged.
Section 7.4 provides an initial positive account intended to repair the prevailing errors identified in the determination of copyright eligibility. This account proceeds by expanding on the first intuitive point of difference (identified in Section 7.3) between copyrightable and patentable objects. Whereas the account in 7.3 merely identifies that copyrightable objects are typically communicative, while patentable objects tend to be ‘useful’ in a more directly utilitarian sense, Section 7.4 identifies a more specific aspect of certain communicative objects (beyond the simple fact of their communicativeness), which ought to define copyright eligibility.

The quality common to all correctly copyrightable objects is that they are second-personally communicative. An object is second-personally communicative if it can only be accurately interpreted, and made use of, when it is understood as being the product of a specific author. This is true even if the identity of the specific author is indeterminable. Implementing second-personal communicativeness as a prerequisite for copyright eligibility would greatly constrain the scope of copyright, since it would preclude many currently copyrightable objects (which are third-personally communicative) from continuing to be considered copyrightable.

In this way, the present account indexes copyrightability much more closely to the intuitive notion of ‘romantic’ authorship that was introduced in Section 6.2, while clearly articulating a principled basis to explain the intuitive uniqueness (and importance) of that kind of authorship. This enables the resolution of famously difficult copyright categorisation problems, such as whether software and computer code should be regarded as copyrightable or patentable. Moreover, it enables the resolution of these cases based on appeal to a general principle. This represents a marked improvement on the serial pursuit of individual, industry-specific solutions that may be determined on disparate and inconsistent principles. Several example cases are examined at the end of the chapter to demonstrate this potential for universalisation.

7.2 The Equivalence of Labour Accounts and Object Accounts

As described in Chapter 6, the case of Baker v Selden progressed through three critical stages. First, the United States Supreme Court acknowledged the inadequacy of the prevailing practice of categorising objects as copyrightable or uncopyrightable based on their physical qualities. Second, the Court responded to that inadequacy by attempting to draw an Idea-Expression divide, which would allow for the conceptual separation of the
physical component of an object from the *essential* non-physical component of that object. The intended consequence of this separation was to enable the essential, non-physical component of objects to serve as the basis in determining copyright eligibility. Third, the Court undercut the success of the Idea-Expression divide by stipulating that the distinction could not be applied to ‘ornamental’ objects. The Court held, instead, that the physical form of an ornamental object ought to be regarded *as* its essence. It might be supposed that the Court intended, for instance, that the form of a sculpture is the defining quality of that sculpture. Unfortunately, this reintroduced a problematic conflation between the physical and non-physical components of ornamental objects.

It might be thought that one way to avoid this problem would be to identify a unique difference in the labour processes which produce copyrightable objects, rather than identifying a unique quality of copyrightable objects themselves. These respective approaches are reflected in the two primary formulations that have already been considered. The object-formulation of the copyright-patent distinction is represented in the distinction between ‘ornamental’ and ‘useful’ objects introduced by the United States Supreme Court in *Baker v Selden*. By comparison, the notion of romantic authorship introduced in Section 6.2 alludes to a formulation based on the nature of the labour undertaken in producing copyrightable objects.

An appeal to the different natures of various labour processes might seem especially promising because it seems to be in keeping with the labour centrism of a Lockean property account. This fit seems even more natural considering the demonstration, in Section 4.2, that labour is never a solely physical process. Given that labour always contains an intellectual, non-physical component, an identifiable variation in that component could potentially serve as a basis for distinguishing between *kinds* of labour which do or do not produce copyrightable objects. For instance, it could be considered that only labour which involves an intellectual component that is ‘romantic’ (whatever that intends) should establish copyright privileges.

A formulation of the uniqueness of copyright that is based on a distinct quality of certain labour processes would be correct and well founded, but not sufficiently functional. This is largely because of the inherent difficulty involved in articulating the nature of that distinct quality. In comparing the labour processes of a poet and an inventor, for example, it is difficult to say much more than that the poet engages in a poetic process; and the inventor engages in an inventive process. Perhaps an inventor engages in a methodical process of trial and error, while attempting to get an invention to work in fulfilling some
need. But so too, we can imagine, a poet has their own process of trialling and revising as they edit and rewrite until they refine something which ‘works’ poetically. Moreover, the most obvious measure by which to adjudicate whether a labour process was (for example) poetic or inventive is to assess whether the intended product of the process is a poem or an invention.

This is equally true of broader categorisations, which identify a commonality between different varieties of labour. For instance, both a poetic labour process and a sculptural labour process might be described as ‘creative’ or ‘artistic.’ Once again, however, this functionally amounts to an observation regarding the nature of the objects produced: both poems and sculptures are creative, artistic works. This pattern even applies to the colloquial sense in which the terms ‘physical labour’ and ‘intellectual labour’ are used. ‘Physical labour’ produces physical objects (or otherwise physically alters something), and ‘intellectual labour’ produces intangible, ideational objects (albeit necessarily expressed in a physical medium).

This trend generalises in such a way that labour based formulation of the difference between copyrightable and uncopyrightable objects could be presented in a logically equivalent object formulation of that difference – and *vice versa*. Suggesting, for example, that people who engage in artistic labour processes should be rewarded with copyright protections amounts to saying that copyright should attach to artistic objects. Similarly, the suggestion that creative objects should be eligible for copyright can be restated as the claim that creative labourers ought to receive copyright in return for the kind of labour that they perform. Some qualification would be required in that case, however, since copyright attaches to successful projects. Although successful projects (which deliver objects) are always the result of labour efforts, labour efforts do not always result in successful projects.

Although this means that either a labour account or an object account of the copyright-patent divide could be formulated, neither can succeed by drawing the distinction on the basis of physical qualities. In addition, despite both formulations being logically equivalent, there is a natural reason to initially prefer the object formulation rather than the labour formulation: property rights attach to objects, not to labour processes. This represents a purely pragmatic concern, in that implementing a copyright regime (or a patent regime) is much more practicable if it eligibility is assessed based on a consideration of the features of the object to be protected, rather than on the nature of the labour which produced it.
Because copyright (and patent protection) attaches to objects, the objects to which they attach are necessarily observable (and therefore examinable) in a way that the labour processes which produced them are not. Patents represent the clearest example of this: A patent application necessarily requires the submission of an accurate description of the object over which patent protection is sought, which can be tested against the protected object and against any objects which are alleged to infringe the patent. By comparison, not only does the labour process which produced the object not need to be detailed, but the accuracy of those details would be impossible to police even if their submission was required.

Some specific cases may present exceptions to the preferability of an object-based formulation of the difference between copyrightable and uncopyrightable objects. For example, the United States Copyright Office, in a section of the Compendium of U.S. Copyright Office Practices titled ‘Works That Lack Human Authorship,’ states that the Office “will not register works produced by a machine or mere mechanical process that operates randomly or automatically without creative input or intervention from a human author.”183 This might include, for example, experimental poetry which is produced through the mechanical arrangement of random words. Similarly, the United States Copyright Office cites as an example the case of “a mechanical weaving process that randomly produces irregular shapes in the fabric without any discernible pattern.”184

These cases ostensibly involve objects that would have been be copyrightable, if they were produced by other means (i.e. guided by the correct propositional attitudes). On this view, determining the copyrightability of a given arrangement of words (or a weave in a fabric) would rely on an assessment of the labour process through which it was produced. Even in these cases, however, the difference can be formulated in terms of the nature of the objects rather than the nature of the labour processes. That is, a random arrangement of words is not a creative arrangement of words, even if the process of randomisation, or the idea to use randomisation, is creative. Furthermore, a random arrangement of words represents an object which is distinct from any creative arrangement of words – even where it shares a physically identical arrangement of words. One has the quality of being an embodiment (or expression) for an ideational object, and the other does not have that quality.

For this reason, the notion that an uncopyrightable object would otherwise have been copyrightable, if only it were produced via different means, is effectively the mere claim

184 Ibid.
that an uncopyrightable object would have been copyrightable if it were a different (ideational) object. The unimportance of the physical identicality of the objects should not be surprising, given the demonstrated requirement for a non-physical basis by which to determine copyrightability. Pragmatically, these cases may benefit from being considered through the lens of a labour formulation of copyrightability – but that formulation remains replicable as a logically equivalent object-based formulation.

Given the equivalency that has been established, the account developed in Section 7.3 could be formulated in terms of the nature objects or in terms of the nature of labour processes. Because an object formulation is simpler to articulate, and can be more pragmatically tested, I provide an account of which non-physical qualities of certain objects render them correctly copyrightable. This can be adapted to a labour-based formulation if such an adaptation is advantageous in the application of the account to specific cases.

### 7.3 Intuitive (Non-Physical) Bases for the Copyright-Patent Divide

In addition to identifying a non-physical basis for copyrightability, an account of the copyright-patent divide should largely continue to reflect several intuitive differences that exist between currently copyrightable and currently uncopyrightable objects. This is not to say that the account, when applied, ought to preserve existing categorisations of copyrightability and patentability. Rather, a new account should be able to offer an articulation of what it is that our prevailing intuitions correctly track, and (subsequently) where those intuitions have been misapplied. This shall amount to a demonstration of how a correct and nuanced application of existing intuitions necessarily entails certain recategorizations when it comes to what is copyrightable and uncopyrightable. Since the prevailing intuitions informing the existing copyright-patent divide are typically left implicit, however, the articulation of this new account requires their explication. Three intuitive bases for the categorisation of objects as copyrightable or patentable can be identified.

#### 7.3.1 Communicative vs Useful objects

The first intuitive distinction between copyrightable and patentable objects is that copyrightable objects are communicative in nature, whereas patentable objects are useful or utilitarian devices; techniques; or processes. This is perhaps the most immediately apparent distinction of the three presented here. It is reflected, for instance, in the United States Supreme Court’s characterisation of copyrightable objects (to which the Idea-
Expression divide supposedly ought not to apply) as ‘ornamental’ and patentable objects (to which the Idea-Expression divide ought to apply) as ‘technical.’\(^{185}\) The Court regarded that ornamental (copyrightable) objects found their purpose in ‘contemplation,’ whereas technical (patentable) objects found their purpose in implementation.\(^{186}\)

Existing categorisations which accord with this basis are common. Books; poems; plays; music; and photographs – broadly, any *artistic* objects – convey an author’s ideas and communicate their thoughts. These objects either inform an audience (e.g. research papers and textbooks) or provoke the kind of contemplation that can engender new knowledge and understanding (e.g. George Orwell’s *1984* or Christopher Nolan’s *Memento*). These are typically considered copyrightable by modern standards of copyright eligibility. By comparison, the lightbulb; the telephone; and toaster ovens are all socially valuable insofar as they have straightforwardly instrumental uses as practical tools. Under existing IP law, these are all to be regarded as patentable.

Not all cases are clear, however. Well known problem-cases which exist in relation to copyright – such as the case of categorising software as either copyrightable or uncopyrightable – arise because of a contradiction in our perceptions regarding software’s communicativeness and usefulness. Software is constructed of computational code, which in turn consists of a series of instructions or commands that are to be executed by a machine. These computational instructions and commands (which contain informational content) represent a form of communication, which would ostensibly render software copyrightable.

On the other hand, however, the way in which software is typically *implemented* by end users is as a tool. As such, the communicative component of the object is usually invisible to the user, and certainly does not constitute the *purpose* of the object. This makes software seem much more akin to lightbulbs; telephones; or toaster ovens (all of which, it might be noted, come in modern versions that implement software into their functionality). This tension makes it unclear, on appeal this intuitive basis, whether software ought to be copyrightable or patentable. The *Baker v Selden* case was also a case that centred upon this tension between an object’s communicativeness and usefulness.

### 7.3.2 Uniqueness vs Multiple Realizability

The second intuitive basis for the copyright-patent divide is most commonly reflected in the everyday distinction between ‘artistic’ and ‘inventive’ creation. This involves an

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\(^{185}\) *Baker v Selden*, 101 US 99 (1879), 103.

\(^{186}\) Ibid.
important difference between the feasibility of multiple people independently developing the same artistic or the same inventive objects. This distinction is sensitive (albeit implicitly) to the natural constraints to which an object is known to be subject, even before it exists.

To understand these natural constraints, it is valuable to consider a distinction between the different ways in which we use terms that describe the intellectual content of productions, such as ‘thoughts’ and ‘ideas.’ Sometimes we discuss an item of intellectual content as being a particular characteristic of one person’s mind, whereas at other times we describe an item of intellectual content as though it is something common and accessible to multiple people. Hugh Breakey points out, for instance, that one person may have the idea that the sun is shining, and yet another person could ordinarily be said to have the same idea:

On the one hand, ideas are something very personal, embodied within particular minds. If I have the idea, ‘the sun is shining’, that is my idea insofar as it is a property, in some sense, of my mind. On the other hand, it is quite meaningful to say that you have just the same idea as I do, as might occur if you too believe that ‘the sun is shining.’

I take Breakey’s particularly-embodied ideas to be possessed ideas, held as specific instances of potential ideas ‘qua abstract propositions.’ Although many ideas qua abstract propositions are accessible to others in the way Breakey identifies, it is also true that certain other ideas are not.

To see how this understanding influences intuitive conceptions of what is copyrightable and what is not, consider a novel such as Tolstoy’s War and Peace. This is a book that seems intrinsically linked to its author, such that it is practically impossible to imagine that anyone except Tolstoy could have written it. This kind of object can be contrasted with objects that, while they may be attributable to a particular individual creator, could feasibly have been created by somebody else. An example of this second class is a telephone.

It is quite reasonable to assume that in a counterfactual world in which Alexander Graham Bell had never existed, a machine functionally equivalent to Bell’s telephone would predictably have been produced, at some time, by somebody else. By contrast, it is virtually impossible to imagine that, had Tolstoy died in infancy, a text identical to War and Peace

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188 Ibid, p. 331.
would ever have been written by someone else. Tolstoy was not merely ‘the first’ to pen the book, and his premature death would not have merely delayed its publication. Tolstoy was the only person through whom a society could come to enjoy War and Peace, and without him it simply would never have existed.189

Another way of expressing this is to say that, where it perhaps makes intuitive sense to talk of Bell’s experiences leading up to the invention of the telephone as experiences ‘qua abstract possibilities,’ which he was the first to conceive, Tolstoy’s particular experiences were so personal and particular to himself, and so necessarily formative to the object War and Peace, that it is absurd suppose that some other person could have had the thoughts and experiences that led to the writing of that book. Although it is logically possible that someone else could have independently produced a work identical to War and Peace, earnestly suggesting that we could have expected it to be so would be as absurd as sincerely tabling the suggestion of infinite monkeys with typewriters as a counterfactual means of its production.190

These differences inform the ways in which artistic and inventive labour is performed. The development of patentable objects is usually quite tightly constrained, in that our existing knowledge of the physical world greatly informs our understanding of what potential objects are viable. For instance, the inventive pursuit of the telephone was informed and motivated by the then-most-recent developments in physics. Those developments significantly evidenced the possibility for, and tightly constrained the viable scope of, methods by which sound could be relayed across great distances.

As human knowledge of the physical world increases, the future realisation of inventive (and thus patentable) objects becomes less of a speculative possibility and more of a perceived inevitability. The realisation of the telephone came as no surprise at the time; several different parties had been developing and presenting work towards the same end. Such situations frequently occur in today’s commercial environment, as competing firms ‘race’ towards the production (and patenting) of new but anticipated technologies. In this sense, the development of patentable objects is largely predictable; anyone well versed enough in the relevant physics can follow a largely broadly prescribed, predictable path towards an intended invention. Even though the details of the invention might not be known, the inventive idea is nevertheless characterizable as an external abstract proposition that is being sought.

189 McKeahnie, above n 119, pp. 200-201.
190 Ibid.
The same is typically not true of copyrightable objects, even where ostensible similarities exist. Sometimes, the themes of artistic works may be predictable, in that they reflect common reactions to a zeitgeist. This (or otherwise, just chance) can lead to something that resembles a patent race, but which involves the production of copyrightable objects instead. For example, the 1998 films *Deep Impact* and *Armageddon* are an example of what are known as ‘twin films:’ the films were released within two months of each other, and both were science-fiction disaster films depicting desperate, last-minute attempts to prevent catastrophic comet or asteroid strikes on Earth. In cases of twin media, where creators have knowledge of each other’s projects, there may be a rush to get products to market, as each creator attempts to gain a first-mover advantage over their competition.

This kind of race-to-release is similar, in many respects, to a patent race. However, there is a fundamental difference between the two: In patent races, the first producer to bring their product to market (or, to the patent registry) thereby precludes their competitor(s) from bringing a product to market at all. In races involving copyrightable objects, however, all creators retain the right to publish independently developed ‘twin’ objects, irrespective of who published first. The advantage gained by winning a patent race is a statutorily enforced monopoly; in copyright cases, any advantage of being the first to market must result purely from natural market forces.

This is an appropriate reflection of the intuitive difference between creations and inventions. Although remarkably similar, objects like *Deep Impact* and *Armageddon* are not functionally equivalent in the way that convergent inventions are. Because the inventive process is so tightly constrained by the scope of plausible solutions (as determined through our ever-increasing understanding of the world), inventors naturally converge upon a locus of very similar objects that, when implemented, are functionally equivalent. By comparison, multiple creative producers – even when they are producing content within a narrow scope involving the same medium; genre; themes; tone; and overarching narrative – will nevertheless inevitably produce unique objects representing distinct interpretations and treatments of those components. This relates closely with the previously described feature of copyrightable objects (their communicativeness), in that these various objects, despite their close similarities, derive uniqueness from the fact that they communicate the personal thoughts and ideas of their respective creators.

### 7.3.3 Non-Modifiability vs Modifiability

A third intuitive basis for the copyright-patent divide regards the matter of when (that is,
under what circumstances, and by whom) an object can be altered or modified. The crux of this differentiation is that copyright owners who have purchased copyrights (but who were not an author of the protected objects) are not permitted to alter or modify the objects over which the copyrights are held. By comparison, patent owners who have purchased patents (but who did not invent the objects covered by the patents) are permitted to alter or modify the objects protected by those patents. For instance, consider a publishing house which agrees to purchase the copyright to an author’s original novel. Further, imagine that, before sending the manuscript to print, the publishing house determined that the novel could be improved by making changes to the ending; or by adding an epilogue. If the publishing house made such alterations or modifications without the consultation and agreement of the original author, but nevertheless still attributed the modified version to the original author, then this would constitute a legal offence against the author. Of course, removing the attribution would also be an offence as it would involve representing the modified version as an original production, when in fact it was largely a wholesale reproduction of another author’s work.

By comparison, if an individual or corporation purchases the patent rights to a piece of proprietary technology, then that person or corporation is subsequently regarded as having the sole right to use the object described in the patent. In addition, the new patent holder also secures the right to modify the design of the protected object, in whatever way shall make it best serve their ends. If the patent owner determined that an improvement could be made to the original design of the technology; or that a modified version would better meet specific requirements, then there would be no legal prohibition against making those changes. Moreover, the original inventor of the technology would not need to be consulted to approve the implementation of such modifications. The justification of this different treatment once again intersects with the distinction between communicative and useful objects, as well as the difference between uniquely realisable and multiply realisable objects.

The fundamental reason for considering copyrightable objects to be unalterable stems from the fact that they are communications. The offence of a publisher making unauthorised modifications to an author’s novel, prior to printing and distributing it, is most naturally characterised as a deontic offence. This is because the objection against the modification is not rooted in any contention as to whether the object could be improved with modification; nor in whether that specific modification represents an improvement. Even if the modified version of the object was universally regarded as an improvement over the original, and thus in some sense would provide greater social utility, this would be insufficient to absolve
the publisher of the action. Instead, the modification of another person’s communication prior to its publication is a natural offence in view of the act constituting an undue interference against a person’s ability to communicate.

The unmodifiable-modifiable distinction is therefore contingent on a difference between the temporal qualities of the actions which produce copyrightable and patentable objects. In the case of an invention, the act of inventing is temporally fixed: invention occurs (or comes to a culmination) at the specific moment when an object is produced. This is represented, under the patent system, in the fact that patent applications capture the state of an invention at a specific point in time. After this, if a purchaser of the patented invention modifies the invention, this does not affect the inventive act previously performed by the original inventor. By comparison, an author’s act of communication is temporally persistent: the act of communication does not happen at one fixed point in time, but persists so long as the communicative object continues to exist. Thus, the modification of a communicative object constitutes an interference against an author’s act of communication.

An inventor whose every invention was modified before reaching market would still have invented, but an author whose every product was modified before it was published may potentially never have communicated.

The fact that the modification of communicative objects does not merely modify what is communicated, but modifies whether an author has communicated at all, should critically inform non-economic conceptions of copyright. Without requiring any reference to the personal benefits that financial protections provide, for example, an account established on the principles Cwik describes (as discussed in Section 4.2.1) could saliently incorporate speech as a critical productive capacity that deserves protection. Cwik observes, for example, that there is “an important connection between control over one’s labor (as a distinctly human, intentional, rational activity) and the capacity to control one’s life according to one’s goals, values, and identity.”191 Speech, perhaps more than any other form of labour (and indeed, even when it is not performed as labour) exemplifies these distinctly human; intentional; and rational qualities, and fundamentally impacts an individual’s ability to exercise control in the manner Cwik describes. In addition, the right to communicate can very naturally be understood as a right that authors must have reserved for them, without being an exclusion against the speech acts of others.


7.4 Second Personal Communicativeness

The three points of distinction presented in Section 7.3 do broadly track a genuine justificatory basis for establishing separate copyright and patent regimes. However, without significant refinement, these distinctions are not nuanced enough to deliver a consistent account of the distinction between correctly copyrightable and correctly patentable (or otherwise uncopyrightable) objects. While a successful account of the difference between copyrightable and patentable objects should be expected to largely preserve this series of distinctions, such an account must also contend with the fact that the distinctions do not represent true dichotomies. For instance, it is possible for communicative objects to be useful or utilitarian. Such useful or utilitarian communicative objects will, in addition, frequently be able to be independently derived by multiple creators; and will be naturally regarded as permissibly modifiable. Therefore, the defining characteristic of copyrightable objects must, despite being sensitive to the communicativeness of objects, be construed more narrowly than to suggest that all communicative objects are correctly copyrightable.

The scope of copyrightable objects should be constrained to a subset of communicative objects. The essential quality of the communicative objects included in this copyrightable set is that they are uniquely second-personal. The identification of this quality as the appropriate criterion draws on Stephen Darwall’s observation that “many central concepts, including those of moral obligation, right and wrong, and moral rights, have an irreducibly second-personal structure” in that they “implicitly refer, in a way other ethical and normative concepts do not, to claims and demands that must be capable of being addressed second personally.”

Darwall contends that a large part of ordinary morality involves what he refers to as second-personal reasons. These are reasons that are provided on an agent-relative basis, meaning that one person issues a reason to a second person, about how the second person should act or behave, in a manner that is contingent on the presupposition that the reason-giver has some authority, relative to the reason-receiver, which informs the validity of the reason. For example, the phrase “It is better if people do not lie” represents a moral claim that is agent-neutral, in that the claim directs an audience towards a fact (if it is true) that should direct behaviour independent of speaker’s identity (and even independent of it being spoken at all). By comparison, the phrase “Do not lie to me” represents a second-personal demand that, to correctly function, must be understood (by speaker and recipient) to imply a right.

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of the speaker to make moral claims on the actions and behaviours of the recipient.\textsuperscript{193}

Many types of communication (whether delivered verbally or non-verbally) must be understood to be essentially second-personal on this view. Darwall explains that:

\begin{quote}
A second-personal reason is one whose validity depends on presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason’s being addressed person-to-person. Reasons addressed or presupposed in orders, requests, claims, reproaches, complaints, demands, promises, contracts, givings of consent, commands, and so on are all second-personal in this sense. They simply wouldn’t exist but for their role in second-personal address. And their second-personal character explains their agent-relativity. As second-personal reasons always derive from agents’ relations to one another, they are invariably fundamentally agent relative.\textsuperscript{194}
\end{quote}

For example, consider a guard who presides over a prison, and who receives a letter declaring the prison to be too cold. The letter explains that the thermostat in the prison should be adjusted to a prescribed temperature. In such an event, the guard’s understanding of the communicative function of the letter would be contingent on their being able to ascertain the identity of its author. If, for instance, the letter had been authored by a prison inmate, then the communication would constitute a complaint and suggestion; but if the same letter had been authored by a prison warden or superintendent, then the letter would correctly constitute an imperative or command. In this case, if the guard (the audience) cannot ascertain the identity of the author, they cannot reach a correct and complete understanding of what the object (as a communication) is. As Dawall explains, “[f]or an utterance to count as a command, for example, certain conventional authority relations must be in the background, and this must be common knowledge between speaker and addressee.”\textsuperscript{195}

I intend to construct an account of the connection between second-personality and copyright that has similarities to Darwall’s account of the connection between second-personality and the nature of interpersonal moral claims. Unlike Darwall, however, I am not concerned with second-personal interactions \textit{qua} interactions that position two people in a relationship of accountability. An author of a copyrightable object does not (necessarily) exist in a relationship of accountability with their audience, since when an

\textsuperscript{193} Stephen Darwall, \textit{The Second-Person Standpoint: Morality, Respect, and Accountability} (Harvard University Press, 2006).

\textsuperscript{194} Ibid.

\textsuperscript{195} Ibid., p. 3.
artist produces something like a novel or a musical score that act of creation does not by that communication’s substance imply that the artist exists within a relationship of accountability with their (potential) audience. This is especially the case because an author’s potential addressees are (typically) free to ignore the author’s work entirely.196

Despite this difference, however, there is a similarity between correctly copyrightable objects and the second-personal modes of imparting moral reasons with which Darwall is concerned (orders, requests, claims, etc.). In the same way that, in the example case of the guard’s letter, the identity of the letter’s author must be known to the guard for them to have a complete epistemic conception of what the letter is as a communication, it is also true that the audience of a correctly copyrightable work need some second-personal conception of the author of that work in order to develop a complete epistemic appreciation of what the copyrightable object is. This is true even when the substance of the copyrightable work does not establish a relationship of accountability between author and audience.

An author of any communicative object (correctly copyrightable or not) is responsible, and must be held accountable, for the things that they author. Authors are appropriately subject to a variety of responses in relation to their authored objects, including credit; blame; praise; and criticism. As was demonstrated in Chapter 5, this means that the preservation of truth and accuracy, in attributing authorship to objects that are second-personally communicative, is centrally important not only to authors (for the sake of guaranteeing the fair assessment of honour and reputation), but also to audiences who can only meaningfully interpret agent-relative communications within the context of a specific second-personal agent-relation. Because of their second-personal quality, correctly copyrightable objects also demand of their authors the additional requirement that the author-identity that is recorded in connection to an author’s work is not unsuitably inaccurate or deceptive (see more on this standard below, section 7.6, in relation to anonymously and pseudonymously published works).

To recap, then: as informed by copyright’s foundational principles of truth and accuracy, the term ‘second-personal,’ as it is used in relation to communicative objects (and as distinct from Darwall’s use of the term), describes those objects which, to function correctly and completely, must be accurately understood to have been authored by a

196 I owe this observation, of the difference between my own account and Darwall’s, to reviewer Hugh Breakey, whose criticism has informed the direct explication of how these accounts diverge.
distinguishable author-identity. ¹⁹⁷ This is not necessarily to say that the identity of the object’s author must be known – since anonymously and pseudonymously published works may still (arguably) be second-personally communicative (see Section 7.6) – but that the authored object must be recognisably the product of a specific author in a way that bears upon an understanding or interpretation of the object. In this way, the appeal to second-personal communicativeness both acknowledges the nature of ‘creative’ authorship as involving speech, and of the appropriateness (and necessity) of indexing claims about speech acts to relevant speakers.

An account of what it means for the author-identity of an object to bear upon the understanding and interpretation of an authored object, in such a way as makes the object function ‘correctly and completely,’ is difficult to articulate. For this reason, although much of prevailing copyright law approximately tracks this feature, certain indicative phrases have historically been relied on to allude to this component without explaining it. For example, insofar as the phrase ‘authorship in the romantic sense’ is intended to select a subset of authorship that produces objects such as fictional novels and poetry, while precluding objects such as instruction manuals and reference books, the phrase closely tracks the notion of second-personal communicativeness.

¹⁹⁷ There is an interesting comparison to be made here between the present account and the account of ‘authorship as public communication’ that Immanuel Kant advanced in response to the issue of copyright. See for example Anne Barron, ‘Kant, Copyright and Communicative Freedom’ (2012) 31 Law and Philosophy 1. Barron explains that Kant characterised authors’ rights “as speech rights, and not as rights of property in works considered as crystallizations of their authors’ communications,” (pp. 5–6) and that “Kant’s premise is that a book considered as a material object must be distinguished from a book considered as the vehicle for an activity of authorial speech” (p. 6). However, despite the similar way in which the Kantian tradition identifies copyright with communicative acts and is concerned with how an author’s integrity is contingent on the preservation of truth (i.e. the preservation of attribution), Kantian arguments ground copyright in the norms of public reason (for example see: Maurizio Borghi, ‘Copyright and Truth’ (2011) 12(1) Theoretical Inquiries in Law 1). That is, the Kantian concern for truth stems from the observation that authors engage in public speech (via authorship) in a way that is dependent on the norms of public reason; and that public reason has a fundamental telos – the collective pursuit of knowledge. On this view, then, the proper function of copyright is to guarantee the appropriate conditions under which authors can successfully contribute to society’s collective pursuit of knowledge. By comparison, the account I present is less constrained, in that I do not hang the need for copyright on the notion of an author’s pursuit of knowledge. This is likely to be important, for example, in articulating the need for copyright in relation to certain cases of fiction – i.e. work that is not written for the purpose of uncovering or communicating knowledge.

A fuller consideration of the relationship between Kantian accounts of copyright and the Lockean account presented here would depend on an analysis on the way that specific readings of Kant situate his writings on copyright within the context of his broader philosophy. A meaningful interpretation of a Kantian conception of author’s rights qua communicators’ rights would require, for example, a consideration of Kant’s conceptions of autonomy; freedom; the Doctrine of Rights, and so forth. Due to constraints of scope I do not offer further consideration here, but for an example of how varied considerations of these components of Kant’s philosophy can impact the effectuation of a Kantian account of authors’ rights, compare Barron’s account with the account offered by Abraham Drassinower in Barron. See also: Abraham Drassinower, ‘Copyright Infringement as Compelled Speech’ in Annabelle Lever (ed.) New Frontiers in the Philosophy of Intellectual Property (Cambridge University Press 2012) 203; Abraham Drassinower, What’s Wrong with Copyright? (Harvard University Press 2015); Laura Biron, ‘Public Reason, Communication and Intellectual Property’ in Annabelle Lever (ed.) New Frontiers in the Philosophy of Intellectual Property (Cambridge University Press 2012) 225; and Niel Netanel, ‘Copyright and a Democratic Civic Society’ (1996) 106(2) Yale Law Journal 283.
his is also true in the case of the distinction made in *Baker v Selden* between ‘ornamental’ and ‘useful’ objects. The notion, posited by the Justices in that case, that ornamental objects realise their purpose through being ‘contemplated’ (as compared with ‘implemented’) represents an attempt to capture the second-personal nature of those objects. It cannot be denied that Selden’s book about bookkeeping systems – including the forms it contained – was communicative. Indeed, it might reasonably be contended that, to make use of his book and implement Selden’s system of accounting, one would need to contemplate it. Nevertheless, the determination was made by the Supreme Court that the purpose of Selden’s book was not realised through contemplation. Although the Court was unable to articulate the point, the difference between Selden’s work and a so-called ‘ornamental’ work is not that it is not contemplated when used, but that Selden’s identity as its author does not appropriately bear on the audience’s contemplation of it.

What these phrases attempt (or at least should be attempting) to capture is the importance of an author-function in the interpretation (or the ‘contemplation’ of) certain communicative objects. To function meaningfully, the notion of romantic authorship must constitute an attempt to capture the image of the author as communicator: as someone whose unique, intimate thoughts offer a peculiar insight into some aspect of the world or of the human condition, and whose expression of those ideas can (when performed skilfully) render those thoughts accessible and understandable to an audience. Similarly, the way in which something ornamental is ‘contemplated’ (in a way that utilitarian ‘useful’ objects are not) should be understood as describing the process by which the expressions of authors, which represent unique products of their mind, are interpreted and digested as those authors’ communications. Subsequently, for a ‘romantic’ or ‘ornamental’ communicative object to be contemplated fully and correctly, the person doing the contemplating must be able to form a sufficient conception of the author as well as the object. This follows from the general principle that, for a communication to be understood, it must be contextualised as a communicative object.

The reasons for which ascertaining an author’s identity is necessary in relation to artistic communications are perhaps more complex, or less obvious, than the reasons for which ascertaining the identity of an author is necessary in cases like the previously considered example of a prison guard’s letter. For instance, if a person were to uncover a long-forgotten painting in a relative’s attic, and notice that it bore a signature resembling that of Picasso’s, it would presumably be of great importance to that person to ascertain whether it was a genuine Picasso piece. Although this would undoubtedly be motivated at least in part by a financial interest (a Picasso painting being much more valuable than a painting
by an unknown artist), the value in the piece being a genuine Picasso is not arbitrary. Although the known physical qualities of the object would persist identically in either case, the importance of determining the identity of the painter is not the merely the product of an arbitrary rarity (i.e. the rarity of Picasso pieces compared with the rarity of anyone else’s pieces) that the art market is particularly (if irrationally) sensitive to.

Rather, although the object would remain physically identical, ascertaining the identity of the painter would determine what the painting is as a communication. A communicative object that exists within the context of a prominent creator’s entire body of work, or which was produced consciously as part of a significant historical movement in the development of the medium, is essentially a metaphysically different object than the ‘same’ object produced by any other author in any other context. Akin to the guard’s letter, the identity of the person who created an artistic communication informs the object’s communicative function. This substantive difference may inform the financial value of an object, but the importance of determining an author’s identity is independent of that single consequence.

Instead of being extended to all communicative objects, copyright ought to be extended only to those objects whose complete and accurate ‘ornamental’ function (their function as communications) is contingent on the second-personal qualities that those objects have. Not only would the application of this principle preserve what is intuitive about existing determinations of copyright eligibility (based broadly on the qualities identified in Section 7.3), it would also consistently resolve a variety of un-intuitive cases that represent challenges under existing conceptualisations.

Moreover, indexing copyright to second-personal communicativeness represents an appropriate recognition that the process of paradigmatic (or ‘romantic’) authorship involves an inherently personal engagement in speech. In this way, the notion of second-personal communication attaches to a notion that has driven much of the ideological impetus of copyright’s development, without ever successfully impacting its implementation in an equivalent way. For example, the Unites States House Committee Report, prepared ahead of an anticipated legislative overhaul in 1961, records the Committee’s opinion that “an author’s intellectual creation has the stamp of his personality and is identified with him.” Despite the ideological motivation this may have provided, however, the Committee’s very next sentence of the report reads: “But insofar as his rights can be assigned to other persons and survive after his death, they are a unique kind of

198 House Comm. on the Judiciary, above n 66, p. 4.
personal rights.”¹⁹⁹ This demonstrates the Committee’s inability to disentangle the natural personal rights which arise in relation to authored works – as second-personal communications – and the economic rights intended as the subject of legislation.

The constriction of the scope of copyright, through the indexing of eligibility to second-personal communicativeness, shall result in numerous presently copyrightable objects (or otherwise ambiguously or disputably copyrightable objects) to be categorised as uncopyrightable. Exploring several examples of such objects, and subjecting them to the refined-communicative account just presented, further demonstrates the appropriateness of this recategorization. In addition, the consideration of a variety of cases demonstrates that the universalizability of this approach – there is no requirement for the development of a myriad of media-specific or industry-specific approaches to determining copyright eligibility.

7.5 The Second-Personal Principle in Action

7.5.1 Maps

Maps have historically been regarded as copyrightable (in that the layout and drawings upon them are copyrightable, although the informational content they convey is not), based on the preoccupation with determining copyright eligibility based on the physical qualities of objects. This is seemingly because they were one of the first objects to be derived via mechanical print. Maps do, however, demonstrate an important, non-physical similarity with correctly copyrightable objects: they communicate information. Being communicative objects, then, maps – in accordance with the preliminary account outlined in Section 7.3.1 – might be expected to be deemed eligible for copyright protection. However, maps also serve a clear utility function: the information they communicate is useful. Per the same preliminary account of the communicative-useful distinction, then, maps (if they are eligible for IP protection of any kind) should be expected to be rendered patentable.

Categorising maps as copyrightable also contravenes the intuitive principle regarding uniqueness and multiple realizability presented in Section 7.3.2. Insofar as maps are intended to form accurate representations of the natural world, they are tightly confined by the world’s physical qualities.²⁰⁰ A map that did not reflect the properties of the world

¹⁹⁹ Ibid.
²⁰⁰ For present purposes I consider maps only insofar as maps are intended as representations of the real world. It is possible, of course, to produce a map of a fictional place, such as of Tolkien’s Middle Earth. An assessment of fictional maps may determine that their copyright eligibility ought to differ from non-fictional maps.
would be, in that regard, an imperfect instance of a map. Therefore, multiple cartographers, all of whom were perfectly competent in mapmaking, each laboured to produce maps of the same area (in the same style; recording the same details), then they should be expected to produce equivalent objects. This is because mapmaking involves the pursuit of an idea \textit{qua} abstract property, in that there exists some perfect idea of how the features of the world are arranged, which mapmakers seek to possess (and to communicate).

Second, as utilitarian tools, maps are correctly modifiable. As the location of national borders; human infrastructure (e.g. roads); and natural features (e.g. rivers) inevitably change over time, static maps become unavoidably outdated. The continuing usefulness of maps is therefore contingent (especially in cases of dramatic change) on their modifiability. Subsequently, it is reasonable for the a company that commissions a mapmaker to make a map, with the intention of producing copies for commercial sale, to expect to enjoy the right to make subsequent updates and changes to the object they have purchased, between the time the map is completed and the time the map is reproduced for sale. Again, this is necessarily directed by the known physical qualities of the world. Such modifications should not be considered to constitute an offence against the original mapmaker, even if the mapmaker is not consulted about the changes.

The application of the second-personal principle lends clarification to the case of maps. Maps can standardly be recognised not to be second-personal communications, despite the information they convey, because their successful implementation is in no way contingent on the identity of the mapmaker who produced them. Although the accurate attribution of a map, to the mapmaker who made it, ought to be maintained, this is only so that praise or blame can be appropriately assigned in if the map functions well or poorly as a tool. On this basis, maps should be considered uncopyrightable.

7.5.2 Instruction manuals

Like maps, instruction manuals are useful communications. A flat-pack furniture company, for example, may commission a simple printed pamphlet, combining rudimentary images and text, that conveys the process by which a customer can assemble the furniture. On the traditional conception, such a pamphlet could be considered eligible for copyright by virtue of its being a printed object. Conceived of correctly, however, such an object would not be considered copyrightable. Although communicative, the scope of potential instructions for assembling a specific pre-packaged object is tightly constrained. Several agents, each tasked with producing instructions on how to assemble the same piece of flat-pack
furniture, should be expected to arrive at equivalent and likely similar solutions. If, when the sets of instructions that were returned were followed accurately, their application did not result in identical outcomes, then this would be an indication that at least some of the instructions were incorrect.

As well as being useful and multiply realisable, categorising an instruction manual or pamphlet as copyrightable is incorrect because situations are conceivable in which it would be just to consider them modifiable. For instance, if the commissioned instructions were discovered to contain a minor inaccuracy – or if the design of the furniture was modified after the instructions were produced – then it would be natural to consider the commissioning company to be within their rights to modify the instructions. The commissioning company would presumably not be required to restart the process of commission instructions anew. In this way, not only is the Idea contained within the instructions patentable rather than copyrightable, but the Expression of that Idea is treated in much the same way.

The categorisation of an instruction pamphlet as modifiable is not merely motivated by a pragmatic interest. Similarly, an instruction manual’s combination of usefulness, multiple realizability, and modifiability is not merely an accident or coincidence. These aspects stem from the fact that, although the object is communicative, it does not form a second-personal communication. As a technical object, intended to be implemented rather than contemplated, the way in which the end-user implements an instruction manual can in no way be contingent on their knowledge of the identity of the author who authored it.

The case of instruction manuals can be resolved by the application of the second-personal principle in much the same way as the case of maps. Correctly following the information communicated in a manual either results in the successful achievement of a desired outcome or it does not; the outcome of this process is never contingent on an audience’s conception of the author-identity of the manual’s creator. Because of this, instruction manuals ought to be deemed uncopyrightable.

7.5.3 One Million Random Digits

In contrast to the previous two examples, this example regards a specific instance of an object, rather than a class of objects. Prior to the existence of electronic random number generators, the generation of random digits was produced via analogue means. Rather than producing random values mechanically (e.g. by flipping coins or rolling dice), the
production of the book *One Million Random Digits* presented a popular (and standardised) means to that end. It is a book that, as the title suggests, contains one million randomly derived and arranged digits for the use of random number generation.

The example of *One Million Random Digits* represents a peculiar case, in that, assuming the series of digits is truly random, there is no perceptible reason that a person would ever want to modify the object. Any modification would, at best, be trivial (if it did not affect the randomness of the digits therein). At worst, such modification would be non-trivial, in that it would reduce the degree of randomness within the arrangement of digits. This lack of perceptible motivation, however, ought not to be confused for a principled basis for deeming the object legally unmodifiable. The second-personal (or otherwise) nature of the object must still determine whether *One Million Random Digits* should be considered alterable.

On this point, two claims stand to be made. The first (a strong claim) is that *One Million Random Digits* does not represent communication at all. This position contends that a requisite component of communicative objects is that they are meaningful, but that randomness is (by definition) meaningless. *One Million Random Digits* would, then, not qualify as communication. The second (weaker) claim is that – even allowing for information to suffice as communication; and granting that *One Million Random Digits* contains information – the communicativeness of the book is nevertheless not second-personal in nature. This second claim, at least, must certainly be granted. In contrast to objects which, to function fully and correctly, depend on the audience to have a conception of the author as well as the object, the function of *One Million Random Digits* would fail to be realised insofar as its use was dependent on any non-random factor. It would therefore be incorrect to extend copyright protections to *One Million Random Digits*, even though it takes the physical form of a book.

### 7.5.4 Computer Code and Software

If a book that serves to produce random digits lacks the second-personal communicativeness to correctly attract copyright protection, then using software to achieve the same end cannot possibly introduce it. Moreover, the fact that the RNG function of a book like *One Million Random Digits* can be adapted and implemented *identically* as a piece of software – such that the book and the software represent precisely equivalent (if differently efficient) tools – demonstrates that software only represents the form, and never the essence, of any digital object. Considering whether software *per se* ought to be
copyrightable or patentable therefore misses the point (as with any determination of copyright eligibility made based on an object’s medium).

A comparison of two example objects demonstrates this irrelevance of an object’s being software (or not) in determining copyright eligibility. On one hand, consider the qualities of a narratively rich computer game. On the other hand, consider the qualities of a computer’s operating system. These two programs – both equally the product of computer code – are dissimilar in every relevant respect. A computer game, like a novel or a film, can convey a narrative that constitutes a second-personal communication. The game thus finds its function in being played (within intentional interactive constraints), by an audience. Two narratively similar computer games can co-exist (for example the games Deep Impact and Armageddon) without any IP infringement occurring (provided that one was not directly derived or adapted from the other). It is implausible that two developers, working independently, could arrive at functionally equivalent narrative games. It would be a natural offence for the publisher of an independently developed game to alter any part of the game’s narrative structure prior to distributing it (for instance, by giving the narrative a happier conclusion) without consultation with, and approval by, the author whose artistic vision the game represented. An offence against this obligation would constitute an undue incursion upon the author’s speech.

An operating system is unlike a computer game in each of these ways. Although all computer code is communicative in the sense that it conveys information (albeit sometimes only to another machine), the code of an operating system is not second-personally communicative. Operating systems are not intended as objects of contemplation, but instead function as utilitarian tools that are implemented in pursuit of various ends. Two developers, working independently, could feasibly arrive at equivalently functional operating systems (though the scope for this may be wider than in the development of more limited programs), but utility patents awarded to the first successful developer would reasonably preclude the publishing of functionally equivalent operating systems by subsequent developers. A company that purchased the patent rights to such a system could, however, permissibly modify or adapt any part of the system’s code, to substantively change it, without engaging or consulting in any way with the original developers.

Whereas it was previously shown that considering the copyright eligibility of software per se led to a contradiction between existing intuitive bases for eligibility determination, considering the copyright eligibility of digital objects based on the nature of their communications they represent resolves this tension. Dispensing with regard for the
medium through which they are expressed, digital objects can be assessed, as any other object, on whether they constitute second-personal communications. Those that do (e.g. narrative games) can be afforded copyright protection, and those that do not (e.g. operating systems) can be afforded patent protection. Understood on this basis, this does not represent a conceptual contradiction.

7.5.5 Rube Goldberg Machines

Although their occurrence is rarer, this account of the copyright-patent divide also provides a basis for clarifying unclear cases in which mechanical objects (to which only patents typically apply) might be intuitively regarded as copyrightable. A machine that is creatively inefficient – such as a Rube Goldberg machine – presents an example of such a case. Although, plausibly, a patent may be sought on a Rube Goldberg machine, such a patent would seem to hold very limited utility to an ‘inventor’ seeking to preserve their machine. Under the provisions of patent protection, if an instance of a Rube Goldberg machine was sold, then despite the design of the object having been patented, the purchaser would nevertheless assume the right to modify the form of the machine.

Also dissimilar to utilitarian devices, Rube Goldberg machines represent objects that, although they have ostensible ‘functions,’ are not multiply realisable because the ‘method’ by which the function of such a machine is achieved intentionally subverts the method that would be produced by an inventor seeking to maximise efficiency. The attempts of multiple inventors to locate the most efficient means by which to achieve an end should be expected to arrive at convergent solutions, since there is typically only one *most* efficient means – given the physical properties of the world. By comparison, the task of intentionally making a machine less efficient, as in the development of a Rube Goldberg machine, can be realised in an effectively infinite number of ways. Because of the divergent nature of this pursuit, it is highly unlikely that multiple independent attempts would return the same result.

Patent protection therefore represents an insufficient form of protection in such cases, because, presumably, the utilitarian function is not actually the *essential* function of a Rube Goldberg device. Although such an object could be conceived as a very poor attempt at engineering, the second-personal interpretation that people naturally engage in makes audiences of Rube Goldberg machines, by which they contextualise the object as the work of an artist. In this way, the second-personal attribution is essential to determining what the object is (a terrible piece of engineering, or a (plausible) competent example of art). The application of the second-personal principle, therefore, reveals that Whereas it is not clear
under what copyrightable medium a Rube Goldberg machine could be categorised in accordance with a strictly physicalist determination of copyright eligibility, this difficulty is avoided by remaining sensitive to the second-personal communicativeness of such objects.

7.5.6 Selden’s Description of His Bookkeeping System

Finally, this account of the copyright-patent divide also succeeds as a basis for deciding the case between Baker and Selden. The Supreme Court was correct in deeming Selden’s bookkeeping system ineligible for copyright, but employed an unsatisfactory basis in reaching that decision. Although the technical-ornamental distinction tracks a valuable division between importantly different kinds of objects, this difference does not turn on the forms of ‘ornamental’ objects being constitutive of their functions.

Instead, the reason Selden’s book should not be considered copyrightable, even though it is a book, is because it does not represent a second-personal communication. A reader employing Selden’s description of his bookkeeping system, and who wants to learn how to implement the system, regards the book in the same way that someone constructing flat-pack furniture regards an instruction manual. Moreover, if the reader determined that Selden’s system was valuable, but could amended to better serve their ends, then it would be natural for them to make such amendments. In making those amendments, the reader may take to physically altering the example charts included in the book (or copies made of them), which Selden also sought copyright over.

Although Selden made an appeal for patent protection over his bookkeeping system, only to have it denied, patent protection is the appropriate domain for such an object. Indeed, by modern standards, a large part Selden’s book might feasibly have been submitted in the form of a patent application. This would establish protection over the system itself (which would still be modifiable, presuming one secured the initial right to its use), while not extending any protection over the text.\textsuperscript{201} Crucially, however, the reason for not affording copyright protections in relation to Selden’s book is not because the system it represents is ‘useful’ or in some sense distinct from the textual object encompassing its description. The feature that precluded Selden’s book from being copyrightable is that it is not second-personally communicative, and thus does not need to be treated as unmodifiable.

7.6 Anonymous and Pseudonymous Works

Before concluding, a note ought to be made about anonymously and pseudonymously published copyrightable works. For this purpose it is necessary to define terms, since there is some overlap between the conventional used of the words ‘anonymous’ and ‘pseudonymous.’ For present purposes I take an anonymously published work to be any work to which the relevant author has not attached their name. This includes cases in which the author has attached a false name, provided that the name is intended to be (and succeeds in being) understood by an audience as a false name. In this way, although such a false name may ordinarily be called a pseudonym, I reserve that term here for false names which audiences are expected to, or could reasonably, understand to be the author’s real name. Two cases considered below, involving the authors ‘Inspector Gadget’ (an obvious false name) and Helen Demidenko (an unobvious false name), are intended to render this distinction clear.

These notions of anonymity and pseudonymity are relevant because, on the second-personal account developed in this chapter, it might be thought prima facie that anonymously published works would be unable to function as second-personal communications; and that pseudonymous works might necessarily constitute deceptions which qualify as moral rights offences. Against the claim that anonymous works cannot function as second-personal communications, I contend that this notion would rely on an over-interpretation of second-personality. Rather than second-personal communications requiring addressees to hold in their mind some conception of an object’s author as a specific, identifiable agent, it is sufficient (in at least some cases) for addressees to understand second-personal communications as a product of some (albeit unidentified) relevantly situated author.

The case of anonymous British blogger ‘Inspector Gadget’ illustrates this point. Inspector Gadget (hereafter ‘Gadget’) was the pen name and online handle of the author of Police Inspector Blog, which operated in its original format between 2006 and 2013. Attesting to be a British police officer, Gadget used the blog to provide a frontline perspective on matters of crime and policing that was sharply critical of alleged bureaucratic inefficiency, overregulation, and ‘political correctness.’ The anonymous author has also written a book contributed columns to British newspaper The Daily Telegraph under the same false name.

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The controversial content and whistle-blower nature of the *Police Inspector Blog* makes the deployment of the ‘Gadget’ name understandable. The continuance of the blog depended on Gadget’s anonymity. Moreover, however, despite not knowing the true identity of Gadget, the *Police Inspector Blog* still successfully functions as a second-personal communication insofar as its function as a communication hinges on its audience’s ability to attribute it to Gadget *qua* a British police officer. If it was revealed that the blog’s author was not truly a police officer, then the *Police Inspector Blog* would have to be reinterpreted and understood as something other than it was presented as. Perhaps it could be interpreted as speculation, or fiction; but not as a genuine blog. A similar reinterpretation would be required if the blog was revealed to be a compilation of accounts from separate British police officers rather than a specific individual.

Of course, it follows that if anonymity is used to obscure some relevant fact about an author, such that a communicative object can be passed off as something other than the thing it is, then this would be a deception that constitutes a moral rights offence. However, this would also be true in the case of an author misrepresenting themselves in the same way while writing under their own name. Anonymity is not inherently deceptive, and anonymous works can still function (if albeit sometimes in a limited capacity) as second-personal communications.

On the matter of pseudonyms, I concede that pseudonymously authored works constitute deceptions, and acknowledge that one consistent way to regard such works is as objects that necessarily offend against moral rights. However, an equally consistent alternative account (which I prefer, but shall nevertheless only outline rather than argue for here) is available. On this account, although some pseudonymously published works constitute moral rights offences, other uses of pseudonym are morally permissible (and possibly sometimes morally praiseworthy). On this view, therefore, not all deceptions are moral rights offences; but all moral rights offences, including those committed via use of pseudonym, are offences because they are deceptions (and not, for instance, property offences).

This difference, between the conception of all pseudonym use as inherently impermissible and the conception of pseudonym use as variably permissible or impermissible (depending

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on the particulars), can be characterised as simply a specific instance of moral disagreement regarding deception generally. For example, a deontologist might consider all pseudonymous authorship to be immoral *qua* acts of deception. By comparison, a consequentialist might consider some pseudonymous authorship to be morally acceptable while believing other pseudonymous authorship to be morally condemnable, based on the respective consequences that the deception brings about.

A consequentialist might object, for example, to the use of pseudonyms in cases such as that of Helen Darville’s novel *The Hand that Signed the Paper*. In that example, Darville wrote under the name ‘Helen Demidenko,’ and although she prefaced her novel by explicitly stating that it was a work of fiction, she misrepresented herself as being of Ukrainian descent – partially through the adoption of the Ukrainian ‘Demidenko’ surname. This misrepresentation was important in positioning the work as a second-personal communication because the novel tells the story of a Ukrainian family which collaborates with the Nazi Party in Germany during the Holocaust. Moreover, an ostensibly constitutive quality of the novel is (or rather was) that it was the product of an author uniquely positioned as the descendent of Ukrainian parents and grandparents who lived during the Holocaust. This situatedness of the author and her work framed the way in which the novel functioned as a communication, and it was integral in establishing the authenticity that addressees attributed to the work. The attribution to ‘Demidenko’ was particularly important to the way addressees interpreted the author’s moral ‘ownership’ and accountability for what were confronting expressions of anti-Semitism by central Ukrainian characters in the novel.

Literary communities often respond to cases of ‘literary fraud’ like *The Hand that Signed the Paper* with condemnation in a way that they do not routinely react to other cases of pseudonymous authorship. For example, it is not typically considered objectionable to use a pseudonym to maintain separate authorial identities when publishing across different genres or otherwise for different audiences. It is not my objective to convince a reader of the merit of these responses by literary community (a deontologist may still consider this an inconsistency), but merely to highlight that insofar as such a divergence in reaction to different cases of pseudonymous authorship is rational, it is based on an observation of the (variable) consequences of falsely situating a work when it is a second-personal communication.
7.7 Conclusion

Despite the intuitive difference between copyrightable and uncopyrightable objects, a clear and principled articulation of that difference has historically been lacking. An account of that difference, formulated as a difference between objects (rather than labour processes) is therefore necessary. Establishing the distinction using second-personal communicativeness is both principally well informed and pragmatically useful. A critical function of this account is to allow for the determination of what unique non-economic copyright protections (as distinct from statutory economic copyright protections) ought to be understood to naturally apply to correctly copyrightable objects. Usefully, an appropriate basis for such protections is already represented at law in the form of IP moral rights. However, as was seen in Chapter 5, moral rights are often poorly understood and wrongly implemented. Chapter 8 therefore contains a consideration of the intersection of second-personal communicativeness and moral rights, to establish a suitable formulation of copyright law.
Chapter 8
Appropriate Copyright Protections Derived from Second-Personal Communicativeness

8.1 Introduction

The previous chapter identified second-personal communicativeness as the quality by which an object’s eligibility for copyright protection ought to be adjudicated. Objects that are second-personally communicative should have copyright protections extended to them, while objects that are not second-personally communicative may (or may not) be eligible for patent or other protections. This observation alone, however, is insufficient to determine what protections copyright ought to confer. One might still ask, for instance, why copyrightable objects need to be protected distinctly at all – especially as compared to patentable objects. Why, for instance, would it be inappropriate for a unified system to handle both kinds of objects identically? The purpose of this chapter is to explain what unique protections copyright ought to confer, especially in comparison to alternative IP systems. This is conducted in accordance with the principle that any protection which is unique to copyright must necessarily be derived from the defining feature of copyrightable objects: their second-personal communicative nature.

The most prominent and consequential difference between copyright and patent, under existing law, is the disparity between the duration of their respective economic protections. With respect to economic monopoly, the maximum duration of patent protection is 25 years (for pharmaceuticals), and usually only 20 years (for everything else). By comparison, the minimum duration of copyright protection is 70 years. This affects the determination of copyright’s scope insofar as there is an incentive (from the point of view of IP owners) to classify ambiguous or seemingly borderline objects as copyrightable. All else being equal, an object’s owner presumably prefers the more generous term of protection. Despite this focus, however, a more fundamental (albeit less often considered) difference exists in relation to the respective non-economic protections that copyright and patent systems extend to creators.

The relevant non-economic difference between copyright and patent is already reflected within existing moral rights legislation. As illustrated in Chapter 5, however, there exists significant confusion around both the theoretical basis for, and implementation of, that
legislation. A refined moral rights account is therefore required to accurately reflect the uniqueness of copyrightable objects at law. As the argument developed in Chapter 7 suggests, this refinement of moral rights legislation ought to be informed by the conception of copyrightable objects as second-personally communicative. Therefore, the function of moral rights legislation, as it relates uniquely to copyright, ought to be to secure those rights to which second-personal communicators ought naturally to be afforded.

The conclusion reached is that a repaired account of moral rights, which overcomes the various misapprehensions raised in Chapter 5, represents the only defensible basis for the copyright-patent distinction. One problem this presents for existing moral rights legislation is that several existing moral rights apply in relation to objects that are not (and should not be) copyrightable. Moreover, it is shown that only one moral right correctly applies exclusively in relation to copyrightable (i.e. second-personally communicative) objects. That moral right is the right to have the fidelity of one’s second-personally communicative works preserved.

 Appropriately reformulating IP law to reflect this observation should be expected to entail radical change. A successful reformulation requires the extensive modification and redistribution of the respective protections that are afforded under copyright and other IP systems. Such a redistribution can only be achieved by reassessing which objects should qualify for copyright or patent protection, and then indexing the respective protections afford under those systems to the qualities which determine object eligibility.

8.2 Refining an Account of Moral Rights

Moral rights legislation represents a plausible instrument for the principled differentiation between copyright and patent. This is because, as established in Chapter 5, moral rights are natural rights. Nevertheless, there remains a significant initial obstacle to identifying a moral right which is capable of sustaining that point of differentiation. A consideration of the treatment of moral rights within the United States reveals that moral rights cannot reasonably be characterised as relating uniquely to the domain of copyright. Despite explicit moral rights legislation being indexed as a subset of copyright legislation, but not arising explicitly in relation to patents or other non-copyright domains, their enforcement within the United States relies upon the (largely theoretical) appropriation of trade mark; defamation; and other non-copyright law. Insofar as the appropriation of these legislative avenues, for use in the protection of authors’ moral rights, is justifiable in principle, it must be the case that the same moral rights are recognised (albeit not under that term) in relation
to non-copyrightable objects.

To understand how and why this has become the domestic legal situation in the United States, it is necessary to consider the broader international copyright landscape. Particularly, one must understand the United States’ obligations as a signatory of the World Intellectual Property Organisation’s *Berne Convention for the Protection of Literary and Artistic Works* (‘Berne Convention’). The Berne Convention is the largest international copyright treaty in existence, with 176 signatory countries, and was first ratified in 1886.\(^{204}\)

The function of the Convention is to standardise domestic copyright provisions between signatories through the stipulation of minimum protections, and to establish the mutual recognition of copyright claims that originate in any signatory country.

As with copyright law generally, the central preoccupation of the Berne Convention regards economic copyright protections. However, in addition its economic provisions, the Convention also requires that signatories establish domestic moral rights legislation. On this, the Convention stipulates that signatories must ensure that:

\begin{quote}
(1) 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.\(^{205}\)
\end{quote}

Two central issues arise in relation to this clause. First, the passage alludes to the function of moral rights legislation as being to protect an author’s honour and reputation. This, however, does not represent a sufficiently basic account of the purpose of moral rights. Second, despite the Convention stipulating the requirement for domestic moral rights legislation – and despite the United States being signatory to the Convention – the United States has not passed explicit legislation that fulfils this obligation. Instead, the United States Congress has asserted the view that it is not necessary for the U.S. to introduce *explicit* moral rights legislation in order to meet their obligation, because moral rights offences can be sufficiently addressed under other existing law.

These issues are closely related. The United States Congress’s claim that explicit moral rights legislation is unnecessary turns on the ability for existing legal avenues to serve the


same end. However, if that amounts to the claim that alternative legal apparatus can be used to guarantee the preservation of an author’s honour and reputation, when that should not be the purpose of moral rights legislation in the first place, then this clearly presents a problem for the sufficiency claim.

8.2.1 The Problem of ‘Honour and Reputation’

In Chapter 5 it was shown that moral rights offences are deception offences. Specifically, the examples of plagiarism and forgery (two types of fraud) were examined. Understanding moral rights in this way reveals an incongruence in the prominence that official accounts of moral rights (such as in the Berne Convention) afford to the concept of ‘honour and reputation.’ This is not to say that the appeal to honour and reputation in relation to copyright is altogether misplaced, since protecting honour and reputation is an important function of moral rights. Rather, it is to point out that while there is a clear and important relationship between accurate (and therefore non-deceptive) attribution, and the concept of an author’s honour and reputation, the two concepts are logically distinct.

Specifically, honour and reputation products of responsibility and accountability. This means that the authors are invested in the accurate attribution of creative works, for the sake of their honour and reputation, because it amounts to the accurate attribution of responsibility and accountability. Audiences, too, are invested in the accurate attribution of creative works for the same reason. There is a mutual importance both in being held responsible for the things one is truly responsible for, and not for other things; and in being able to accurately hold other people accountable for the things they are accountable for. This subsequently requires object fidelity is maintained in the case of authored objects, for as long as the attribution to the author is maintained.

The objection presented here is not, therefore, that the concepts of honour and reputation are unrelated to moral rights. Instead, the appropriate claim is that the prominence afforded to honour and reputation represents too narrow of a view to be admitted. Particularly, this is true because such an account, at least as reflected in the Berne Convention, is too individualistic in focus. To derive a defensible account of moral rights, accuracy of attribution, and fidelity in reproduction, must be promoted to prominence independent of honour and reputation. This is because falsification through the misattribution of authorship represents a natural offence independent of the way in which it impacts an author’s honour and reputation. It therefore represents the only sufficiently basic foundation for establishing moral rights legislation.
The concept of ‘honour and reputation’ retains relevance under this framework because both components represent prominent second-order values (after truth) which often become casualties when deceptions occur. Attributing sub-standard work to an otherwise respected author could obviously damage that author’s reputation. However, some moral rights breaches remain objectionable despite not being harmful to the honour or reputation of the relevant author. This is akin to the way in which, as demonstrated in Chapter 5, frauds that do not impose a negative economic impact on defrauded authors nevertheless constitute natural moral rights offences.

It is worth considering how the protection of moral rights, in the two ways prescribed by the Berne Convention, is ultimately grounded in a concern for the preservation of truth and accuracy. Quite straightforwardly, the right of an author to claim authorship over their works is a guarantee that certain facts of the world will not be misrepresented. That is, certain people, who really are the producers of certain objects, should have the right to be acknowledged as such. Less immediately clear, by comparison, is the way in which the Berne Convention’s second provision – which introduces the notion of authorial honour and reputation – is also motivated by a concern for truth and accuracy. To illustrate this, it is worthwhile to examine the United States’ attitude to the Convention’s requirement that the identified moral rights be incorporated into the national legislation of its signatory countries.

8.2.2 Domestic Moral Rights Legislation in the United States of America

The United States provides no general protection of moral rights. The only explicit reference to moral rights, within United States law, is provided within the Visual Artists Rights Act (VARA). Although VARA acknowledges the existence of moral rights, it only extends those rights within a tightly circumscribed scope, which is much narrower than the Berne Convention requires. The reason that the United States is able to remain a recognised signatory of the Convention despite this prima facie failure to satisfy its provisions is that the World Intellectual Property Organisation (WIPO), which oversees the Berne Convention, has been satisfied by the claim that complaints regarding moral rights breaches within the United States can be sufficiently addressed under existing domestic law. Defamation law, as well as the Lanham Act (which conventionally concerns

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207 Visual Artists Rights Act of 1990 (VARA) 17 U.S.C § 106A.
208 Kwall, above n 206.
trademark law) are two components of the United States legal system that have each been employed outside of their traditional breadth in order to facilitate moral rights complaints.

There are compelling reasons to believe that neither defamation legislation nor the Lanham Act provide sufficient protection to adequately substitute for dedicated moral rights legislation. For example, under each of these avenues there exists a requirement to demonstrate financial or other material harm, rather than to simply evidence damage to one’s integrity. In addition, defamation protections are individualistic, in that cases can only be actioned by an author who has been wrongly unattributed (or has had something falsely attributed to them). As was shown in Chapter 5, moral rights offences like plagiarism need to be actionable by third parties, since people other than authors can be harmed by moral rights offences, independent of whether an author is harmed. Nevertheless, it is worthwhile to consider why these areas of law have been identified as being pertinent to the protection of moral rights.

If either defamation law or the Lanham act does succeed (to even a limited extent) in accommodating moral rights claims, then they do because of the way in which they relate to the concepts of truth and accuracy. Moreover, given that the measure of their suitability is the Berne Convention, their success must derive from their acknowledgement of the instrumental importance that truth has in relation to individual honour and reputation. The defining consequences of defamation, being the exposure of a victim to hatred; ridicule; contempt; lessened esteem; or shunning, all clearly display a conceptual kinship with the notions of honour and reputation. Combined with the condition that only the communication of false statements can constitute defamation (which emerged out of the landmark 1733 defence offered in the representation of John Peter Zenger: that “truth is an absolute defence against libel”), defamation can be reasonably understood as a deception offence in which honour and reputation are necessarily casualties. This makes it appear to be prima facie a natural fit as an avenue for enforcing moral rights.

Alongside defamation law, the Lanham Act, which is typically applied in relation to trademarks, has similar essential components that contribute to the United States Congress considering it to be a suitable substitute for dedicated moral rights legislation. The Lanham Act provides that:

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209 Ibid.
Any person who, on or in connection with any goods or services … uses in commerce any word, term, name, symbol, or device … or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) Is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person …

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.211

Although this was written with the intention of governing trademarks, its application to copyright and moral rights does seem correctly motivated and appropriate. The Act recognises deception offences as potentially impactful in several ways, including to a person’s honour or reputation. Additionally, whereas a defamation lawsuit can only be actioned by the defamed individual on their own behalf (making it an individualistic rather than social protection), the Lanham Act openly protects third parties who also stand to be harmed by deception offences like frauds.

Although the Lanham Act has effectively been considered sufficient by the World Intellectual Property Organisation as a substitute for explicit moral rights legislation, the Act makes no direct reference to the notion of honour and reputation. Instead, the Lanham Act only references offences such as the false designation of origin and false description of fact. Insofar as the World Intellectual Property Organisation is appeased by the existence of the Lanham Act, then, it is because the requirements of the Berne Convention, regarding honour and reputation, are met by the Lanham Act’s explicit regard for truth and accuracy. This demonstrates the way in which the Berne Convention’s preoccupation with honour and reputation is ultimately nested within a broader concern for truth and accuracy.

Importantly, by comparison, this is not an equivalency that is bi-directional. That is, although a protection of truth and accuracy can successfully substitute, in the intended way, as a protection of honour and reputation, a protection of honour and reputation cannot successfully act as a substitute protection of honour and reputation. As demonstrated in Chapter 5, some instances of fraud seem not to be harmful to honour or reputation at all. In the case of a forger who attaches another’s name to the product of their own labour, the producer of the object (the forger) incurs no infringement against their honour or reputation.

Of course, if the product was of poor quality, then the honour and reputation of the person whose name was erroneously attached to the work could suffer, but it is not implausible that the forged object could be of sufficiently high quality that the forgery could have a positive impact upon the honour and reputation of the falsely attributed ‘author.’

Similarly, by attributing their work to a famous artist, a skilled but unknown artist could become better enabled to profit from the marketing of their work, while the famous artist could enjoy additional or continued praise for the ostensible application of their skill. This would nevertheless cause deception that would result in confusion and mistake on the part of the public, which would satisfy the conditions for a successful civil action suit under the Lanham Act. On the other hand, despite these continued harms to the public, it is not clear how the Berne Convention, with its focus on individual honour and reputation, could be straightforwardly applied without there being made a further appeal to the values of truth and accuracy. A reformulation of the treatment of moral rights in the Berne Convention, through the clarification that the fundamental function of moral rights is to preserve truth and accuracy, is therefore appropriate.

### 8.2.3 Inadequate Duration of Moral Rights Under the Berne Convention

In addition to the re-articulation of the central purpose of moral rights, the Berne Convention requires modification with respect to the minimum duration for which signatories must recognise moral rights. It was shown in Chapter 5 that moral rights are natural rights which do not expire, and thus the Berne Convention should be expected to reflect that. Unfortunately, as an extension of the way in which the Berne Convention regards moral rights as individualistic rights, it prescribes several unjustifiable limitations on the duration of moral rights. First, the Convention requires only that moral rights be preserved “at least until the expiry of the economic rights,”212 except where some (unspecified) moral rights may be regarded to lapse upon an author’s death.213

Although these limitations are consistent with an interpretation of moral rights as fundamentally concerned with honour and reputation, they are incongruous with an account of moral rights which identifies their primary function as the preservation of truth and accuracy. Again, there is a parallel here between moral rights and defamation law, insofar as it is commonly regarded that if the sole purpose of legislation is to provide an avenue for the redress of material harms which result from an injury to one’s honour or reputation,

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212 Berne Convention for the Protection of Literary and Artistic Works, above n 204.
213 Ibid.
then there is no practical benefit in the extension of those protections to dead people. Many jurisdictions regard it to be impossible, for instance, to defame the dead, since dead people are not materially affected by reputation (or anything else).

Understood as social protections (not individual protections), which are concerned with the preservation of truth and accuracy (not merely honour and reputation), moral rights can be naturally understood as appropriately perpetual protections. The truth values of natural facts (such as who authored an object) do not expire because of an author’s death or the expiration of any person’s economic rights. Instead, preserving the accuracy of such records remains perpetually necessary.

8.2.4 Moral rights for non-copyrightable objects

Although it requires something of a creative, non-standard, and ultimately under-recognised application to succeed,214 in principle the Lanham Act appears capable of serving as a avenue for the enforcement of moral rights within the United States. Notably, however, the Act was originally only intended to provide trademark protection. This dual applicability provides an initial reason to suspect that moral rights ought to be recognised as existing in relation to property beyond objects that are copyrightable. This is a notion worth exploring in some depth. Indeed, insofar as moral rights represent a right of attribution in relation to copyrightable objects, this right only barely, if at all, extends beyond the quite standard expectations of attribution that arise in relation to any act of labour. That is, social demand for truth and accuracy in the attribution of labour is not typically contingent on a consideration of what sorts of property the labour produces. Consequently, moral rights can be expected to extend not just beyond copyright, but beyond all forms of traditional IP.

This is reflected in the Lanham Act itself, as can be illustrated through considering comparative (potential) applications of the Act to different objects. The first and most obvious comparison to be made is between the application of the Lanham Act to the domains of copyright and trademark. There are many important similarities between copyright law and trademark law, and these similarities are of an essentially non-economic variety that align largely with the properties specific to moral rights. Dissimilar to an institution like the patent institution, wherein formal application and registration is required in order to establish legal protections over an idea, within the United States both copyrights

214 Kwall argues, convincingly, that the Lanham Act remains deplorably inadequate as a substitute for dedicated moral rights legislation within the United States precisely because of its invisibility to moral rights holders as an avenue for the protection of their rights. See: Kwall, above n 206.
and trademark rights are attained automatically upon the publication of an object, or the use of a mark, respectively.\textsuperscript{215} Also like copyright, trademark protection serves both the individualistic interests of trademark holders (by guarding their brand recognition, and the reputation that accompanies their brand) as well as the public interest (by protecting consumers against confusion and deception). The overall purpose of trademark is to guarantee that the provenance of a product remains clearly apparent to the public, to ensure that there are clear lines of accountability for the product’s quality.

Of course, differences also exist between the way in which copyrights and trademarks function. Trademarks are used exclusively in relation to commerce, and so might seem inherently economic by nature; it has been shown that copyright, although it often protects objects that are commercially profitable, is just as able to be employed (when it comes to moral rights) in the protection of non-commercially valuable products. The perceived commercial nature of trademarks has contributed to their being deemed saleable, and they can be transferred in isolation or as part of the sale of a business. This is significant because it is equivalent to a transfer of reputation, honour, and implied accountability, which runs contrary to the preservation of truth and accuracy. In fact, the sale of a trademark independently of the ‘underlying goodwill,’ which consists of the reputational value of the name-recognition the trademark brings, is termed an assignment in gross, and invalidates the entire transferral of the mark. It may be that the transferral of trademarks is subsequently indefensible; though it is likely that differences between corporate identities and individual human identities may require this transferability as a matter of pragmatism.\textsuperscript{216} In either

\textsuperscript{215} The case of trademarks within the US, the automatic protection occurs at the state level only, with formal registration required in order to expand the exclusivity of the mark such that it extends nationwide. This is not fundamentally a dissimilarity between copyright and trademark, however, because it reflects the observation of the natural limits to the breadth of trademark recognition. It may be likely for residents of a particular state to be confused and misled by the operation of an organisation under a mark similar to one that is already in use in that area. It is also not unreasonable to expect the second operator to be aware of the existing mark, and to hold them accountable if they do not become so before operating their own mark. By comparison, residents are likely to be unaware of a myriad of organisations operating in other states, rendering them immune to confusing them with other organisations operating under similar marks. The extent of the common law thereby tracks the natural communicative reach of the mark within a market, as is right. This is further reinforced by the fact that an operator operating in one state, although not expected or required to be aware of existing marks that are used only in other states, is nevertheless not permitted to use a mark similar to a mark used interstate if the operator does somehow have knowledge of that mark. See also: United States Patent and Trademark Office, Trademark FAQs (5 Aug 2014) <https://www.uspto.gov/learning-and-resources/trademark-faqs>.

\textsuperscript{216} The complexity arises due to the fluidity of corporate identities as compared to personal identities. When it comes to corporate identities, it seems unviable to stipulate that persistent trademarks must track persistent corporate bodies, such that any personnel change (such as a single employee leaving the company) would mandate a change in associated marks. At the same time, we might imagine a Ship of Theseus situation wherein all the original members of Firm Alpha leave, one by one, to take up positions at Firm Omega – a competitor in the same industry. Eventually, all of those members (and only those members) come to comprise the entire personnel (and in the same configuration of roles) as they once did at Firm Alpha. We might ask which mark it would be right for each of the firms to operate under, and whether it would change things had the members made a single coordinated transfer as a group. Determining deceptiveness should be the guiding principle in answering these questions, and part of that requires determining baseline expectations that clients have regarding the consistency or fluidity or corporate structures. Determining appropriate responses to these problems is well beyond the scope of the present account, however.
case, the fundamental purpose for which trademark regimes are established is to preserve clear communication regarding the provenance of objects. This means they can be understood as a species of moral rights.

As well as trademarks, moral rights ought to be acknowledged in relation to patent protection and justifiably patentable objects, too. Indeed, insofar as the Lanham Act has the capacity to satisfy the need for legislated moral rights protection in relation to copyright, it appears equally sufficient as a means of providing it in relation to patents. More than sufficient, in fact, it appears necessary.

Patent protection has what appears to be an initial advantage when it comes to successfully integrating moral rights, because although (like trademarks) patents might be thought of as inherently economic in nature, the protection of moral rights is in fact heavily tied up in the requirements that need to be met before a patent is granted. For example, attribution is guaranteed by the requirement that patent applicants be named on the patent application. Moreover, an individual may only enter a patent application on behalf of themselves, and only the true inventor of an object may file for a patent over that invention. If a person was discovered to have been granted a patent which protects an object that they had not themselves invented, then, even if the true inventor was complicit in and consented to the application being made, this would invalidate the patent.

Furthermore, because there is a public register upon which successful patent applications are recorded, the way in which the original conception of the inventive idea was first publicly presented is maintained and can be perpetually accessed. This prevents the original expression of a patented idea from being altered and deformed through its inaccurate duplication – or it at least provides an authoritative avenue through which to verify the (in)accuracy of any representation that is constructed. This means that an inventor’s moral right to have their name attributed to their idea (which is faithfully-represented in a patent) is protected as soon as they patent it.

Nevertheless, this incidental protection of inventors’ moral rights, via their entwinement with the economic processes of the patent system, does not provide sufficient protection in isolation. Not only does the patent system’s success in protecting moral rights occur absent of any explicit account of the values being protected, but, in isolation, it also excludes from protection any inventor who does not seek patent protection on their inventions. It thereby unduly treats moral rights as ancillary rights that are contingent on the assertion of statutory economic rights. Moral rights must instead be acknowledged to apply independently of
economic rights, including in relation to inventors who do not exercise the option to patent their inventions. In such cases, a non-patenting inventor could (again, at least theoretically) be expected to find redress through the Lanham Act (and perhaps too through other legislation such as defamation law).

More broadly still, it is evident that everyday instances of productive behaviour must be equally protected, even where they do not at all intersect with traditional IP structures such as copyright; patent; or trademark. For example, a landscaper who builds an ordinary retaining wall or fence, under contract to a client, must be taken to have the same exclusive right to have the product of their labour attributed to them. They are the producer of a product in just the same way as an author or inventor is. Not only is this an individual right that serves the landscaper, but because contractors and clients may base their hiring decisions on a survey of previous work, this attribution plays an essential social function. We ought to expect, on appeal to the values of truth and accountability, that a person who labours to construct a wall or fence to be afforded the ability (and in some cases, the obligation) to claim responsibility for the labour they perform. Fortunately, the Lanham Act (and other legislation) protects these kinds of true claims about facts of the word while prohibiting competing claims that are made in bad faith.

As has thus been demonstrated, moral rights must be understood to arise in relation not only to copyrightable objects, but also to all objects produced via labour. This presents an ostensible problem, since (in Chapter 5) it was demonstrated that economic rights cannot provide a basis for the principled differentiation between copyrightable and patentable objects. If moral rights were also shown provide a basis for differentiating between separate categories of object (because they applied equally to all objects) then no principled distinction between copyright and patent could exist. On the contrary, however, although many moral rights apply equally in the case of copyrightable and non-copyrightable objects, the second protection cited in the Berne Convention can be shown to apply uniquely to copyrightable objects. That is, the protection against the distortion, mutilation, or other modification of an author’s work can be shown to attach appropriately to the defining feature of copyrightable objects – being their second-personal communicativeness.

### 8.3 Non-Modifiability as a Moral Right Unique to Copyright

In Section 7.3.3, the comparative nature of copyrightable and patentable objects was considered in relation to their respective modifiability. Although the Berne Convention’s
provision against modification is slightly too narrow (because it vests protection only in terms of honour and reputation, which is insufficiently basic), a preclusion against modification, which applies uniquely to correctly copyrightable objects, is appropriate. In other important ways, however, the appropriate scope of this moral right may be narrower than its proponents anticipate. This is because a determination must be made as to what constitutes the modification of an object, as compared to the derivative production of a distinct (albeit similar) object.

An example is useful to illustrate the function of this component of moral rights legislation. The case of Alexander Calder – a United States artist – is illustrative. In 1958, Calder produced the artwork Pittsburgh, which took the form of a black and white mobile constructed from aluminium and iron (two metals taken to be iconic of the city of Pittsburgh). Pittsburgh was purchased by a private collector, and it was donated to be installed at Allegheny County airport, Pittsburgh. In the wake of subsequent renovations that were made to the airport, however, authorities there opted to modify the mobile. First, they immobilised the individual parts of the mobile (which were originally able to move independently), before attaching a motor to the reworked object to provide movement to the artwork as a whole. In addition, the airport resurfaced the new object in the colours green and gold – covering up the original black and white – for the purpose of integrating the piece into the new aesthetic that had been achieved during the airport’s renovation.217

Calder objected to the implementation of these changes. However, the installation and modification of his work occurred prior to the United States becoming a signatory to the Berne Convention, and prior to the implementation of VARA. As such, no legislative basis existed on which Calder could expect to have his objection legally sustained, and so he was dissuaded from pursuing a legal case regarding the matter.218 Under the provision of the Berne Convention, however, this would have constituted a moral rights offence.

To reiterate the point made in Section 7.3.3, this is importantly different to the way in which a patented object is treated under the law. Had Pittsburgh airport installed a useful mechanical device of some kind, which had been designed to specifications outlined in a patent (which the airport had appropriately paid for the right to use), then the airport authority’s decision to later amend the design of that machine, to make it better serve the needs of the airport, would not constitute a moral rights offence (nor an economic patent violation). Although the airport authority may not otherwise have been permitted to

218 Ibid.
implement the altered mechanical design without first purchasing the original patent rights (i.e. if the altered design was not sufficiently different when compared to the original patented design), the securing of the right to use the patented design would also entail the right to use similar, but altered, designs.

This different treatment of Calder’s mobile installation and patented utilitarian designs reflects the second-personal communicativeness of Calder’s work. Notice that this indexation to second-personal communication is not contingent on any affect that modification has on a communicator’s honour or reputation. Although a large cause for Calder’s objection to the modification of *Pittsburgh* was that he considered the artistic vision it represented to be inferior to his own, that does not represent a necessary basis for his objection. This can be seen by examining the logically antecedent case, which, although counterfactual, was theoretically possible. That is, we can imagine that the case instead involved Calder originally constructing *Pittsburgh* in its adjoined, motorised, and green and gold form. In this case, had the airport authority modified the artwork into its segmented, non-motorised, and black and white form, then this should be expected to represent a benefit to Calder’s honour and reputation (if he was correct in his belief that this form of the artwork reflected more positively on him).

Nevertheless, it should be expected that Calder, in the counterfactual instance, should still have the right to object to the unauthorised modification. This, importantly, is not contingent on a notion of ambiguity or subjectivity as to which version of the artwork truly reflected more positively upon Calder. First, the assertion of an author’s right against modification of their work is not contingent on the author being able to demonstrate that the modified version reflects less positively upon them than their original version. Second, even if such a demonstration of damage to one’s honour or reputation was required (similar to the requirement to demonstrate material damage in bringing forward a successful defamation case), the demonstrability of that fact in one of the cases would logically preclude the demonstration of the same fact in the antecedent example.

Moreover, additional cases can be imagined wherein the original author of a work objects to its subsequent (unauthorised) modification, despite openly acknowledging that they expect their reputation to benefit from the modification. For example, an artist may have created a potentially controversial work of art, which, although they believe it to communicate an important message, they also recognise shall bring them into general disrepute. If the curator of an exhibit in which that artwork is to be showcased ultimately balks at exhibiting the object and modifies it so that it is less controversial and has more
mass appeal, then the artist could not object to that modification on the basis that they incurred damage to their honour or reputation. The artist could correctly, however, object to that modification as an undue corruption of a speech act. In modifying the object, the curator would be generating a second-personally communicative object that was not attributable, as a communication, to the original artist.

8.3.1 Offence Against Third Parties

It also important to note that, being offences against communication, muting offences negatively affect audiences as well as authors. This means that for the duration that audiences have a continuing interest in consuming second-personally communicative works, there exists a moral basis for preserving their original integrity. For example, despite Da Vinci having died approximately 500 years ago, it would still constitute a natural offence for an administrator at the Louvre to paint over or otherwise amend the *Mona Lisa* in a (misadvised) attempt to improve upon Da Vinci’s original artistic vision. While restorative work (to preserve Da Vinci’s vision) may be warranted, the impartation of a new artistic vision, which would corrupt Da Vinci’s (while it was still attributed to him) would be both an offence to Da Vinci and to his audience.

8.3.2 Modification of a Work vs Creation of Derivative Works

One final conceptual difficulty arises in relation to the application of a right against modification. That is, one must be able to distinguish between modification that simply corrupts an original communication attributable to an author, and the kind of modification that arises in the process of creating derivative works. This distinction is most clear in relation to one-of-a-kind objects like paintings. Painting over a portion of the original *Mona Lisa* in a misguided attempt to improve it, or amending a mural of Christ to cover his bare chest for modesty (as in the case of a work by Alfred Crimi in Rutgers Presbyterian),\(^{219}\) clearly involves an offence that involves an effective deletion of an original author’s artistic vision through the substitution of another author’s vision – without appropriately modifying the attribution of the work.

By comparison, the publication of a digital reproduction of the *Mona Lisa*, in which the original composition was recognisable, but had been digitally altered, would involve the modification of the *Mona Lisa* that would nevertheless leave the original artefact intact. In

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In this case, the original speech act captured in the *Mona Lisa* would be preserved, even though a subsequent speech act would have also been made. In this case, a distinction between the original speech act and the derivative speech act seems clear, such that the original has not been corrupted (independent of whether the derivative object is considered so similar as to constitute an economic copyright infringement). In this case, the attribution of the original and the attribution of the derivative could be separated and simultaneously maintained.

In real cases, however, the distinction between two objects is not necessarily as clear. Consider, for instance, the recent example involving the sculpture *Charging Bull*, located on New York’s Wall Street. Originally installed as a piece of guerrilla artwork by Arturo Di Modica in 1989, the 3.2 tonne bronze statue of a bull was placed in the financial district, intended to stand as a symbol of prosperity and strength. In 2017, however, a separate sculpture, created by Kristen Visbal under commission to State Street Global Advisors, was placed opposite *Charging Bull*. Visbal’s sculpture, called *Fearless Girl*, depicts a young girl, feet firmly planted and hand on hips, defiantly staring down (on account of its relative positioning) Di Modica’s sculpted bull. *Fearless Girl* is intended as a communication about gender equality and the place of women within the financial industry. Di Modica, however, considers *Fearless Girl* to have corrupted the artistic integrity of *Charging Bull*, rendering it a menace and a villain rather than a positive symbol.

There is no question that the meaning of *Fearless Girl*, as a speech act, is contingent on its positioning in relation to *Charging Bull*. In this sense it is a derivative work, and, moreover, a person seeing the two sculptures for the first time, with no background knowledge of their respective productions, might infer that they constitute a single object. Interpreted this way, the situation could be understood as one in which a single object has always existed in that location (originally Di Modica’s *Charging Bull*), which has subsequently been modified by Visbal.

On the other hand, however, unlike the previously considered cases which involved (for example) the direct application of paint to cover up and physically obscure an original object, *Charging Bull* can still be interpreted as a standalone object as well as a component of a second object that involves *Fearless Girl*. Interpreted this way, *Fearless Girl* can be understood as making a communication which is derived from and exists simultaneously

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221 Ibid.
to, but does not interfere with or preclude, the original communication made via *Charging Bull*. On this view, *Fearless Girl* can be understood in much the same way as any other artwork that comments on or criticises other artwork. This function of art is protected as a case of free expression, and when it is effective, the criticism or commentary may change public perception of the work being commented on. Outside of cases involving commentary that defames, authors have no moral rights securing their work against such commentary and criticism. Therefore, even if Visbal has changed the way *Charging Bull* is perceived, she has not violated any moral right of Di Modica’s if she has not falsely attributed either of their respective works.

Potential cases, similar in nature, can be imagined in relation to the book print industry. For example, consider a hypothetical case in which a publisher purchases the economic copyright to an author’s original novel, and prints and distributes 100 copies of it. Subsequently, imagine that the publisher makes several trivial changes, such as to the names of characters, but otherwise republishes the book under the publisher’s own name, and prints and distributes 500,000 copies of that ‘new’ derivative work. Such an action may or may not (because of the publisher’s having purchased the economic copyright to the original work) constitute an economic copyright offence, but that question would remain somewhat beside the point of the moral rights question. Although, like with the case of *Fearless Girl*, the publisher’s actions would (technically) preserve the speech act of the original author, and contribute a second independent speech act in addition. This should be understood as objectionable, however, in a way that *Fearless Girl* is not necessarily so.

To understand and be able to articulate what makes the previous example naturally objectionable, it is worth considering the protected status of parody within the United States. This serves as a useful analogue because works of parody are exempt from copyright protections, and the reason why that is appropriate can be indexed to the position they occupy as derivative communicative objects. That is, a work of parody only successfully functions as parody if it is appropriately contextualised as a derivative work by an audience sufficiently familiar with the original source of the derivation. Sometimes a parody will function to skewer an entire class of objects, such as through the humorous treatment of tropes common to a genre of work. At other times, however, a parody will target a single title, such as *The Lord of the Rings*, and attempt the same function specifically in relation to it. In either case, the parody relies on the audience’s prior familiarity with the relevant genre (or other class) or specific title.

In these cases, then, a successful derivative work of parody cannot be constructed where a
record of the original is not maintained (including details of its attribution). This is because authors rely on audiences to contextualise parodies within a broader knowledge of a specific prior communication or class of prior communications. This is not only true of parody, however. Returning to the hypothetical case of the objectionable publisher, publishing a derivative but (trivially) new object, we see that the application of the same standard is appropriate. That is, irrespective of whether an economic offence is committed, a moral rights offence is evident because the publisher’s derivative work, being (by design) so much more broadly distributed than the original work from which it was derived, cannot reasonably be expected to be understood *qua* the derivative work that it is. The speech act represented in such a derivative work could therefore not reasonably have its relevant second-personal qualities ascertained. The production of such a work would not only represent an offence against the author of the work from which it was derived, but also a natural deception offence against the audience of the work.

Finally, such deceptive cases must be considering against cases of what might be called honest (rather than deceptive) modifications of works – including one-of-a-kind works. Several cases of this kind are defended as artistically meritorious by Amy Adler in her paper ‘Against Moral Rights.’

Adler considers, for example, Rauschenberg’s erasure of a drawing by the revered artist Willem de Kooning. This erasure, which did not completely remove the original drawing but left only a faint impression of it to be seen, was subsequently presented and contextualised by Rauschenberg as a new work of art titled *Erased de Kooning Drawing*. Although certainly not a parody, Rauschenberg’s artwork nevertheless functions in a similar way – as an honestly attributed communication – because of the overt attribution of the original drawing as de Kooning’s work (and communication) and the *act of erasure* as Rauschenberg’s work and communication.

In a significant departure from existing moral rights regimes, I agree with Adler that (at least some) such acts of modification, where the nature and extent of the alterations are clearly demarcated and attributed to distinct author while a record of the original communication is accurately maintained and attributed to the original author, should not be considered moral rights offences. While there may be other social; cultural; or political reasons to object to the modification of important works (as there may be for objecting to the complete destruction of those works, when the preservation of other works is not considered important), these bases should not be confused as constituting moral rights bases. Indeed, antecedently, similarly social; cultural; or political reasons could lend weight

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223 Ibid., pp. 283–4.
against the preservation of artworks (again, contra existing moral rights regimes), as in the case (perhaps) of portraits and statutes of dictators or (in the United States) Civil-War era confederate leaders. Moral rights regimes ought to regard the preservation of attribution, and not the preservation of communication per se.

8.4 Implications for the Implementation of Copyright law

This reconceptualization of the moral right of non-modifiability as the defining protection to be afforded to correctly copyrightable objects has important implications for the broader implementation of copyright. In Section 6.4.2 it was shown that, on a physicalist conception of copyright, cross-media adaptations would not likely constitute copyright infringements, since they necessarily involved obviously distinct physical forms. Moreover, the presence of any non-physical similarity between such objects – such as specific plot devices or themes – could only be deemed to constitute an infringement on economic grounds, and only if it could be empirically shown that the prospect of derivative cross-media adaptations represented a disincentive to original production (which is unlikely). Copyright holders may be tempted to escape this concession (not wanting to relinquish their existing rights to control cross-media adaptation) by appeal to a non-physicalist account. However, given qualities of a non-physicalist account that have hereto been demonstrated to be appropriate, that manoeuvre cannot succeed without accepting significant additional consequences.

Reconsider the counterfactual case in which Sony produced its cinematic interpretation of Harry Potter without J.K. Rowling’s permission. By the time such filmic adaptations were made, the Harry Potter novels were sufficiently recognisable that the films could only have been perceived as derivative works. If Rowling’s name was not misleadingly used in association with the films, then no natural offence would have been committed in producing the films without her consent. No second-personally communicative work would have been misrepresented, and Rowling’s own novels would not have been modified by the existence of the derivative work. Once again, only the empirical economic matter could be used as a basis for deeming it an offence, and that basis would not be likely to succeed.

A detractor might object to this position by asserting that such unauthorised derivative works do in fact function to modify the original work. Only by giving control over adaptations, it might be thought, can an author be assured of having their work retain the integrity it needs to be appropriately interpreted as a second-personal communication. However, despite asserting the minimum required to sustain such a claim, this argument entails more than its proponents are likely to intend.
For example, one must recall that moral rights, being natural rights that pertain to the protection of truth and accuracy, apply perpetually. In addition, they function as protections to the public as well as to authors. Therefore, if one accepts that the only way to ensure that the communicative integrity of an author’s work is to have them control cross-media (and any other) adaptations of their work, then such adaptations could only ever be made during the lifetime of the author. If Rowling had died during the production of one of Sony’s *Harry Potter* films, for example, then production on that film would have to have ceased immediately. On this account, if development on the project had have continued without Rowling’s oversight, then this would have represented a risk to the integrity of her original work. This, in turn, would have presented a risk of offending against its public audience.

The consequence of this is critical, as it means accepting one of two conclusions:

1) Cross-media adaptation of a creative work is unlikely to reasonably constitute an offence (i.e. in that it could only be an offence for economic reasons, contingent on a disincentivising effect that is unlikely to be evidenced). Or;

2) Cross-media adaptations of a creative work, if they are not presided over by the original work’s author, represent too great of a risk against the integrity of the original object. This means that adaptations can only be permitted expressly by the author – while they are alive – and that the author must retain the right to veto such an adaptation at any point during its production, prior to its publication.

I endorse the former conceptualization, since it is much more consistent with the general economic function of copyright on the utilitarian account.

### 8.5 Conclusion

Although explicit moral rights legislation (where it exists) is indexed as a subsection of copyright law, most of the moral rights provisions which are extended under such legislation apply with equal force to uncopyrightable objects. Indeed, this observation amounts to the United States’ entire justification for not having general moral rights legislation, despite being a signatory to the Berne Convention. That is, such complaints can be handled under legislative avenues designed to protect uncopyrightable objects. However, one moral right – the right of non-modifiability – applies uniquely to second-personally communicative objects, and thus represents the only identifiable non-economic basis for the copyright-patent (and the broader copyright/non-copyright) divide.
Implementing both a system of economic copyright and moral rights protections, in view of the account provided in this chapter, requires radical changes to be made to existing copyright regimes. First, it is essential to abandon the individualistic focus of a predominantly ‘honour and reputation’ based account of moral rights, and to recognise the primary relevance moral rights have in relation to truth and accuracy. From that acknowledgement it follows that moral rights must be protected perpetually, since the importance of truth and accuracy extends beyond the author and to public audiences. Moreover, this extension continues past the death of authors, and independently of any economic rights they hold.

The role of the right of non-modifiability must also be understood to have fundamental implications for the implementation of copyright. If a non-physicalist account of copyright is to be preferred over a physicalist account, and the essential non-physicalist property unique to correctly copyrightable objects is understood to be their second-personal communicativeness, then the right to non-modifiability must be implemented as the measure of whether an object constitutes a legitimately derived work or an object that infringes against an original author’s natural right to authorial communication.

This measure can be set according (broadly) to one of two standards. On a liberal conception, the question of whether a derivative object is too like the original to be permissible would be left almost entirely to an economic calculation as to whether that degree of similarity, if it were universally permissible, would have a negative impact on the incentivisation of original production. The only exception to this would be in the consideration of cases wherein a trivially ‘original’ derivative object is (likely intentionally) afforded a broader circulation than the original, with the effect that it obscures the nature of the object qua a derivative object to the audience. If this standard is accepted, then at a minimum we should expect that cinematic adaptations of successful novels are not ordinarily considered to constitute infringements, even if they are unauthorised.

The second standard by which the right to non-modifiability could be applied is much more restrictive. By this standard, almost any derivative work would be regarded as a likely threat to the integrity of the original work, to such a degree that the development of derivative works could only justifiably occur at the express (and continuing) pleasure of the original object’s author. This would also entail that no derivative works could be produced after an author’s death, since that would offer no alleviation of the risk to integrity.
I advocate the adoption of the more liberal standard, since it better reflects the ordinary use of derivation that seems natural in creative processes. Whichever standard one endorses, however, a substantial reconceptualization of copyright necessarily follows. Copyright law needs to be reformulated with regard to both what objects are categorised as copyrightable and uncopyrightable, and how those respective classes are legally regarded and protected.
Chapter 9
A Just Construction of Copyright

9.1 Introduction

The construction of a just copyright regime requires an appreciation of several critical points of nuance. The objective of this chapter is to tie together those various points, which have been raised in previous Chapters, and to demonstrate the relationships between them. This shall serve to provide a holistic and unified positive account of copyright. Unlike historical attempts to locate a justification for copyright, which have overwhelmingly involved the post hoc defence of a preconceived formulation of copyright, the intention here is to determine the principled based for copyright first, and to derive an appropriate formulation of copyright founded on that. This should be expected to deliver a version of copyright that is markedly dissimilar to the version implemented in law today.

The most important distinction to draw in formulating a holistic account of copyright is the distinction between its economic and non-economic components. The predominant motivation driving copyright holders to pursue the continuation and expansion of copyright (in its current form) has been the security of financial and economic advantage. As a result, the focus placed on the economic function of copyright, both in philosophical theory and in the practical application of law, largely overwhelms the consideration of any other function copyright may appropriately have. It is essential, however, to differentiate between the function copyright has in establishing and protecting economic property rights, and the function copyright has in protecting natural moral rights.

Where moral rights are considered within copyright theory, and especially where they are implemented as a component of law, they receive a rather confused treatment. Proponents of expansive copyright often conflate the economic and moral-rights functions of copyright by attempting to attribute the natural quality of moral rights to the economic protections it provides. In this way, the natural uniqueness of copyrightable objects is inappropriately represented as establishing a reason to eschew appeals to consequentialist reasoning in determining what protections (and what durations of protection) are appropriate under copyright. On the other hand, the moral rights component of copyright is often intentionally minimized at law because the non-economic protections they establish can restrict the way that copyrightable objects can be used by copyright holders other than original authors (e.g.
Stephanie Plamondon Bair notes that scholars typically regard consequentialist and moral-rights accounts of copyright as being diametrically opposed, with the assumption being that the “two theories have little in common and are incompatible with one another.” Bair acknowledges that “a small subset of scholars” pursue a middle ground, and attempts herself to “reframe the debate by suggesting that the dichotomy between moral rights and utility is a false one.” However, these attempts to reconcile moral rights and consequentialism typically seek to converge the two accounts. For example, Bair argues that “when it comes to creation, the moral rights concern of fairness often is utility in a very real sense.”

By comparison, I argue for a reconciliation of consequentialist copyright and moral rights through a divergence of the two. It is not the case that copyright, to be justifiable, must either protect natural moral rights or that it must fulfil some economic utility function. Rather, copyright must be able to satisfy both an economic social utility function and provide adequate deontological protections against certain non-economic offences. Although it is plausible that the protection of moral rights contributes to the incentivisation of authorial production (e.g. by engendering a sense of fairness), it is inappropriate to reduce those rights to an instrumental component of a consequentialist calculation. The function of moral rights protections can only appropriately be conceived of as distinct from copyright’s utility function. Therefore, instead of conceiving of moral rights accounts as being positioned against utility accounts; and instead of conceiving of moral rights accounts as utility accounts, it is critical to the success of a justificatory account that copyright be conceived of as having two distinct but complimentary components.

9.2 A Paradox of Motivations and Principles

There has historically been an important tension between the principles espoused as the basis for expansionist copyright, and the motivations which proponents have for pursuing expansionist copyright. Overwhelmingly, the contestation about what copyright protections are appropriate (and, especially, of how long those protections should last) been driven by the recognition of the economic consequences that are contingent on those determinations. Copyright holders recognise the economic value of the monopolies they

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224 Bair, above n 151, p. 1487.
225 Ibid., p. 1499.
226 Ibid., p. 1501.
227 Ibid.
are granted, and are thus motivated to argue for the establishment of generous monopoly conditions. Opponents of expansionist copyright, by comparison, recognise the negative impact that monopolies have upon an economy, and are therefore motivated to restrict monopolies to the extent that they are not socially valuable.

To strengthen their case against anti-monopoly economic arguments, proponents of copyright expansion have been motivated to pursue non-economic justifications of copyright. These arguments are intended to be logically prior to considerations of economic consequences. The benefit to copyright holders, if such an approach succeeds, is that it presents the economic monopolies granted under copyright as incidentally necessary, but not the primary objective of copyright regimes. This is an attempt to situate the economic consequences of copyright beyond the scope of fair criticism.

Importantly, there are two kinds of natural law arguments that proponents of expansive copyright attempt. The first involves arguing that property rights are natural rights, and that this is as true in the case of copyright as it is in the case of traditional physical property. Other proponents, however, make the natural law case in terms of things like authorial integrity and personality rights. When it comes to natural property arguments, Bair is correct in her observation that natural law property accounts are mutually incompatible with consequentialist accounts of copyright as a system of statutory property. However, in the case of arguments which turn on notions of integrity or personality (for example), it is unclear why these notions would deliver economic property rights rather than non-economic integrity or personality rights.

Insofar as natural rights relating to integrity or personality are perpetual rights (or at least rights which persist for the span of a person’s natural life), pro-expansionist copyright proponents motived towards strong economic copyright protections rely on a conflation of those two components. That is, the implication is that if provisions for the protection of an author’s integrity or right of personality ought to exist in perpetuity, then so too (for some reason) must the author’s economic proprietary rights. As shall be shown, the claim regarding copyright as natural property rights cannot be sustained; and arguments regarding non-economic protections (of integrity or personality, for example) are logically independent to the question of economic copyright.
9.3 Failure of Natural Law in Economic Copyright

The Berne Convention prescribes that the minimum term for which economic copyrights must endure is the entire lifetime of a given work’s author, plus 70 years. The initial indexation of copyright to an author’s lifespan reflects the persistent perception that:

1) There is something intimately personal about acts of authorship; and
2) The existence of this intimately personal quality warrants that the protections afforded to authors, over their works, be conceived of as owed naturally to them – including economic protections.

For this notion to be affirmed, an account of the protections extended to authors under copyright – including an explanation of the natural rights those protections serve – would be required.

The most plausible basis for such an explanation is typically acknowledged to be a Lockean labour account of property. Ultimately, however, the Lockean account is unable to sustain such an explanation. Although Locke’s account of property successfully establishes a just basis for the recognition of natural economic rights (i.e. property rights) over tangible objects, and thus might be suspected of being able to sustain a case for the recognition of natural property rights in the form of copyright, key restrictions that are essential to Locke’s account prevent the extension of the account to intangible objects. Because intangible objects, including ideas, do not naturally exhaust when they are used, monopolising the use of an intangible object would standardly count as an offence against one or both Lockean provisos (the waste proviso and the ‘as good and as much’ proviso).

The Lockean labour account of property can be read very sensibly as an attempt to demonstrate the natural illegitimacy of economic monopolies. Locke takes it as his starting point that all (physical) objects of the world belong ‘in common’ to all people. While Locke is motivated to provide an account of the way in which this common claim can be pragmatically realised (and arrives at private property via labour as the appropriate mode), a consistent challenge intended to be addressed by his account is the question of how this can be done without enabling the exploitative concentration of essential resources among a small minority. This makes it difficult to extract a positive account of copyright from Lockean theory, since economic copyright inherently establishes monopolies. Nevertheless, the provision that Locke makes for social contracting, in his broader political philosophy, makes the Lockean position compatible with a positive account of copyright that is established on a social utility basis.
The standard social utility account of copyright is therefore as much as can be delivered via appeal to Locke when it comes to establishing a positive justification of copyright. Even though it would functionally create monopolies, and seemingly usher violations of the Lockean provisos, the establishment of economic copyright is compatible with Lockean property theory provided it serves the collective interests of a society. A Lockean theorist can therefore conceive of just copyright regimes as systems of agreement between individuals, who each recognise an equal claim ‘in common’ against certain objects (in this case, ideas), and who intended to ensure that they best coordinate their actions to collectively realise the maximum potential value of the objects. The question of what social arrangement best achieves this outcome is an empirical one, but any protections agreed upon in this manner shall always be statutory, rather than natural.

9.4 Inadequacy of the Social Utility Account

Although this means that the consequentialist account of economic copyright is compatible with Lockean natural law theory, this still only addresses one of the two functions of copyright. Moreover, if the economic social utility function of copyright is taken to be its only appropriate function, then it becomes unclear why copyright and patent systems need to be conceived of as being distinct. Both the question of copyright’s distinctness from other IP protection regimes (especially patent regimes), as well as the impersonal nature of economic copyright provisions, give critics of the purely economic consequentialist approach to copyright a good basis upon which to mount an objection. These concerns can be met, and the objections overcome, but only via an expanded account of copyright which articulates its function in protecting non-economic moral rights. The two potential points of objection are worth considering more completely.

9.4.1 Indistinct Copyright

When James Madison observed, during the drafting of the United States Constitution, that Great Britain had affirmed the legitimacy of a system of monopolies (copyright) over creative works, he considered it natural that such a system ought to be replicable and applicable in the case of inventions as well. As a result, the provisions for copyright and patent regimes were introduced at the same time in the United States, and both systems were cited as being founded on the same principle. Madison, guided by what, unknown to him, was an already overturned judgement in Great Britain, mistakenly considered economic IP protection over contributions to ‘science’ and ‘the useful arts’ (i.e. copyrightable and patentable objects) to be warranted by natural law. Nevertheless,
Madison’s broader claim – that if IP protections are appropriate in the case of creative works, then they ought to be appropriate in the case of inventive works – can be sustained when an appropriate conception of statutory IP is affirmed.

The historical development of copyright in Britain, insofar as it established a system designed to only protect a specific class of objects, coloured the development of IP in the United States. Although Madison was correct to question the disparity inherent in IP protections being extended to artistic objects but not to inventive objects, the perception remained that such an extension would take the form of a new system distinct from copyright. However, were the consequentialist economic account of copyright correct, and if it represented a complete account, then it would not be clear why any distinction between copyright and other classes of IP protection (e.g. patent) would be necessary. Disregarding the respective historical developments of the copyright and patent systems, and approaching the cases from first principles, the consequentialist justification based on the incentivisation effect of IP would seemingly apply equally to artistic objects and inventive objects. What need, then, could there be to treat them under different systems?

One reason that a consequentialist might have to protect certain objects differently than other objects, while still protecting them under the broader umbrella of IP, would be if it was expected that certain objects involved greater investment of labour to produce or would take longer to deliver a worthwhile return on investment. The division of copyright and patent (and the difference in their comparative 70-year and 20-year protection periods) might be justified, for example, if it could be shown that the creation of copyrighted works required a greater up-front investment; or could otherwise only deliver a motivational return on investment over a longer term, when compared to patentable objects. This sensitivity to differences in the minimum level of protection required to incentivise the creation of different types of objects must surely be considered a boon to the consequentialist concerned with capturing maximum utility from an IP system (or combination of IP systems). However, there are two striking challenges to this characterisation of the relationship between copyright and patent.

The first challenge in justifying the existing copyright-patent divide, on appeal to the economic consequentialist account, is an empirical one. Although it is ultimately an economic question, and thus a conclusive account is not provided here, there is at least a strong initial reason to think that copyrightable objects do not, in general, require a more substantial initial investment or take a longer time to generate a meaningful return on investment compared to patentable objects. If anything, one might expect that this would
trend oppositely. As demanding as it may be to write a novel, for instance, one would expect the research, development, testing, and production that goes into bringing an original pharmaceutical to market to be significantly more demanding in terms of time; initial financial outlay; and overall labour. If this were born out evidentially, however, IP proponents may still be expected to resist the categorisation of new pharmaceuticals as copyrightable objects.

The second challenge, which is largely a conceptual generalisation of the previous challenge, is that the distinction between creative objects and inventive objects must seem remarkably arbitrary to the consequentialist proponent of IP. Even if the appropriateness of that distinction were able to be empirically supported, it would seem peculiar to think that it represented the only such point of distinction. It is already the case that a non-standard patent duration is awarded in the case of pharmaceutical objects, for example, which is intended to reflect unique qualities of the pharmaceutical industry, and it has been argued that software should be treated uniquely because the nature of the industry is such that “the product cycles are short, the database of software patents is impossible to search, and software lives and dies on its interoperability with other software.”

A similar argument could plausibly be constructed in relation to various media forms protected under copyright. For example, the financial success or failure of commercial films is typically considered to have been determined within the first weeks of commercial release. If a film has a ‘bad opening weekend’ it is popularly deemed unsuccessful; the consideration is never afforded that the film may realise a profitable resurgence a decade later. One might wonder how a consequentialist account of IP could possibly endorse a 70-year term of protection over objects whose commercial viability is decided over a matter of days, even if such a term was appropriate in the case of other (ostensibly similar) objects. The copyright-patent divide, even if defensible on the consequentialist model of IP, cannot be considered sufficiently nuanced to be the only appropriate basis for differing terms of protection for different kinds of objects.

If IP protections were being implemented for the first time (without the influence of the historical British or United States experience), and if the social utility account was taken to provide the entire justificatory basis of that implementation, then it would be reasonable to expect that the protection of creative objects and the protection of inventive objects to be handled under the same system. Within that system, it might be appropriate for different

objects to be afforded different terms of protection, depending on the specific conditions which might affect the difficulty of incentivising people towards their production. However, such differences in the terms of protection should not be expected to be established based on the creative or inventive nature of an object alone. Insofar as a broad distinction between copyright and patent is appropriate, it must be appropriate on the basis of some non-consequentialist basis.

9.4.2 Indexation to the Author’s Life

The second potential point of objection to the consequentialist social utility account of copyright has to do with the intuitive indexation of copyright to the lifespan of an object’s author. Moreover, it could be asserted that this indexation is naturally appropriate because it reflects an inherently personal connection that exists between authors and their creations, which is not present between other creators (e.g. inventors or builders) and their creations. The argument would proceed that, since this reflects a natural quality of copyrightable objects, and the indexation of protection to the author’s lifespan is therefore naturally appropriate, it would be wrong to think that statutory provisions can be established on a consequentialist account which would undercut or supersede those naturally appropriate protections.

Since this poses a meaningful difference between copyrightable objects and patentable objects, and since this difference is not accounted for in a purely economic account, it requires something more than the social utility account to adequately explain. Although it was demonstrated that a labour account of property could not successfully account for the natural protections that are owed in relation to copyrightable objects, this does not mean that there is no natural law account capable of succeeding in that capacity. At the same time, given that this construction is to be undertaken uninfluenced by the historical development of copyright and patent, it should not be expected that the determination of what is copyrightable and what is patentable, according to a defensible natural account, will accord with the categorisations that exist today.

9.5 Statutory Economic Rights are Correct, but not Complete

Correctly conceived of, these objections to the social utility account represent criticisms of the completeness of consequentialist accounts that justify purely statutory copyright. Insofar as the function of copyright is economic, such consequentialist accounts are correct; the contention is over whether copyright’s function ought to only be economic. This marks
a departure from the traditional framing of debate, in which the issue of whether copyright is of a (statutory) economic or (natural) non-economic character is presented as strictly dichotomous. One reason that the social utility account, despite being correct, persistently fails to enjoy broad universal traction, is because it addresses only one of the necessary functions of copyright. Although proponents who argue for the extension of a traditional labour-based property account to intangible objects (to demonstrate the natural non-economic quality of copyright) are mistaken in the approach they take, the formulation of a complete account of copyright requires that their concerns be addressed via an alternative explanation.

9.6 Moral Rights Compliment and Complete the Economic Account

The provision of moral rights protections within copyright, alongside the statutory economic protections designed to deliver social utility, presents a viable avenue toward the development of a complete account of IP. The inclusion of moral rights provisions in an account of copyrightvaluably compliments the social utility account in two main ways. First, moral rights are often deeply personal rights. This quality means that it is often intuitive to index the protection of moral rights to the lifespan of the rightsholder. Second, the copyright-patent divide can be sustained based on the recognition of a moral right which applies only in relation to correctly copyrightable objects. That right is the right that an author has to the fidelity of their work, whenever that work is copied.

Before each of these contributions is considered in more depth, it is worth noting some features of the general interplay between moral rights and economic copyright. Moral rights, being natural rights, are logically prior to, and therefore must ordinarily supersede, statutory economic rights. The only way this can be excepted if social contract provisions can allowably overturn the natural moral rights provisions (by appeal to the collective social benefit that such an overturning would achieve), as in the case of natural property rights pertaining to (potential) intangible objects being overturned to help incentivise the actualisation of those objects in the first place. The way in which moral rights pertain specifically to truth and accuracy (c.f. property rights, for example) means that it should be expected that no such exception ought to apply to them.

The reason that rights pertaining to the protection of truth and accuracy should be expected to be immune to social contraction is because any contract intended to solidify a collective agreement to regard something untrue or inaccurate as true or accurate would be self-defeating. A collective agreement to ignore something true, and to accept as true something
untrue, must necessarily be predicated on each of the contracted individuals having knowledge of the deception – in which case the deception ceases to function. Moreover, truth and accuracy are natural qualities, and could not be altered via fiat even if it would (somehow) be socially beneficial to do so. Given the overwhelmingly complimentary nature of implementing a moral rights component in addition to the statutory economic component of copyright, the two main advantages of the moral rights component are worth considering.

9.6.1 Intuitive Personal Gap

The implementation of moral rights protections into an account of copyright contributes a recognition of the intimately personal nature of artistic endeavours. In addition, moral rights legislation assists in preserving the truth and accuracy of attribution claims which are particularly important because of this personal connection. Correct attribution is acknowledged in existing moral rights legislation to be critically important to artistic creators’ honour and reputation. Drawing upon the reasoning used in other areas of legislation concerned primarily with the preservation of honour and reputation, this can be shown to provide an initial reason for indexing moral rights to the life of an author.

The closest legislative analogue to moral rights, in terms of its preoccupation with the protection of honour and reputation, is defamation law. This similarity is so pronounced that the Congress of the United States considered that dedicated domestic moral rights legislation was unnecessary, largely because offences against moral rights could be effectively dealt with through the enforcement of defamation law. A prominent limitation of defamation law, however, is that an action which would otherwise be defamatory cannot be considered an offence if it is directed at a deceased individual, since the dead cannot be victims of damaged honour or reputation. By the application of the same reasoning, then, if moral rights elicited their importance solely from the importance they have in relation to honour and reputation, it would be appropriate that they expire upon a creator’s death.

Although the conception of moral rights as primarily functioning to protect honour and reputation would contribute to satisfying the intuitive desire to index copyright protection to the lifespan of authors, it is nevertheless vulnerable to other significant criticisms. Particularly, because personal honour and personal reputation pertain to specific individuals, conceiving of moral rights in this way increases the risk them being considered inherently individualistic rights. That is, if the moral rights which I am due are intended

229 Berne Convention for the Protection of Literary and Artistic Works, above n 204.
only to protect *my* honour and *my* reputation, then it would be natural to think that their enforcement ought to occur at *my* discretion. This notion is especially enforced when moral rights are categorised under the umbrella of intellectual *property* rights, since property rights are individualistic rights which can be transferred or waived at the discretion of the relevant rightsholder.

Contrary to this conception, the fundamental function of moral rights is more basic than the protection of honour and reputation. The fundamental function of moral rights is to guarantee truth and accuracy. Since the true and accurate attribution of authorship is of special importance to the honour and reputation of authors, the protection of individuals’ honour and reputation is one of the most important consequences of enforcing moral rights. Notice, however, that moral rights ought to only guarantee the preservation of a reputation that is deserved (i.e. only where honour and reputation are derived from a true and accurate record of events). The false attribution of an acclaimed artwork (to an artist not responsible for its production) must be considered a moral rights offence even if (and perhaps especially if) that attribution improves the reputation of the falsely attributed author. This is true even if the attribution is endorsed by the actual creator.

The indexation of moral rights to the lifespan of authors is therefore fraught, since the importance of true and accurate attribution persists beyond the death of any given author (c.f. that author’s honour and reputation). While moral rights may not, therefore, ultimately satisfy the traditional desire to index copyright protection to the lifespan of an author, the critical point to notice is that the argument which leads to this determination contends with moral rights as natural, deontic rights. This makes the argument much better able to inform intuitions to do with the indexation of copyright protections (compared to the purely economic consequentialist account), since it directly contends with the question of what deontic function they ought to serve. This represents a marked improvement over dismissing natural law copyright out of hand, on the basis that they serve a non-consequentialist function.

9.6.2 Distinct Copyright

The implementation of moral rights as a complimentary component of copyright, in addition to the economic consequentialist component, has the further advantage of serving as a principled basis for the establishment of distinct copyright and patent regimes. Under a pure social utility account, incentivising the creation of socially valuable intangible objects need not be achieved by different means (i.e. different provisions) simply due to
some intangible objects being ‘artistic’ and others ‘inventive.’ While different protection durations may be justified on a case by case basis, due to differences in the degree of difficulty or cost of investment required to produce specific intangible objects, there is no initial reason to expect these differences in difficulty or cost to correlate with the present copyright-patent divide.

Through a consideration of moral rights, however, a copyright-patent distinction can be defended. This might not be immediately apparent, since many moral rights ought to be taken to apply equally to both copyrightable and uncopyrightable (including patentable) objects. For example, true and accurate attribution should be asserted in relation to all objects, whether artworks; inventions; or ordinary physical objects. One moral right, however, applies uniquely to a certain kind of object that is typically considered copyrightable.

The right to fidelity in one’s work – that is, the right to have one’s work preserved against alteration, even after the economic sale of that work – is a moral right which applies uniquely to those communicative objects that can only be sensibly interpreted as the product of a specific (known or unknown) author. Because the nature of these second personal communicative objects is inherently contingent on the respective identities to which they are attributed, the truth and accuracy of those attributions is essential to the integrity of the objects themselves, since the attributions form a constitutive part of what the objects are. Antecedently, any alteration of a second personal communicative object, which changes what the object is, amounts to an interference against a speech act. The social importance of speech acts – especially those fixed in persistent physical states – makes this form of interference particularly egregious.

9.7 Radical Redefinition of the Scope of Copyright

Although an appropriate incorporation of moral rights into an account of IP delivers a justifiable basis for establishing copyright and patent as distinct systems, it does not enable a justification of either of those systems in their current forms. It is clear, upon review, that the categorisation of objects as either copyrightable or patentable does not consistently reflect the second personal communicativeness of those objects. Adherence to the principled account of copyright outlined herein would therefore require a radical redefinition of copyright’s scope.

Certain presently-copyrightable objects, such as maps and reference books, communicate
information without being second-personally communicative. Such objects serve a purely utilitarian function, and the information communicated through them can be sensibly digested without reference to the identity of a relevant author. This acknowledgement of the appropriate role of moral rights in an account of copyright is particularly useful in informing the treatment of newly emerging classes of object, such as computer software and code. Rather than attempting to account for the inclusion of all software as either copyrightable or patentable, the approach endorsed here enables a principled basis for determining the copyright or patent eligibility of any specific instance of computer software, without having to categorise all software in the same way. A utilitarian piece of software, such as an operating system, can be categorised as patentable, while code that contributes narratively rich content to a computer game may be categorised as copyrightable due to the way in which it situates the end user as an audience of deliberate communication.

A final point is worth reiterating in relation to the radical recategorization of objects as copyrightable or patentable: despite the otherwise consequentialist justification for IP systems (as vessels for incentivising the production of socially valuable intangible objects), the categorisation of an object as copyrightable rather than patentable, or vice versa, should not bear on the economic protections afforded to that object. The only legal impact that categorisation should have, is in determining whether fidelity must be maintained throughout the use and duplication of the object.

9.8 Appropriate Provisions Under a Just Conception of Copyright

Copyright ought to provide economic monopolies to creators of second-personally communicative works. The purpose of providing such monopolies should be to incentivise the production of socially valuable works. This is achieved through temporary monopolies because monopolisation prevents free-riding competitors from driving down prices in a way that would make original production prohibitively costly. Because the justification of economic copyright is therefore to make socially valuable objects socially accessible, the duration of the monopolies should be as tightly constrained as possible (while still fulfilling their incentivising function), because monopolies that artificially inflate prices also thereby restrict the ability for consumers to access those objects.

Determining the minimum monopoly term capable of providing the requisite incentivising function of copyright must be undertaken as an empirical economic task. Although I have not attempted to make that determination here, it has been suggested that an economic
The breadth of economic copyright protection should also be determined based on incentivisation. That is, whether a derivative object infringes copyright ought to be determined by consideration of whether, had the original author anticipated the derivative being legal, they would still have partaken in the production of the original. This means that direct copies and trivially different derivations would be prohibited, while things like cross-media adaptations of an original work should be expected to be permitted.

In addition to being subject to economic protections, second-personally communicative objects ought to be uniquely regarded as unmodifiable objects. This means that, whereas patented designs can be altered by anyone who subsequently purchases the relevant patent rights, someone who purchases the rights to reproduce a second-personally communicative object must not be permitted to make alterations to it. Moreover, this ought to represent the central defining feature of copyright. Whereas different economic provisions might be appropriate due to different economic conditions within specific industries (to be determined empirically), non-modifiability represents a moral right which must be understood to apply uniformly to all copyrightable object.

In addition, although the non-modifiability requirement is particularly important for the fair preservation of an author’s honour and reputation, it reflects a broader and more basic concern regard that must be held for the preservation of truth and accuracy. It follows that, because the preservation of truth and accuracy is important to audiences of second-personally communicative objects as well as to authors, this right must be considered to persist perpetually. The term of an author’s right of non-modifiability cannot be restricted by being indexed to the lifespan of the author.

One final point of difference between copyright and patent protection, which exists today, should also be preserved. Whereas patent protection ought to be contingent on an inventor’s compliance with an application process, copyright protection ought to apply automatically to second-personally communicative objects. The automatic applicability of copyright is appropriate because of the uniquely realisable quality of those objects. Because inventions are multiply realisable, meaning that it is feasible that different people could arrive at the same inventive objects independently, it is necessary to establish a centralised measure for determining who achieves such realisation first. By comparison, correctly copyrightable objects could only feasibly be realised by specific authors, and as such the demonstration

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230 Productivity Commission, above n 95, pp. 130-131.
of one’s being the legitimate author of an object can be more easily established after the fact.
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