
2016

"Enough and as Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine

Alexander D. Northover

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Alexander D. Northover, *"Enough and as Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine*, 65 Emory L. Rev. 1363 (2016).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol65/iss5/3>

This Comment is brought to you for free and open access by Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

“ENOUGH AND AS GOOD” IN THE INTELLECTUAL COMMONS: A LOCKEAN THEORY OF COPYRIGHT AND THE MERGER DOCTRINE

ABSTRACT

Embedded in our national identity, the right to reap the fruit of one’s labor defines the quintessential American Dream. This ownership right seems so intuitively obvious that it needs no logical explanation, and thus John Locke’s foundational theory of property rights is often misinterpreted from the start. Locke’s labor theory of acquisition has perpetuated a kind of philosophical circuit split among scholars, relegating his ideas to a realm of partisan politics. These misinterpretations are unfortunate because, when properly applied, Locke’s property theory holds the promise of resolving complex issues in copyright law and theory.

In the tradition of Locke’s contextualist interpreters, this Comment examines Locke’s philosophy and its context with the aim of describing a theory of Lockean copyright that is compatible with the basic tenets of American copyright law. Because the Lockean copyright theory offered here accounts for both procedural and consequential goods, it has stronger prescriptive power than the current utilitarian model and can do more work. Also, because Lockean duties lend well to bright-line rulemaking, applying Lockean thinking to legal analysis can streamline litigation. As an example of Locke’s cash value to copyright law, this Comment expounds upon his thoughts on the natural law duties of property owners and the state’s role in mitigating transaction costs of private ownership to assign burdens of proof at trial. This framework is utilized to outline a potential solution to the circuit split over whether the merger doctrine should apply during the copyrightability stage or the infringement stage of a copyright infringement lawsuit.

Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the *metaphysics of the law*, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.

—Justice Joseph Story¹

INTRODUCTION

Although the test for copyright infringement seems simple enough on paper,² Justice Story's observation that intellectual property (IP) distinctions approach "the metaphysics of the law"³ forecasted the storm of confusing philosophical conjecture, internal contradictions, and circuit splits that plagues copyright law today.⁴ Although copyright law is widely considered a statutory creation, some scholars attribute this doctrinal confusion to the constitutionally enshrined foundation of intellectual property law: utilitarianism.⁵ Unfortunately, the absolutely objective perspective required to carry out the utilitarian balancing calculus of the Copyright Clause is not a position that real-life judges can occupy.⁶

This Comment argues that applying John Locke's theory of property rights to copyright law can resolve much of the doctrinal mess. Rather than engage in ad hoc balancing of the public welfare against private interests in a utilitarian framework, Locke's property theory—imposing rule-based duties on the property owner at the outset of ownership—serves underlying utilitarian ends.⁷

¹ *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (emphasis added).

² A claimant suing for copyright infringement must establish (1) ownership of a valid copyright (referred to as the copyrightability stage) and (2) that the defendant actually copied protectable elements of that work (referred to as the infringement stage). See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir. 2004). "If no direct evidence of copying is available, a claimant may establish this element by showing that the defendant had access to the copyrighted work and that the copyrighted work and the allegedly copied work are substantially similar," to which the defendant may raise various affirmative defenses. See *id.*

³ *Folsom*, 9 F. Cas. at 344.

⁴ Summing up academia's discontent for the ineptitude of contemporary copyright law, one scholar calls copyright law "a swollen barnacle-encrusted collection of incomprehensible prose" and "an obese Frankensteinian monster." Terry Hart, *Copyright Reform Step Zero*, 19 INFO. & COMM'NS TECH. L., 147, 148 (2010) (citation omitted). Esteemed Professor David Nimmer has described Title 17 (the Copyright Act) as consisting of "interminable pages of opaque, contradictory, and indecipherable regulations." David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1315 (2004).

⁵ See U.S. CONST. art. I, § 8, cl. 8; ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2–3 (2011).

⁶ See MERGES, *supra* note 5, at 3.

⁷ See *id.* at 7.

This Comment explores how Locke’s rigid structure of prima facie rights and duties can be utilized to allocate burdens of proof and streamline copyright infringement litigation proceedings.⁸

Beyond matters of efficiency, Locke’s property theory is useful in contemporary IP discussions because it embodies normative judgments that substantially contributed to the first copyright law ever enacted, from which all American copyright law originated.⁹ Locke’s concerns with monopolies and societal progress undoubtedly shaped early copyright theory and should still serve as guiding principles today.¹⁰

This Comment’s aim is to define a theory of Lockean copyright from a perspective of reconciliation, considering Locke’s compatibility with basic tenets of American copyright law as a starting point. This approach avoids making broad-sweeping claims that call for paradigmatic shifts in copyright jurisprudence, instead focusing on how piecemeal application of Lockean theory can solve real problems in the law.¹¹ To further demonstrate Locke’s pragmatic value within copyright law, this Comment applies Locke’s theory to the longstanding circuit split over whether the merger doctrine (barring copyright protection for an expression that effectively confers a monopoly over an idea¹²) should be applied at the initial copyrightability stage or the later infringement stage of a copyright infringement suit.¹³

This Comment proceeds in Part I by describing Locke’s labor theory of acquisition as well as its historical significance and various interpretations. Part II follows with a brief examination of Locke’s political advocacy against the renewal of the Licensing Act of 1662 as contextual evidence of his perspective on intellectual property. Part III draws on the ideas of other contextualist Lockean copyright theorists to describe a system of Lockean copyright that is compatible with the Copyright Clause and § 102 of the Copyright Act. This Part concludes with a rebuttal to Adam Moore’s interpretation of Lockean copyright theory.

⁸ See *infra* Part IV.C.

⁹ See *infra* Part II.

¹⁰ See Justin Hughes, *Locke’s 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 CARDOZO ARTS & ENT. L.J. 555, 556–57 (2010) (introductory essay).

¹¹ Contrast this approach with the one taken by Adam Moore’s article, *A Lockean Theory of Intellectual Property*. See Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 108 (1997) (advocating paradigmatic changes in U.S. copyright law to comport with his reading of Locke).

¹² See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

¹³ See *infra* Part IV.A.

To demonstrate the practical utility of the Lockean copyright theory advocated by Part III, Part IV explores how that theory is capable of resolving the tedious circuit split concerning the merger doctrine. Part IV argues that the merger doctrine should be split into separate inquiries that take place at different stages of the infringement suit.¹⁴ Locke's rumination on the state of nature and the formation of the social compact provides a foundation to assess the state's role in alleviating high transaction costs on property owners.¹⁵ Locke's goal of minimizing transaction costs justifies placing simple legal disputes, like instances of merger where there is only one possible way to express an idea, at pretrial dismissal stage. These issues can be deduced from simple logic such that an actor in the state of nature could self-adjudicate.¹⁶ However, more complex legal issues, like instances of merger where there is a finite set of potential expressions available to express an idea, require a complete examination of the trial record to make a sound determination; this kind of complex property dispute was the primary reason inhabitants in the state of nature formed the social compact and empowered judges.¹⁷ As explained in Part IV, the Lockean theory of merger proposed here would always impact copyrightability, causing either complete reversion to the public domain or a diminution of the scope of copyright protection.¹⁸

I. A BRIEF EXAMINATION OF LOCKE'S PROPERTY THEORY AND ITS RELEVANCE

In order to best understand John Locke's theory of property rights, it is paramount to examine the tumultuous political climate in which it was conceived. Around 1680, religious sectarianism dominated English politics; Locke was closely entangled in this conflict through his employer, Lord Shaftesbury, who introduced the Exclusion Bill that sought to prevent King Charles II's Catholic brother, James II, from ascending to the throne.¹⁹ After

¹⁴ See *infra* Part IV.B.

¹⁵ See *infra* Part IV.C.

¹⁶ See *infra* Part IV.C.1.

¹⁷ See *id.*

¹⁸ See *infra* Part IV.C.

¹⁹ See GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY 15–17 (1995); *John Locke*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/locke/> (last visited Feb. 24, 2016). Although Lord Shaftesbury commanded a majority in the House of Commons, the Bill was repeatedly blocked by Charles II's control over the House of Lords; this event is known as the Exclusionary Crisis, a watershed moment in British history that marked the decline in the monarch's authority. See JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE 44 (1969) ("As the struggle progressed it became increasingly a struggle to establish permanent controls over the prerogative for the Whigs . . .").

Charles II uncovered an assassination plot on his life concocted by several of Locke’s acquaintances, Locke feared for his life and fled to Holland, where he stayed until the Glorious Revolution saw an end to the absolute monarchy in 1688.²⁰

To combat negative sentiments toward the crown in the years preceding the Glorious Revolution, Tory loyalists utilized Sir Robert Filmer’s moral apologia, *Patriarcha*, to assert that the landed gentry’s continued wealth depended on maintaining the King’s authority.²¹ Relying on Scripture, Filmer argues that God created the entire world and gave it to one man, Adam.²² Over the course of human history, Adam’s private dominion was partitioned by various kings who retained Adam’s paternal jurisdiction, empowering them to allocate property based on a system of feudal entitlement.²³ According to Filmer, maintaining exclusive ownership would be impossible without the centralized power of a monarch because to exclude others from land claimed as property, the property owner would require consent from all humans on Earth.²⁴ Thus, Filmer surmised that any title to property is both morally and practically contingent on the monarchy’s divine authority and power.

Appealing to Lord Shaftesbury’s political constituents, who later organized as the Whig faction and advocated for constitutional restraints on the monarch’s authority, John Locke argues in the *Second Treatise of Government* that one’s color of title to property can be discerned independent of royal decree.²⁵ Like his rival, Locke begins his analysis of private property with a biblical account of the time prior to civilization, which he calls the state of nature; however, Locke devises a way that individuals so situated could acquire property rights without requiring direct consent from anyone.²⁶

²⁰ See Ellis Sandoz, *The Civil Theology of Liberal Democracy: Locke and His Predecessors*, 34 J. POLITICS 2, 12–13 (1972); *John Locke*, *supra* note 19.

²¹ See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1563 & n.171 (1993).

²² See *id.*; E. Clinton Gardner, *John Locke: Justice and the Social Compact*, 9 J.L. & RELIGION 347, 351–52 (1992).

²³ See Gardner, *supra* note 22, at 351–52.

²⁴ SREENIVASAN, *supra* note 19, at 25.

²⁵ See *id.* at 16–18.

²⁶ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 19 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) [hereinafter *SECOND TREATISE*] (“If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.”).

A. *The Labor Theory of Acquisition and Its Major Interpretations*

Contesting Filmer's biblical interpretation, Locke argues that God originally bequeathed the world to all of humanity to be shared in common.²⁷ While resources in the state of nature are held in common, individuals retain property in themselves and their labor.²⁸ In what would later be called the labor theory of appropriation, Locke argues, "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*."²⁹ This move allows Locke to avert Filmer's consent problem by demonstrating that the unilateral act of mixing one's labor with raw materials held in common invokes a natural right to the fruit of one's labor, establishing private ownership.³⁰

Importantly, this ability to unilaterally acquire private property in the state of nature is not unlimited; rather, Locke maintains that property owners must obey natural law obligations, ordained by God in *Psalms* and *Timothy*.³¹ The foremost proviso that limits private ownership is the duty to preserve "enough, and as good, left in common for others" (hereinafter the "enough and as good" proviso).³² Meeting this duty is a condition precedent to initial acquisition and a condition subsequent to continued ownership, so that any later violation may cause reversion of the property to the natural commons.³³ Again relying on Scripture, Locke proclaims that "[n]othing was made by God for man to spoil or destroy" (hereinafter the spoilage restriction), indicating that property owners have an obligation to prevent their property from going to waste.³⁴

Although this Comment explores various interpretations of Locke's theories throughout, the fundamental schism among Locke scholars—the interpretation of the limiting provisos after the formation of civil government—merits attention here.

²⁷ *Id.* at 18 (citing *Psalms* 115:16).

²⁸ *Id.* at 19.

²⁹ *Id.*

³⁰ See SREENIVASAN, *supra* note 19, at 17–18.

³¹ See SECOND TREATISE, *supra* note 26, at 18–21.

³² *Id.* at 19.

³³ See JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 165 (1980) ("[W]hen the vital proviso is no longer satisfied, goods once legitimately acquired can no longer be retained in exclusive possession, but revert to common ownership.").

³⁴ See SECOND TREATISE, *supra* note 26, at 20–21.

The possessive individualist interpretation, championed by C.B. Macpherson,³⁵ proposes that once civil society is established, the limiting provisos are necessarily expunged.³⁶ The spoilage restriction is nullified through the creation of money, “some lasting thing that men might keep without spoiling.”³⁷ Macpherson highlights Locke’s phrase that one “might heap up as much of these durable things as he pleased” without breaking the spoilage restriction.³⁸ Macpherson interprets this passage as a justification for unrestricted accumulation of wealth.³⁹ Furthermore, the “enough and as good” proviso is “transcended,” according to Macpherson’s interpretation, by highlighting Locke’s passage:

[H]e who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed [sic] and cultivated land, are . . . ten times more than those which are yielded by an acre of land of an equal richness laying waste in common.⁴⁰

According to Macpherson’s reading, privately owned land necessarily yields more product than land held in common.⁴¹ This surplus value derived from industrious effort will eventually trickle down to the rest of society, thereby always leaving “enough and as good” for others.⁴² Macpherson’s interpretation, which embraces the so-called “traditional reading” of Locke, has been used by conservative and libertarian pundits to advocate for laissez-faire capitalism, an unregulated wage system, vast accumulation of wealth, and trickle-down economics.⁴³

³⁵ C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 3 (1962). According to Macpherson, possessive individualism is a “conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them.” *Id.* This reading of Locke advocates a minimal state in which “[p]olitical society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange.” *Id.*

³⁶ *Id.* at 203–20.

³⁷ *SECOND TREATISE*, *supra* note 26, at 28.

³⁸ *Id.*; *see* MACPHERSON, *supra* note 35, at 204.

³⁹ MACPHERSON, *supra* note 35, at 221.

⁴⁰ *SECOND TREATISE*, *supra* note 26, at 23; *see* MACPHERSON, *supra* note 35, at 211–12.

⁴¹ *See* MACPHERSON, *supra* note 35, at 211.

⁴² *See id.* at 212.

⁴³ *See* Malla Pollack, *The Owned Public Domain: The Constitutional Right Not to Be Excluded—or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.*, 22 *HASTINGS COMM’NS & ENT. L.J.* 265, 274 (2000). Some may find this ironic because Macpherson, a theoretical proponent of socialism, uses the possessive individualist interpretation of the *Second Treatise* in order to criticize American capitalism. *See* MACPHERSON, *supra* note 35, at 1–4.

By examining Locke's entire body of work in its historical and political context, contextualist Lockean scholars have argued that the so-called "traditional view" is skewed towards excessive liberty and individualism.⁴⁴ Contextualist Lockeans like James Tully argue that the limiting provisos are not so easily expunged merely through civil society's inventions of money, wages, and the privatization of resources.⁴⁵ Rather, private individuals and civil government must take active roles to expunge the perpetual natural law limitations and promote the public welfare.⁴⁶ This interpretation argues that an individual's right to property varies based on environmental constraints and the needs of others.⁴⁷ The contrast between contextualists' emphasis on Lockean relational duties and possessive individualists' emphasis on Lockean individual liberty is the basis of decades of disagreement and debate over Locke's foundational property theory.

B. Significance of Locke's Philosophy in American Law

Throughout American jurisprudential history, the writings of John Locke have enjoyed an elevated stature.⁴⁸ Justice Story described this prolific philosopher and statesperson as "the most strenuous asserter of liberty" whose vision of democracy had a lasting impact on American law.⁴⁹ Locke's labor

⁴⁴ TULLY, *supra* note 33, at 61.

⁴⁵ *Id.*

⁴⁶ *Id.* (describing Lockean ownership as a stewardship relationship). The role of Locke's limiting provisos in the state of nature and in civil government after formation of the social compact is analyzed in greater detail below. *See infra* Part IV.C.1.

⁴⁷ *Id.* at 11 ("[A] fundamental assumption of Locke's political thought is, contrary to common misunderstandings, not to treat man as an isolated individual but, rather, to treat him in his various relations with other men and with God.").

⁴⁸ The Supreme Court has continually evoked Lockean rhetoric and theory in deciding a diverse array of cases. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2753 (2011) (citing JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* (1962), in 37 *ENGLISH PHILOSOPHERS OF THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 27–28 (C.W. Elliot ed., 1910)) (discussing child development and parental duties); *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) (discussing legislative autonomy and separation of powers); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 860 n.10 (1987) (acknowledging Locke's labor theory of acquisition as a means of creating moral entitlement to the fruit of one's labor); *Scales v. United States*, 367 U.S. 203, 278 (1961) (discussing Locke's right to revolution). Locke's ubiquity even extends to the Bluebook, which references his *Second Treatise* as an example of how to cite "Pre-1900 works." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.4(c), at 141 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). Scholars have remarked on Justice Scalia's notable use of Lockean theory. *See* JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* 127 (2006) ("One detects from Scalia's reading of Article II a strong hint of John Locke's right of prerogative.").

⁴⁹ 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 299 n.2 (photo. reprint 1970) (1833).

theory of acquisition profoundly influenced the Founders and is embedded deep within the Constitution.⁵⁰ Thomas Jefferson kept no secrets concerning the importance of Locke’s philosophy in the formation of his own political beliefs and morals.⁵¹ In one letter, Jefferson wrote, “Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on.”⁵² In the essay *Property*, James Madison echoed the teachings of Locke by defining property’s broader and more just meaning that “embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*.”⁵³

C. *Locke’s Gloss of History*

Locke’s special situation as the “father of American liberalism”⁵⁴ has its drawbacks. Lockean rhetoric has been used as a language of legitimation for ideologies foreign to Locke himself. This gloss of history has created ambiguity, offering a “hermeneutical free play” for partisan theorists to make strategic appeals by paying lip service to Locke’s great works in order to advance their own political agendas.⁵⁵

Lockean historians have often turned to changing cultural values to explain the hermeneutics of Locke’s property theory.⁵⁶ In *The Liberal Tradition in*

⁵⁰ See ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 90 (1948). Furthermore, it is apparent that in writing the Declaration of Independence, “Jefferson had . . . succeeded admirably in condensing Locke’s fundamental argument into a few hundred words.” *Id.*

⁵¹ See Kenneth D. Stern, *John Locke and the Declaration of Independence*, 15 CLEV.-MARSHALL L. REV. 186, 190–91 (1966); Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 561 (Julian P. Boyd et al. eds., 1958) (“Bacon, Locke and Newton . . . I consider . . . as the three greatest men that have ever lived, without any exception, and as having laid the foundation of those superstructures which have been raised in the Physical and Moral sciences . . .”).

⁵² Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *reprinted in* 8 THE PAPERS OF THOMAS JEFFERSON, *supra* note 51, at 681, 682 (1953).

⁵³ James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983). *Compare id.*, with SECOND TREATISE, *supra* note 26, at 19 (discussing the “enough and as good” proviso).

⁵⁴ Michael Alexander, *Censorship and the Limits of Liberalism*, 47 U. TORONTO FAC. L. REV. 58, 78 (1989).

⁵⁵ PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 44 (1996).

⁵⁶ See, e.g., James L. Huston, *The American Revolutionaries, the Political Economy of Aristocracy, and the American Concept of the Distribution of Wealth, 1765–1900*, 98 AM. HIST. REV. 1079, 1080 (1993) (describing how the Lockean labor theory of value was fueled by “Protestantism’s stress on reward being earned by the sweat of one’s brow”).

America, Louis Hartz claims that specific historical events, unique to the American experience, shaped our interpretation of Locke's labor theory of acquisition.⁵⁷ Hartz argues that settlement of the western frontier instilled a new sense of negative freedom among brave prospectors, "living in the world's closest approximation to a [Lockean] state of nature."⁵⁸ This shared experience imparted a sentiment of rugged individualism in the American collective conscious and caused subsequent theorists to emphasize vulgar interpretations of Locke's labor theory of acquisition that ignore or trivialize the communal duties imposed by property ownership.⁵⁹ These interpretations are sometimes pejoratively labeled "irrational Lockeanism" for their strict adherence to libertarian maxims of laissez-faire capitalism and unrestricted accumulation of wealth despite substantial evidence that Locke did not envision this.⁶⁰ Critics argue that these opportunistic libertarian theorists misrepresent Locke's theory by cherry-picking quotes from Chapter V of Locke's *Second Treatise* and considering them in a theoretical and historical vacuum.⁶¹

Today, Locke's property theory has been propagandized and misconstrued to the public, reducing the great philosopher to a placard for the libertarian brand. For example, consider the John Locke Foundation, a conservative 501(c)(3) think tank promoting radically limited government,⁶² funded in part by the billionaire Koch brothers.⁶³ It's no coincidence that individuals with inordinate wealth promote this skewed interpretation of Lockean property rights, which all but eliminates any duties property owners might owe to other members of civil society.

⁵⁷ LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 74–75* (1955).

⁵⁸ *Id.*

⁵⁹ *Id.* at 60 ("One side of Locke became virtually the whole of him.").

⁶⁰ *See id.* at 6 (describing the possessive individualist interpretation held by Macpherson and Moore as "a nationalist articulation of Locke which usually does not know that Locke himself is involved").

⁶¹ *See* Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 *QUEEN'S L.J.* 1, 48 (2002) ("If we situate this theory within the context and purpose for which it was undertaken, it is not entirely clear that Locke drew the libertarian conclusion attributed to him.").

⁶² *About the John Locke Foundation*, JOHN LOCKE FOUND., <http://www.johnlocke.org/about> (last visited Feb. 24, 2016).

⁶³ *Koch Family Foundations*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Koch_Family_Foundations (last visited Feb. 24, 2016). The Kochs have a distinct pecuniary interest in preventing government regulations and market-based solutions that address the tragedy of the commons because "the very essence of the Koch business model is to exploit breakdowns in the free market." Tim Dickinson, *Inside the Koch Brothers' Toxic Empire*, ROLLING STONE (Sept. 24, 2014), <http://www.rollingstone.com/politics/news/inside-the-koch-brothers-toxic-empire-20140924>.

II. NO INTERPRETATION NEEDED: LOCKE’S POLITICAL ADVOCACY FOR AUTHORIAL RIGHTS AS A PRECURSOR TO MODERN COPYRIGHT LAW

To avoid creating yet another pseudo-Lockean theory, this Part examines Locke’s political writings in their historical context to determine if and how Locke’s property theory should apply to copyright law.⁶⁴

Around 1695, Locke formed the “College,” a club that included himself, Member of Parliament Edward Clarke, and prominent surgeon and social advocate John Freke.⁶⁵ This club advocated legislation in Parliament and lobbied to defeat the renewal of the Licensing Act of 1662.⁶⁶ The Act limited printing and regulated the ability to own a printing press; Locke was most concerned with the monopoly granted by the English monarch to the Stationers Company to enforce exorbitant licensing fees.⁶⁷ In February of 1695, Edward Clarke was appointed by the House of Commons to a committee charged with drafting a bill to replace the Licensing Act.⁶⁸

Locke’s “Memorandum on the Licensing Act of 1662” presents both economic and social problems caused by the Stationers Company’s monopoly on printing.⁶⁹ Most apparent to Locke was the high cost and “scandalously ill” quality of ancient texts, which the Stationers Company owned the exclusive

⁶⁴ Such a contextualist interpretative tool rests on the assumption that Locke would not intentionally contradict himself when comparing his philosophical works with his acts of political advocacy. *See* M. SELIGER, *THE LIBERAL POLITICS OF JOHN LOCKE* 33 (1968) (Locke’s works appear contradictory unless understood in their historical context.). *See generally* JAMES TULLY, *AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS* (1993) (defining the canon of contextualist interpretations of Locke). This contextualist assumption will not surprise many jurists because it is heavily used in many well-recognized textual canons of construction. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Tanner Lecture on Human Values 111 (Mar. 8–9, 1995) (transcript available at the University of Utah), http://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf (“In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not, of course, an interpretation that the language will not bear.”).

⁶⁵ Benjamin Rand, *Introduction to THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE* 1, 40–41 (Benjamin Rand ed., 1927) [hereinafter *CORRESPONDENCE*].

⁶⁶ *See id.* *See generally* Mark Goldie, *Introduction to John Locke, Liberty of the Press*, in *LOCKE: POLITICAL ESSAYS* (Mark Goldie ed., 1997) [hereinafter *Locke, Liberty*].

⁶⁷ *See* Lior Zemer, *The Making of a New Copyright Lockean*, 29 *HARV. J.L. & PUB. POL’Y* 891, 898 (2006). In a letter to Clarke, Locke bemoaned personal troubles with the Stationers Company; it refused to grant him a license to publish an English primer of *Aesop’s Fables*. *See* Letter from John Locke to Edward Clarke (Jan. 2, 1692), in *CORRESPONDENCE*, *supra* note 65, at 366, 366–67.

⁶⁸ Goldie, *supra* note 66, at 329 (introductory text preceding Locke’s *Liberty of the Press*).

⁶⁹ Hughes, *supra* note 10, at 556.

right to print.⁷⁰ On a societal level, Locke was concerned with the chilling effect the Licensing Act had on authors' abilities to create derivative works, inhibiting communal knowledge and progress.⁷¹

In opposition to the Licensing Act, Locke supported authorial rights as a means of expanding knowledge. Locke argues, "I know not why a man should not have liberty to print whatever he would speak."⁷² According to Locke, this broad liberty to publish should be buttressed by strong rights of attribution held by prior authors.⁷³ Authorial rights should not be granted in perpetuity, as Locke explains "it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years."⁷⁴

Although the College was unsuccessful in passing its proposed bill, Locke's rhetoric of societal progress and advocacy for term limits on exclusive printing rights found their way into the Statute of Anne, the first-ever copyright act.⁷⁵ Under the Statute of Anne, authors of new works received fourteen years of copyright protection, with a renewal term of an additional fourteen years.⁷⁶ It is well-recognized that the Statute of Anne had a major impact on American copyright law and the formation of our current Copyright Act.⁷⁷ Because of Locke's influence on the Statute of Anne, his thoughts on authorial rights are regarded as compatible with underlying rationales in the American paradigm of intellectual property.⁷⁸

⁷⁰ John Locke, *Anno 14^o car. 2. cap. XXXIII*, in PETER KING, 1 THE LIFE OF JOHN LOCKE 375, 378 (Thommes Press 1991) (1830) [hereinafter Locke, *Memorandum on the Licensing Act of 1662*].

⁷¹ See *id.* at 386 (arguing that granting an exclusive right to print ancient texts is "unreasonable and injurious to learning").

⁷² *Id.* at 376; see also Zemer, *supra* note 67, at 900.

⁷³ Locke, *Liberty*, *supra* note 66, at 338 (amendments to draft bill). To protect original authors, Locke sought to prohibit any book to be printed, published, or sold without the printer's or bookseller's name, under great penalties. *Id.*

⁷⁴ Locke, *Memorandum on the Licensing Act of 1662*, *supra* note 70, at 387.

⁷⁵ See Zemer, *supra* note 67, at 900 n.31. There is evidence that Locke's writings influenced passage of the Statute of Anne; Clarke distributed copies of Locke's Memorandum on the Licensing Act of 1662 to other members of Parliament. See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 33 LIBR. 296, 305 (1978), <http://library.oxfordjournals.org/content/s5-XXXIII/4/296.accessible-long>.

⁷⁶ See Statute of Anne 1709, 8 Ann. c. 19 (Eng.).

⁷⁷ See Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 223 (1966).

⁷⁸ See Astbury, *supra* note 75, at 313; Zemer, *supra* note 67, at 904.

Numerous scholars have argued that Locke’s ruminations on authorial rights are compatible with his labor theory of acquisition.⁷⁹ Locke’s Memorandum on the Licensing Act provides textual support for the proposition that the product of an author’s mental labor is her property,⁸⁰ to which she has a natural right.⁸¹ Locke’s interest in creating a limited copyright term that promotes a robust public domain resonates well with the contextualist emphasis on the social duties imposed by Locke’s limiting provisos.⁸²

Using Locke’s real-world political advocacy as a starting point to frame a Lockean theory of copyright that is compatible with contemporary copyright law, the next Part examines Locke’s theoretical writings to determine how a Lockean theory of copyright would function.

III. A LOCKEAN THEORY OF COPYRIGHT THAT IS COMPATIBLE WITH AMERICAN COPYRIGHT LAW

Applying Locke’s labor theory of acquisition to issues in copyright law has been an alluring prospect for IP theorists over the years.⁸³ As a preliminary matter, all Lockean copyright theorists must assess the scope of Locke’s definition of property to determine whether it may include ineffable, intangible goods, such as copyrights.⁸⁴ Fortunately, one need not extrapolate his theory to arrive at Locke’s belief in a broad conception of property.

In the *Second Treatise*, Locke makes explicit that his definition of property includes more than tangible res; the foremost property owned by each

⁷⁹ See, e.g., Zemer, *supra* note 67, at 908.

⁸⁰ Locke, *Memorandum on the Licensing Act of 1662*, *supra* note 70, at 386 (criticizing the Licensing Acts as “so manifest an invasion of the trade, liberty, and *property*” (emphasis added)). Locke’s proposed amendments to the draft Bill clarify its purpose as “[t]o secure the author’s property.” Locke, *Liberty*, *supra* note 66, at 338.

⁸¹ Cf. Locke, *Memorandum on the Licensing Act of 1662*, *supra* note 70, at 380 (“[N]or can there be any reason in nature why I might not print them as well as the Company of Stationers, if I thought fit.”).

⁸² *Id.* (“[S]uch titles as these, which lie dormant, and hinder others, many good books come quite to be lost.”). Locke’s rhetoric seems congruent with the “enough and as good” proviso and the spoilage restriction. Compare *id.*, with *supra* notes 32–34 and accompanying text.

⁸³ See, e.g., Craig, *supra* note 61, at 3; Moore, *supra* note 11, at 108; Zemer, *supra* note 67, at 928; Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179, 1179 (2003).

⁸⁴ The Supreme Court seems receptive to a broad theory of Lockean property. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (discussing trade secrets as a kind of intangible property akin to Lockean “labour and invention” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405 (1768))).

individual is in her personhood, her rights, and her labor.⁸⁵ This broad conception of property strongly influenced the Founders and the Constitution.⁸⁶ Locke posits that the natural property right of self-ownership enables one to acquire property:

[T]hough the things of nature are given in common, yet man, by being master of himself, and *proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property*; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others.⁸⁷

The often-overlooked language of “invention and arts” in this passage may lend textual support to the proposition that Locke contemplated copyright and patent protection within his labor theory of acquisition.⁸⁸ Thus, if Locke’s labor theory of acquisition can support a laborer’s claim to intellectual property, then his theory must also be interpreted to prevent appropriation of intellectual objects that violate the “enough and as good” proviso and the spoilage restriction.⁸⁹

What would such a Lockean copyright theory look like? In answering this question, this Comment attempts to reconcile a Lockean theory of copyright with existing fundamental copyright doctrines in constitutional law in Part III.A and in statutory law in Part III.B. This project is a pragmatic and

⁸⁵ SECOND TREATISE, *supra* note 26, at 90 (“By *property* I must be understood here, as in other places, to mean that property which men have in their persons as well as goods.”); *see also* Morgan Cloud, *Expressive Property in a Digital Age*, in INFORMATION AND LAW IN TRANSITION: FREEDOM OF SPEECH, THE INTERNET, PRIVACY AND DEMOCRACY IN THE 21ST CENTURY 55, 58 (Anna-Sara Lind et al. eds., 2015) (“The broad conception of property was a cornerstone of Locke’s complex theories about the nature of human beings, individual rights, society, and government.”).

⁸⁶ *See* Madison, *supra* note 53, at 266 (“[A] man has a property in his opinions and the free communication of them. . . . He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.”); *see also* Patterson v. Portch, 853 F.2d 1399, 1404 (7th Cir. 1988) (quoting SECOND TREATISE, *supra* note 26, at 46) (“In contrast to Hume, a distinguished philosophical expositor of Blackstone’s narrow conception, Locke, whose thinking influenced the framers of the Constitution, defined “property” as “life, liberty, and estate.”).

⁸⁷ SECOND TREATISE, *supra* note 26, at 27; *see also* United States v. \$12,390.00, 956 F.2d 801, 810 (8th Cir. 1992) (discussing Locke’s broad theory of property).

⁸⁸ *Cf.* Steven J. Horowitz, *Rethinking Lockean Copyright and Fair Use*, 10 DEAKIN L. REV. 209, 222 (2005).

⁸⁹ *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1581 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 319 (1988).

piecemeal one and, as Part III.C argues, does not require a paradigmatic shift in focus from widely accepted copyright doctrines.⁹⁰

A. Reconciling Locke with the Copyright Clause of the Constitution

The Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹¹ When drafting copyright legislation, the Copyright Clause demands that Congress strike “an appropriate legal balance between the rights of authors and publishers on one hand and the rights of users and consumers on the other.”⁹² By securing ownership rights to self-authored expressions for a limited duration, copyrights function as economic incentives in the furtherance of the constitutional goal of promoting the progress of the arts and sciences.⁹³ Allowing a perpetual monopoly to be upheld via copyright law contradicts this constitutional purpose.⁹⁴

At first glance, it may seem that Locke’s property theory, based on natural rights, is fundamentally at odds with the commonly held, consequentialist reading of the Copyright Clause.⁹⁵ However, the consequentialist aim of promoting “the Progress of Science and useful Arts” demanded by the Copyright Clause can be achieved without strict adherence to utilitarian theory.⁹⁶ Many scholars recognize that Locke’s labor theory of acquisition

⁹⁰ *But see* Moore, *supra* note 11, at 108 (arguing that paradigmatic shifts in United States copyright law are required to bring about a Lockean theory of copyright).

⁹¹ U.S. CONST. art. I, § 8, cl. 8.

⁹² Howard B. Abrams, *Originality and Creativity in Copyright Law*, LAW & CONTEMP. PROBS., Spring 1992, at 3, 3.

⁹³ *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

⁹⁴ *See, e.g.*, Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . It is the means by which copyright advances the progress of science and art.”).

⁹⁵ *Cf.* Craig, *supra* note 61, at 43 (arguing that libertarian interpretations of Lockean copyright are expressly contrary to consequentialism in the Copyright Clause). *See generally* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979) (arguing that the different emphases between utility and rights make their respective paradigms incompatible).

⁹⁶ *See* Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105, 1119 (2012). Himma argues that

there is no assumption in the Constitution that any consequentialist theory is true. First, although this provision grants Congress the power to protect copyright for reasons having to do with the consequences and social benefits, the Constitution, strictly speaking, provides the *legal*

contains “a buried utilitarian assumption” that makes his theory reconcilable with constitutional copyright law.⁹⁷ Locke’s limiting provisos impose continual duties that mitigate the negative externalities of one’s property entitlement, establishing utilitarian considerations in his natural rights framework.⁹⁸

B. Reconciling Locke with § 102 of the Copyright Act

Section 102(a) of the Copyright Act provides protection for “original works of authorship fixed in any tangible medium of expression,” while § 102(b) states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁹⁹ In the landmark decision *Baker v. Selden*, the Supreme Court described what would later be called the “idea-expression dichotomy,” dictated by the language of § 102(b).¹⁰⁰ In *Baker*, the claimant alleged infringement of a system of bookkeeping described in his copyrighted book.¹⁰¹ Justice Bradley, writing for a unanimous Supreme Court, indicated that although the complainant owned a copyright in his authored work, he did not own the ideas expressed in that work, arguing that “[t]o give to the author of the book an exclusive property in

justification for protecting copyright. It does not so much as even purport to provide a moral justification.

....

... For this reason, the very system of law that the Constitution defines is in need of the foundational moral justification.

Id.

⁹⁷ ALAN RYAN, PROPERTY 63 (1987). Tom G. Palmer describes how these “buried assumptions” in Locke’s natural law correspond with utilitarianism:

Such “buried assumptions” concern human flourishing or the attainment of man’s natural end. These consequences are usually attained indirectly, through respect for general rights, or rules of conduct, rather than directly, as in most utilitarian theories. The sharp separation in contemporary moral philosophy between natural rights and utility, or the common good, is, however, an artificial one, and would certainly be foreign to many of the great natural law theorists.

Tom G. Palmer, *Are Patents and Copyrights Morally Justified?: The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL’Y 817, 819 n.5 (1990); cf. Emir Aly Crowne, *The Utilitarian Fruits Approach to Justifying Patentable Subject Matter*, 10 J. MARSHALL REV. INTELL. PROP. L. 753, 755 (2011) (describing a Lockean theory of patents as a means of achieving a utilitarian result).

⁹⁸ See Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y 713, 733–34 (1989).

⁹⁹ 17 U.S.C. § 102 (2012).

¹⁰⁰ See 101 U.S. 99, 102–05 (1880).

¹⁰¹ *Id.* at 99–100.

the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public.”¹⁰² The system of bookkeeping was not eligible subject matter for copyright protection.¹⁰³

Numerous scholars have taken a contextualist approach to reconcile Locke’s property theory with the idea–expression dichotomy.¹⁰⁴ Their central argument is that any appropriation of an idea is a per se violation of the “enough and as good” proviso.¹⁰⁵ Therefore, ideas cannot be appropriated and must remain held in common for free use by all of humanity.¹⁰⁶

In his seminal essay, *The Philosophy of Intellectual Property*, Professor Justin Hughes draws the analogy between the “field of all possible ideas” and the Lockean commons.¹⁰⁷ Like the commons, which Locke describes as “that which God gave to mankind in common,”¹⁰⁸ Hughes makes the theoretical leap towards a seemingly platonic proposition: ideas exist a priori as creations of God to be held in common.¹⁰⁹ Hughes notes,

[I]n that view, the ideas already exist and the chief labor is transporting them from the ethereal reaches of the idea world to the real world where humanity can use them. If ideas are thought of as such preexistent platonic forms, the *only* activity possible is execution, which consists of transporting, translating, and communicating the idea into a form and a location in which humans have access to it.¹¹⁰

¹⁰² *Id.* at 102.

¹⁰³ *Id.* at 107. “Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.” *Id.* at 100–01.

¹⁰⁴ See, e.g., Gordon, *supra* note 89, at 1581; Hughes, *supra* note 89, at 315.

¹⁰⁵ See, e.g., Gordon, *supra* note 89, at 1581 (“The proviso prohibits a creator from owning abstract ideas because such ownership harms later creators. The more general an idea is, the more capable it would be of rediscovery by others. To give ownership in such fundamentals would deprive future creators of a meaningful opportunity otherwise open to them.”).

¹⁰⁶ See *id.*

¹⁰⁷ Hughes, *supra* note 89, at 315 (“[I]deas fit Locke’s notion of a ‘common’ better than does physical property. The ‘field’ of all possible ideas prior to the formation of property rights is more similar to Locke’s common than is the unclaimed wilderness.”).

¹⁰⁸ SECOND TREATISE, *supra* note 26, at 18.

¹⁰⁹ Hughes, *supra* note 89, at 315 (“It requires some leap of faith to say that ideas come from a ‘common’ in the Lockean sense of the word. Yet it does not take an unrehabilitated Platonist to think that the ‘field of ideas’ bears a great similarity to a common.”).

¹¹⁰ *Id.* at 312.

In this interpretation of Locke, the labor required to create intellectual property acts to “transport” intellectual objects from a theoretical realm into particularized expressions that are subject to ownership.¹¹¹ This theory of “propertizing” intellectual objects by laboring to create an expression from an uncopyrightable idea fits nicely with the fixation requirement of § 102(a).¹¹² On this view, fixation is necessary evidence that human labor has transformed an abstract idea into a copyrightable expression.¹¹³ Like Tully posits for real property, Hughes argues that if an otherwise valid copyright violates the “enough and as good” proviso, then the owner’s exclusive right is “depropertized” and either reverts to the commons entirely or is limited in scope.¹¹⁴

Some scholars find contention with such a reading of Lockean copyright because it requires a platonic view of ideas as existing prior to human discovery.¹¹⁵ Besides its theoretical weightiness, the platonic view of ideas discussed by Hughes is not analogous to the Lockean commons. Locke describes the commons as wild and uncultivated,¹¹⁶ while Hughes’s interpretation posits that all ideas are already cultivated in the platonic realm of forms.¹¹⁷

Horowitz secularizes Hughes’s project by arguing that the intellectual commons “consists of the resources for the production of intellectual products

¹¹¹ *Id.*

¹¹² Compare *id.*, with 17 U.S.C. § 102(a) (2012) (stating that in order to invoke copyright protection for an original work of authorship, it must be “fixed in any tangible medium of expression”).

¹¹³ See Hughes, *supra* note 89, at 312.

¹¹⁴ Compare *id.* at 319, with TULLY, *supra* note 33, at 165. Many theorists point to §§ 37–38 of the *Second Treatise* to support this claim. See SECOND TREATISE, *supra* note 26, at 23–25. However, the strongest textual support for Hughes’s depropertization-reversion theory can be found in the opening pages of Locke’s *A Letter Concerning Toleration*, which states that

[i]f anyone presume to violate the laws of public justice and equity, established for the preservation of [private property], his presumption is to be check’d [sic] by the fear of Punishment, consisting of the *deprivation or diminution of those civil interests or goods*, which otherwise he might and ought to enjoy.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James Tully ed., Hackett Publ’g Co. 1983) (1690) (emphasis added); cf. Zemer, *supra* note 67, at 935 (“It is clear that a natural right for Locke is a dynamic rather than static guarantee, changing to meet the needs of the particular situation.”).

¹¹⁵ See, e.g., Horowitz, *supra* note 88, at 222. Even Hughes realizes that a platonic understanding of ideas “may be reification in the extreme.” Hughes, *supra* note 89, at 312.

¹¹⁶ SECOND TREATISE, *supra* note 26, at 21 (noting, however, that “it cannot be supposed [God] meant it should always remain common and uncultivated,” so long as acquisitions from the commons satisfy the limiting provisos).

¹¹⁷ Horowitz, *supra* note 88, at 222; see Hughes, *supra* note 89, at 312.

and not the products themselves.”¹¹⁸ Horowitz argues that ideas are raw materials in the intellectual commons that serve as building blocks for ownable expressions. Ideas are communal resources akin to large bodies of water and the atmosphere, which necessarily must be kept in common; these precious communal resources are per se unownable.¹¹⁹ This interpretation squares nicely with the idea-expression dichotomy; ideas are essential communal resources, and preserving their free flow is necessary to sustain a healthy democracy.¹²⁰ But when ideas are mixed with the intellectual labor of an author in the act of original authorship, that particular expression becomes subject to private ownership,¹²¹ so long as the limiting provisos remain unviolated.¹²²

The proposition that ideas are communal resources that should not be privately owned is supported by Locke’s arguments in *An Essay Concerning Human Understanding*.¹²³ Here Locke argues that humans acquire knowledge in one of three ways: (1) observation of phenomenon in the world, (2) categorization of new actions or abstract concepts, and (3) invention.¹²⁴ Locke describes invention as “voluntary putting together of several simple *Ideas* in our own Minds: So he that first invented Printing, or Etching, had an *Idea* of it in his Mind, before it ever existed.”¹²⁵ This implies that some simple, preexisting ideas must be utilized in order to “invent” an idea capable of expression.¹²⁶ Once this particular idea is formed, the author’s labor transfers the particular idea into a fixed, tangible form subject to copyright protection.¹²⁷

¹¹⁸ Horowitz, *supra* note 88, at 222.

¹¹⁹ *See id.* In *Some Considerations of the Consequences of Lowering of Interest, and Raising the Value of Money*, Locke implies that some natural resources, such as air and water, should never be completely appropriated. JOHN LOCKE, SOME CONSIDERATIONS OF THE CONSEQUENCES OF THE LOWERING OF INTEREST, AND RAISING THE VALUE OF MONEY, in 4 THE WORKS OF JOHN LOCKE 1, 41 (C. Baldwin ed., London 1824) (1691) (“What more useful or necessary things are there to the being, or well being of men, than air and water? . . . Hence it is, that the best and most useful things are commonly the cheapest: because, though their consumption be great, yet the bounty of providence has made their production large, and suitable to it.”).

¹²⁰ *See* Horowitz, *supra* note 88, at 222.

¹²¹ *See id.* (“The ideas that inspire the production of intellectual products are commonly owned, whereas the individual expressions—the particular poem, painting, or song—are not part of the natural intellectual common.”).

¹²² *See id.*

¹²³ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 291–93 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690) [hereinafter LOCKE, HUMAN UNDERSTANDING].

¹²⁴ *Id.* at 291–92.

¹²⁵ *Id.* at 292.

¹²⁶ *See* Zemer, *supra* note 67, at 938 (“Only the combination of pre-existing ideas and templates makes a person the *first* inventor.”).

¹²⁷ *See* Hughes, *supra* note 89, at 319.

At this point, it is possible to fully conceive the Lockean theory of copyright law that this Comment advocates. An author who creates an original work of authorship in a tangible medium of expression has a prima facie property claim in that intellectual object, which will be granted copyright protection unless ownership of that intellectual object violates one of the limiting provisos.¹²⁸ Subsequent violations of the “enough and as good” proviso cause “depropertization” of the copyright and reversion to the public domain or diminution of the scope of copyright protection.¹²⁹ As other contextualists have argued, this Comment posits that the limiting provisos create two kinds of duties: (1) duties at the onset of property acquisition and (2) continual duties that extend over the course of continued ownership.¹³⁰ In the copyright context, both kinds of duties must be met to justify acquisition and continued ownership of a particular expression.¹³¹

While this Lockean theory of copyright does not immediately solve all the dilemmas in copyright law, it does create a general normative framework to advance discussions in copyright law.¹³² Because of the complexity of the idea-expression dichotomy, Horowitz admits that some hard cases may need further consideration.¹³³ The remainder of this Comment will attempt to apply this reading of Lockean copyright to one such hard case that is currently debated among the circuit courts: the merger doctrine.

C. A Rebuttal to Moore’s Lockean Copyright Theory

This Comment is not alone in addressing the merger doctrine in light of a Lockean theory of copyright.¹³⁴ In opposition to the stance recommended by this Comment, Adam Moore argues that the merger doctrine should be

¹²⁸ See, e.g., Moore, *supra* note 11, at 78.

¹²⁹ See *supra* note 114 and accompanying text.

¹³⁰ See *supra* note 32 and accompanying text.

¹³¹ See Horowitz, *supra* note 88, at 216.

¹³² See *id.* at 223.

¹³³ As Horowitz explains,

Sometimes it might be hard to tell the extent to which an intellectual product is actually an expression rather than merely an idea. For example, consider a musician who records a single note—with nothing distinct about it—on the piano. The note itself is part of the intellectual common: it is a raw material that, combined with other materials, musicians use to create unique expressions. But at the same time, this particular musician used this note alone to express herself. The idea/expression dichotomy seems to blur.

Id. Without explicitly indicating so, Horowitz’s hypothetical dilemma implicates the issue of merger in current copyright law. See *infra* Part IV.A.

¹³⁴ See Moore, *supra* note 11, at 92–93.

abrogated under his reading of Lockean copyright theory.¹³⁵ This Part argues that Moore’s conclusion on the merger doctrine rests on false premises concerning Lockean theory and the general nature of intellectual property.

Moore asserts that the Lockean labor theory of acquisition can account for creation and ownership of intellectual property, limited *prima facie* by the “enough and as good” proviso.¹³⁶ While it is theoretically cumbersome to determine what quantity of property constitutes “enough” and what quality of property constitutes “as good” to satisfy the “enough and as good” proviso,¹³⁷ Moore concludes by logical deduction that if acquisition harms no one but benefits at least one person (a “Pareto improvement”), then the acquisition necessarily passes the “enough and as good” proviso.¹³⁸ Moore also believes that many products of the mind are created “*ex nihilo*—from nothing.”¹³⁹ Moore reasons that the appropriation of newly created products of the mind never worsens anyone’s position because “the frontier of what is available for appropriation is practically infinite.”¹⁴⁰

Moore’s argument proceeds as follows: (1) Based on the unexamined assumption that *ex nihilo* creation of ideas is possible, Moore asserts that the field of ideas is practically infinite.¹⁴¹ (2) Because the field of ideas is practically infinite, Moore reasons that private ownership of a newly created idea will necessarily benefit the putative owner without causing harm to anyone, resulting in a Pareto improvement.¹⁴² (3) Because Moore interprets the “enough and as good” proviso as being necessarily expunged by making a Pareto improvement, he concludes that the privatization of any idea is always justified under his reading of Locke’s property theory.¹⁴³ In a fundamental departure from American copyright jurisprudence, Moore asserts that even

¹³⁵ *Id.* at 93.

¹³⁶ *See id.* at 78.

¹³⁷ Other theorists argue that what constitutes “enough and as good” is determined by a baseline consideration of what would have been available in the state of nature. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 180–81 (1974). But this approach leads to theoretical difficulties, particularly when considering a Lockean theory of intellectual property. *See* Gordon, *supra* note 89, at 1559 n.149, 1581 n.237.

¹³⁸ *See* Moore, *supra* note 11, at 78–79. Given an initial allocation of goods among a set of individuals, a change to a different allocation that makes at least one individual better off without making any other individual worse off is called a “Pareto improvement.” *See* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512–13 (1980). An allocation is defined as “Pareto optimal” when no further Pareto improvements can be made. *Id.*

¹³⁹ Moore, *supra* note 11, at 77.

¹⁴⁰ *See id.*

¹⁴¹ Moore, *supra* note 11, at 77–78.

¹⁴² *See id.*

¹⁴³ *See id.*

appropriation of ideas is justified as the fruit of one's mental labor, so long as such ideas are not already in the public domain or "part of the common culture."¹⁴⁴ Because ideas are copyrightable on Moore's account, he sees no use for the idea-expression dichotomy or merger doctrine, and concludes that they should be abrogated under a Lockean theory of copyright.¹⁴⁵

The contextualist reading of Locke's labor theory of acquisition shows the flaws in Moore's reasoning.¹⁴⁶ According to Locke, nothing can ever be created *ex nihilo* by human labor alone, because only God is capable of pure creation¹⁴⁷:

The Dominion of Man . . . in the great World of visible things; . . . however managed by Art and Skill, reaches no farther, than to compound and divide the Materials, that are made to his Hand; but can do nothing towards the making the least Particle of new Matter, or destroying one Atome of what is already in Being.¹⁴⁸

According to Locke, no measure of artistry or skill exerted by individual industry could allow the human mind to create an idea *ex nihilo*.¹⁴⁹ On Hughes' account, this passage bolsters the platonic concept of ideas as preexisting forms.¹⁵⁰

However, it is not necessary to adhere to a Lockean version of platonic metaphysics in order to defeat Moore's proposition that ideas can be created *ex nihilo* through human effort alone, by appealing to Locke's theory of mind espoused in *An Essay Concerning Human Understanding*.¹⁵¹ Locke believed the human mind begins as a tabula rasa—blank slate—and must acquire all ideas through a posteriori learning from the external world.¹⁵² Because no ideas are innate to the human mind, any idea invented by human labor must use the limited resource of preexisting, simpler ideas learned from observing

¹⁴⁴ *Id.*

¹⁴⁵ Moore, *supra* note 11, at 93. *But see* Zemer, *supra* note 67, at 934 ("It is wrong to portray Locke as a defender of a robust system of natural property right, unencroachable by norms of equality and public good.").

¹⁴⁶ *See supra* Part III.B.

¹⁴⁷ Zemer, *supra* note 67, at 937–38.

¹⁴⁸ LOCKE, HUMAN UNDERSTANDING, *supra* note 123, at 120.

¹⁴⁹ *See* A. John Simmons, *Makers' Rights*, 2 J. ETHICS 197, 200–01 (1998) ("God's property is based on his having created new things; man's property is based on extending his property in his person by acts of labor, which may or may not 'make' new things, but which never make them in a way sufficiently like God's *ex nihilo* creations . . .").

¹⁵⁰ *See* Hughes, *supra* note 89, at 311–12.

¹⁵¹ *See generally* LOCKE, HUMAN UNDERSTANDING, *supra* note 123.

¹⁵² *See id.* at 104.

nature and society.¹⁵³ In light of this context, Moore’s reading of Lockean copyright seems contradictory because his belief in *ex nihilo* creation of ideas does not coincide with Locke’s epistemological theory.

Even if one overlooks this inconsistency, accepting Moore’s proposal that the “frontier” of ideas is limitless,¹⁵⁴ his argument remains flawed because it assumes all ideas are “as good” as each other and therefore any appropriation of a newly created idea is a Pareto improvement.¹⁵⁵ Assuming *arguendo* that ideas can be created *ex nihilo* such that there is an infinite supply of potential ideas available for privatization, only a finite few of those ideas will be of any value.¹⁵⁶ Without any reference to other preexisting concepts, the so-called *ex nihilo* idea would appear unintelligible to its listener.¹⁵⁷ For Locke, the invention of intelligible ideas requires individual intellectual labor that uses preexisting, simple ideas that are culturally constructed.¹⁵⁸ Agreeing on this point, Professor Drahos argues,

[E]ven where the stock of abstract objects is infinite, the human capacity to exploit that stock at any given moment is conditioned by the state of cultural and scientific knowledge which exists at that historical moment. . . . The set of usable abstract objects may also be further reduced because some ideas or knowledge may be necessary gateways to others.¹⁵⁹

Moore’s copyright theory grants protection to newly created ideas because he regards them as infinitely plentiful, thus any appropriation of them necessarily leaves “enough” to satisfy the “enough and as good” proviso.¹⁶⁰ However, because culture and technology define a limited set of valuable ideas,¹⁶¹ Moore’s theory does not account for the “as good” in the “enough and as good” proviso.¹⁶² If absolute ownership rights to newly created ideas were

¹⁵³ See *id.* at 89–92.

¹⁵⁴ Moore, *supra* note 11, at 77.

¹⁵⁵ See *id.* at 77–79.

¹⁵⁶ See Donald G. Richards, *The Ideology of Intellectual Property Rights in the International Economy*, 60 REV. SOC. ECON. 521, 530–31 (2002).

¹⁵⁷ Cf. Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CANADIAN J.L. & JURIS. 3, 9–10, 13 (2003) (claiming that the creation of intellectual property is a bilateral act between individual and society).

¹⁵⁸ See Horowitz, *supra* note 88, at 227 (quoting Gordon, *supra* note 105, at 1563–64).

¹⁵⁹ DRAHOS, *supra* note 55, at 51.

¹⁶⁰ See Moore, *supra* note 11, at 77–78.

¹⁶¹ See Richards, *supra* note 156, at 531 (arguing that ideas are more so a result of social construction rather than individual creation).

¹⁶² See Horowitz, *supra* note 88, at 215–16 (discussing the qualitative meaning of “enough and as good”).

granted in perpetuity, as Moore advocates, some copyright owners would be allowed to monopolize the limited set of culturally valuable and technologically feasible ideas.¹⁶³ Ultimately, Moore's pseudo-Lockean justification for the radical proposal of idea appropriation is only possible because he neglects the qualitative demands of the "enough and as good" proviso while erroneously assuming that the quantitative demands of the proviso are met.

Upon review, Moore's flawed conclusion that a Lockean copyright theory would demand abrogation of the merger doctrine can be traced back to the fundamental schism in Lockean interpretation, outlined in Part I.A. Like C.B. Macpherson, Moore attempts to construct an interpretation of Chapter V of *The Second Treatise* in a theoretical vacuum that is structured such that any natural law duties dictated by the "enough and as good" proviso and spoilage restriction are easily expunged. Macpherson presupposes that the surplus value created by laissez-faire capitalism will necessarily leave "enough and as good" for others,¹⁶⁴ while Moore presupposes that an infinite stock of ideas will necessarily leave "enough and as good" for others.¹⁶⁵ By relying on these unfounded assumptions masked by logical flourishes, Macpherson and Moore downplay the role of the limiting provisos and emphasize an unencumbered natural right to amass unlimited property, irrespective of the social cost.¹⁶⁶ But these interpretations do not comport with the Copyright Clause of the Constitution or the Copyright Act and have stretched Locke's own words to their breaking point.

IV. MONOPOLIZING IDEAS: THE MERGER DOCTRINE AND LOCKE'S "ENOUGH AND AS GOOD" PROVISIO

This Comment advocates a contextualist Lockean theory of copyright as a general normative framework capable of resolving many hard cases in copyright law. This Part exemplifies the theory's practical utility by applying it to resolve the merger doctrine circuit split. Part IV.A describes some of the most polarizing central cases from differing sides of the split. Rather than provide an exhaustive description of case law, this Part highlights landmark

¹⁶³ See *id.* at 216, 222–23. Drawing an analogy to tangible property further illustrates the absurdity of Moore's proposition: although there are theoretically infinite resources available in the universe, only a very small percentage located on or near Earth is of any practical value to humans.

¹⁶⁴ See MACPHERSON, *supra* note 35, at 203–21.

¹⁶⁵ See Moore, *supra* note 11, at 77–78.

¹⁶⁶ See Zemer, *supra* note 67, at 926–29.

decisions to derive the theoretical foundations of the merger doctrine disagreement. Part IV.B advocates a pragmatic split-approach to the merger doctrine, applying it to both stages of an infringement suit, but argues that a finding of merger should always affect the copyrightability of the claimant’s work and allow for actual copying by the defendant. Part IV.C explains how the Lockean copyright theory advocated above could resolve the circuit split, finding results that corroborate the legal recommendations in Part IV.B.

A. *A Brief Description of the Circuit Split*

To provide context for the analysis of the split, an overview of the general structure of copyright infringement suits, as succinctly articulated by *Lexmark International v. Static Control Components*,¹⁶⁷ is appropriate here. To establish a claim of copyright infringement, the claimant must show “(1) ownership of a valid copyright” and “(2) that the defendant copied protectable elements of the work”¹⁶⁸:

The first prong [called the copyrightability stage] tests the originality and non-functionality of the work, both of which are presumptively established by the copyright registration. The second prong [called the infringement stage] tests whether any copying occurred (a factual matter) and whether the portions of the work copied were entitled to copyright protection (a legal matter). If no direct evidence of copying is available, a claimant may establish this element by showing that the defendant had access to the copyrighted work and that the copyrighted work and the allegedly copied work are substantially similar.¹⁶⁹

Once this prima facie burden is met, the burden shifts to the defendant to show that one of the various affirmative defenses, like fair use, applies.¹⁷⁰

Since its inception, copyright law has perplexed the various circuit courts by its complicated and pedantic nature; at the forefront of this confusion is the merger doctrine. The merger doctrine was first developed in two cases: *Herbert Rosenthal Jewelry Corp. v. Kalpakian*¹⁷¹ and *Morrissey v. Procter & Gamble Co.*¹⁷² In *Kalpakian*, the plaintiff brought an infringement suit over its

¹⁶⁷ 387 F.3d 522 (6th Cir. 2004).

¹⁶⁸ *Id.* at 534.

¹⁶⁹ *Id.* (citations omitted).

¹⁷⁰ *See id.*; see Nathan C. Rogers, Note, *Copyright Protection: A Dead Fish for Sculptors of Taxidermy Mannequins?*, 6 J. INTELL. PROP. L. 159, 181 n.104 (1998).

¹⁷¹ 446 F.2d 738, 739 (9th Cir. 1971).

¹⁷² 379 F.2d 675, 676 (1st Cir. 1967).

“copyright registration of a pin in the shape of a bee[,] formed of gold[, and] encrusted in jewels.”¹⁷³ Judge Browning determined that the idea of a bee pin and its expression “appear to be indistinguishable,” claiming that “[t]here is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both.”¹⁷⁴ Ultimately, the court ruled that because the idea and expression were inseparable, copying the expression could not be barred because such a ruling “would confer a monopoly of the ‘idea’”¹⁷⁵

Similarly, the *Morrissey* court contemplated the copyright of a simple sweepstakes involving the social security numbers of participants.¹⁷⁶ The *Morrissey* court determined that if a limited number of ways exist to express an idea, then the expressions are not subject to copyright protection because otherwise, “by copyrighting a mere handful of forms, [such a copyright holder] could exhaust all possibilities of future use of the substance.”¹⁷⁷ Ultimately the court sided with the defendant, concluding that the sweepstake rules were not copyrightable subject matter “and plaintiff cannot complain even if his particular [rules were] deliberately adopted.”¹⁷⁸ These early cases did not mention the term “merger” and left the definition and scope of the doctrine ambiguous, allowing interpretive room for a circuit split to develop.

Arising from these early cases, the merger doctrine states that when an idea is so closely linked to a particular expression that there is only one way or a small number of ways to express the idea, the expression is said to have merged with the idea.¹⁷⁹ A merged expression is barred from copyright protection because allowing such a copyright to exist would confer an unfair monopoly to the idea itself, preventing subsequent expressions of that idea.¹⁸⁰ Because this common law doctrine was never explicitly codified, some courts have applied the merger doctrine to the initial question of whether the claimant’s work is copyrightable, while others have applied it as an affirmative defense to excuse a particular defendant’s conduct, leading to the circuit split described below.

¹⁷³ *Kalpajian*, 446 F.2d at 739.

¹⁷⁴ *Id.* at 742.

¹⁷⁵ *Id.*

¹⁷⁶ *Morrissey*, 379 F.2d at 676.

¹⁷⁷ *Id.* at 678.

¹⁷⁸ *See id.* at 679.

¹⁷⁹ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 535 (6th Cir. 2004).

¹⁸⁰ *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990) (citing *Kalpajian*, 446 F.2d at 742).

1. *The Copyrightability Approach to the Merger Doctrine*

With no clear common law decisions for support, many subsequent courts turned to the statutory language and intent of § 102(b) of the Copyright Act, focusing on the policy rationale of incentivizing economic growth by permitting the free flow of ideas, to conclude that the merger doctrine should be applied to the copyrightability stage.

In *Kern River Gas Transmission Co. v. Coastal Corp.*, a pipeline company sued its competitor for copying maps outlining a proposed pipeline route.¹⁸¹ Both parties in this suit were negotiating government contracts to build adjoining segments of the same pipeline.¹⁸² The defendant copied and utilized maps submitted to the Federal Energy Regulatory Commission by Kern River when applying for permission to build a pipeline in the same corridor as Kern River.¹⁸³

Judge Clark, writing for the Fifth Circuit, indicated that although Kern River’s map falls within the category of “pictorial, graphic, and sculptural works” eligible for copyright protection under § 102(a)(5) of the Copyright Act, § 102(b) prohibits granting copyright protection to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”¹⁸⁴ The Court recognized the congressional intent behind this statutory language as striking a balance between “the competing concerns of providing incentive to authors to create and of fostering competition in such creativity.”¹⁸⁵ The Fifth Circuit held that the idea of the proposed location of the pipeline and its expression embodied on a map are inseparable and, via the merger doctrine, not copyrightable.¹⁸⁶ Judge Clark rejected the complainant’s argument that the original creation of Kern River’s map was a costly venture: “[t]he problem for the copyrightability of the resulting maps, however, is not a lack of originality, but rather that the maps created express in the only effective way the idea of the location of the pipeline.”¹⁸⁷

¹⁸¹ *Id.* at 1459.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1463 (quoting 17 U.S.C. § 102 (1988)).

¹⁸⁵ *Id.* (citing *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983)).

¹⁸⁶ *Id.* at 1463–64.

¹⁸⁷ *Id.* at 1464. Perhaps the nexus between the originality requirement and this instance of merger is stronger than what Judge Clark contemplated. See 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:47, Westlaw (database updated Sept. 2015).

The Fifth Circuit reaffirmed its position on the merger doctrine in *Veeck v. Southern Building Code Congress International*.¹⁸⁸ In *Veeck*, the plaintiff-appellee, Southern Building Code Congress International (SBCCI), a nonprofit organization whose purpose was “to develop, promote, and promulgate model building codes,” sued a website operator for infringing on its copyrighted building codes, which had been enacted into law.¹⁸⁹ Veeck, the operator of a noncommercial website dedicated to sharing information around North Texas, had difficulty finding the town copies of the building codes for two Texan towns, and instead bought them in digital form from SBCCI.¹⁹⁰ Despite the copyright notice on the disk, Veeck copied and pasted the relevant building codes from the disk to his website, without attribution to SBCCI, thus bringing about an infringement lawsuit.¹⁹¹

Judge Jones indicated that because the accuracy of legal wording is crucial, there is only one way to express the building codes as law; thus, the merger doctrine renders that expression uncopyrightable.¹⁹² “[A]s law, the model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives. As model codes, however, the organization’s works retain their protected status.”¹⁹³

More recently, the Seventh Circuit agreed that applying the merger doctrine during the copyrightability stage is the best approach. In *Ho v. Taflove*, Professor Ho brought an infringement suit against a faculty colleague for copying his improved mathematical model for predicting electron behavior.¹⁹⁴ Ho’s research assistant was tasked with converting the model into computer code to be further analyzed; after five years of work with Ho, the research assistant transferred to the defendant’s research team.¹⁹⁵ The student retained some of Ho’s unpublished manuscripts to which he had contributed.¹⁹⁶ Two years later, the defendant and the research assistant published articles describing the model without attributing Ho.¹⁹⁷ Ho filed a lawsuit after learning of the alleged infringement when he attempted to submit his research

¹⁸⁸ 293 F.3d 791, 801 (5th Cir. 2002).

¹⁸⁹ *Id.* at 793–94.

¹⁹⁰ *Id.* at 793.

¹⁹¹ *Id.* at 793–94.

¹⁹² *See id.* at 801 (“It should be obvious that for copyright purposes, laws are ‘facts’ . . .”).

¹⁹³ *Id.* at 793 (emphasis omitted).

¹⁹⁴ *See* 648 F.3d 489, 493–94 (7th Cir. 2011).

¹⁹⁵ *Id.* at 493.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 493–94.

for publication but was rejected because the ideas were preempted by the defendant’s publication.¹⁹⁸ Ho alleged that the defendant “copied the *substance* of the equations, figures and text.”¹⁹⁹

Judge Ripple held that the merger doctrine rendered Ho’s equations and figures uncopyrightable because, as a mathematical model representing scientific fact, there is only one way to accurately represent the underlying idea.²⁰⁰ Because Ho did not meet the burden of showing that there was more than one way to express the ideas underlying his model, Judge Ripple affirmed the defendant’s grant of summary judgment.²⁰¹ Because the substance of Ho’s equations and figures were deemed uncopyrightable, any evidence of actual copying that took place due to the research assistant’s possession of Ho’s manuscript was irrelevant.²⁰²

2. *The Affirmative Defense Approach to the Merger Doctrine*

The Second and Ninth Circuits contend that the merger doctrine is most appropriately applied as an affirmative defense in the infringement stage of analysis. This approach is heavily advocated by Professor David Nimmer, a prolific authority in copyright law.²⁰³ Addressing the circuit split, Nimmer argues that the “better view” is to analyze “the inseparability of idea and expression in the context of a particular dispute, rather than attempting to disqualify certain expressions from protection *per se*.”²⁰⁴ Under this approach, merger serves to excuse a finding of substantial similarity between two independently authored expressions.²⁰⁵ Merger excuses the defendant’s particular conduct under the circumstances but does not affect the scope of the claimant’s copyright.²⁰⁶

¹⁹⁸ *Id.* at 494.

¹⁹⁹ *Id.* at 499.

²⁰⁰ *See id.* at 497; *see also* Coquico, Inc. v. Rodríguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009) (“The merger doctrine denies copyright protection when creativity merges with reality; that is, when there is *only one way* to express a particular idea.” (emphasis added)).

²⁰¹ *See Ho*, 648 F.3d at 499–500.

²⁰² *See id.* at 504. Such a plaintiff may find relief for actual copying under trade secret law, so long as the intellectual object at issue remained unpublished and was intentionally kept secret; Ho could not meet this burden. *Id.*

²⁰³ *See David Nimmer*, IRELL & MANELLA LLP, <http://www.irell.com/professionals-51.html> (last visited Feb. 26, 2016).

²⁰⁴ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03 (2015) [hereinafter NIMMER] (footnote omitted).

²⁰⁵ *See id.*

²⁰⁶ *See id.*

Nimmer's argument for merger as an affirmative defense is most enthusiastically advocated in *Kregos v. Associated Press*.²⁰⁷ In *Kregos*, the creator of a form that compiled statistics on baseball pitchers brought a copyright infringement suit against a newspaper.²⁰⁸ *Kregos* had circulated his form to various newspapers that subscribed to his service of compiled baseball statistics.²⁰⁹ The year after *Kregos* began distributing his baseball statistics form, Associated Press released a pitching form that was nearly identical to the one owned by *Kregos*.²¹⁰

Judge Newman concluded that the merger doctrine did not apply in this case because *Kregos*'s baseball statistics form compiled facts based on matters of taste and personal opinion, showing that other expressions existed that could also be appropriated.²¹¹ In dicta, Judge Newman argued that “[a]ssessing merger in the context of alleged infringement will normally provide a more detailed and realistic basis for evaluating the claim that protection of expression would inevitably accord protection to an idea.”²¹² Rather than focus on the language and intent of § 102(b), the *Kregos* opinion focused on the practicality of judicial administration of the merger doctrine to conclude that it is best determined at the close of evidence upon an examination of all the circumstances.²¹³

The battle over when to apply the merger doctrine is most readily apparent in *Hart v. Dan Chase Taxidermy Supply Co.*, in which the Second Circuit struck down a district court's ruling because it applied the merger doctrine too early in its analysis, before it contemplated the issue of “substantial similarity” in the infringement prong.²¹⁴ In *Hart*, the creator of a line of fish mannequins used to display fish skin sued competitor Dan Chase Taxidermy Supply Co. for making identical copies of its mannequins.²¹⁵ The district court dismissed the copyright infringement claim because the claimant's fish mannequins had “no meaningful detail . . . that is not commanded by the idea of a realistic fish,”

²⁰⁷ See 937 F.2d 700, 705 (2d Cir. 1991); see also *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) (also noting Nimmer's stance).

²⁰⁸ See *Kregos*, 937 F.2d at 701–02.

²⁰⁹ *Id.* at 702. *Kregos* went through the necessary steps to “register[] his form with the Copyright Office and obtain[] a copyright.” See *id.*

²¹⁰ *Id.*

²¹¹ See *id.* at 707.

²¹² *Id.* at 705.

²¹³ See *id.*; see also *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 836, 838 (10th Cir. 1993) (discussing the utility of applying merger to filter unprotectable elements in the infringement stage).

²¹⁴ 86 F.3d 320, 322 (2d Cir. 1996).

²¹⁵ *Id.* at 321.

and thus it held that the fish “‘exemplif[ied] the merger of idea and expression’ and were not copyrightable.”²¹⁶

Second Circuit Judge Calabresi disagreed with that decision, arguing that the district court applied the merger doctrine too early.²¹⁷ While recognizing that merger is not equivalent to the question of infringement, the court pronounced its “strong preference” toward Nimmer’s approach, ratified in *Kregos*.²¹⁸ Judge Calabresi elaborated, “For in essence, the merger inquiry asks whether all realistic fish mannequins, no matter how artistic they might be, will necessarily be ‘substantially similar.’ And only if this is so, is there no unique expression to protect under the copyright laws.”²¹⁹

Judge Calabresi’s language treats merger more as a factual dispute rather than a legal dispute.²²⁰ However, the learned judge made useful observations concerning instances when merger is obvious at the onset:

It is true that *Kregos* did not categorically forbid district courts from reaching merger questions before hearing evidence about substantial similarity. There may be *highly unusual cases* in which virtually all of an idea’s possible expressions are before a district court at the copyrightability stage. In such rare cases it may perhaps be possible to determine the merger issue while deciding whether a given expression is copyrightable. But we agree with *Kregos* that this is very unlikely and therefore adhere to our strong preference that the question be decided only after all the evidence of substantial similarity is before the court.²²¹

According to Judge Calabresi, the realization that merger is applicable in a given case is such a “sweeping conclusion” that it can only be realistically reached after a full examination of the record, after substantial similarity has been determined, as an affirmative defense.²²² Ultimately, the court remanded the case back to the district court to determine whether infringement had occurred.²²³

²¹⁶ *Id.* (alterations in original).

²¹⁷ *Id.* at 322.

²¹⁸ *See id.*

²¹⁹ *Id.*

²²⁰ *See id.*

²²¹ *Id.* (emphasis added).

²²² *Id.* at 323.

²²³ *See id.*

The most recent precedent concerning the merger doctrine came in *Oracle America v. Google*.²²⁴ In that case, Oracle sued Google for patent and copyright infringement of thirty-seven packages of computer source code known as application programming interfaces (APIs).²²⁵ Oracle's predecessor, Sun Microsystems, developed the Java APIs as a platform "to relieve programmers from the burden of writing different versions of their computer programs for different operating systems or devices."²²⁶ Oracle holds copyrights for 166 APIs that allow third-party programmers to use pre-written code "shortcuts," alleviating the programmers' need to write entirely new code from scratch.²²⁷

Google copied code verbatim from thirty-seven Java APIs and inserted that code into parts of Android software.²²⁸ Google argued it did so because programmers who were familiar with Java would want to find the same set of thirty-seven functionalities called by the same names in the new Android operating system as they would find in Java.²²⁹ Oracle filed suit in the Northern District of California and Google alleged multiple defenses, one of which argued that the idea behind the disputed APIs had merged with the expression, rendering them uncopyrightable.²³⁰ The jury returned a verdict concerning the infringement analysis, indicating that Google had infringed, but the jury could not reach a conclusion as to Google's fair use defense.²³¹ However, the district judge, ruling on the issue of copyrightability, concluded that the merger doctrine applies to Oracle's APIs, rendering them uncopyrightable as a matter of law.²³²

On appeal, Judge O'Malley, writing for the Federal Circuit, indicated that the lower court erred when applying the merger doctrine.²³³ First, the court argued that the district court erred by applying the merger doctrine to the copyrightability stage, claiming that "[i]n the Ninth Circuit, while questions regarding originality are considered questions of copyrightability, concepts of merger and *scènes à faire* are affirmative defenses to claims of

²²⁴ 750 F.3d 1339 (Fed. Cir. 2014).

²²⁵ *See id.* at 1347.

²²⁶ *Id.* at 1347–48.

²²⁷ *Id.* at 1349.

²²⁸ *Id.* at 1350–51.

²²⁹ *Id.* at 1350.

²³⁰ *See id.* at 1359–1360.

²³¹ *See id.* at 1347.

²³² *Id.* at 1348.

²³³ *Id.* at 1360–61.

infringement.”²³⁴ Second, the court noted in dicta that because there were multiple ways of expressing the same idea in code at the time Sun Microsystems originally authored the APIs, the merger doctrine did not apply.²³⁵ In dicta, Judge O’Malley proclaimed that “the district court erred in focusing its merger analysis on the options available to Google at the time of copying”; instead the scope of protectable subject matter is “to be evaluated at the time of [the claimant’s] creation [rather than] the time of infringement.”²³⁶

This decision sparked discontent among programmers who fear that the ruling in *Oracle v. Google* will have sweeping, negative implications on software tech start-up companies.²³⁷ Some commentators have indicated that this decision will suffocate small tech companies with a flood of litigation on one hand or high licensing premiums on the other.²³⁸

The reasoning utilized by this line of cases has been heavily criticized, most famously by Judge Sweet in his celebrated dissenting opinion in *Kregos*. By framing the debate on the merger doctrine in the context of § 102(b) of the Copyright Act, Judge Sweet reasoned that the merger inquiry should take place during the copyrightability analysis.²³⁹ Here the learned judge criticized Nimmer’s approach because it requires that a reviewing court hold that the “two works in question are not ‘substantially similar,’ even where they are in fact identical, a result which [he] view[s] as a not useful variety of doublespeak.”²⁴⁰ Besides this semantic confusion, Judge Sweet’s main concern with Nimmer’s approach is the “erroneous conclusion” that merger should be

²³⁴ *Id.* at 1358. Here, Judge O’Malley was restricted to applying Ninth Circuit law because “on subjects not exclusively assigned to the Federal Circuit, the court applies the law which would be applied by the regional circuit.” *Id.* at 1353 (quoting *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990)).

²³⁵ *Id.* at 1360. The court noted that Sun originally had “unlimited options as to the selection and arrangement of the 7000 lines Google copied.” *Id.* at 1361 (quoting Opening Brief and Addendum of Plaintiff-Appellant at 50, *Oracle Am., Inc.*, 750 F.3d 1339 (No. 2013-1021), 2013 WL 518611, at *49).

²³⁶ *Id.* at 1361.

²³⁷ See, e.g., Russell Brandom, *Federal Court Overturns Google v. Oracle Decision, Setting Disastrous Precedent*, VERGE (May 9, 2014, 1:53 PM), <http://www.theverge.com/2014/5/9/5699958/federal-court-overturns-google-v-oracle>; Terry Hart, *Federal Circuit Releases Decision in Oracle v. Google*, COPYHYPE (May 12, 2014), <http://www.copyhype.com/2014/05/federal-circuit-releases-decision-in-oracle-v-google/>.

²³⁸ See Corynne McSherry, *Dangerous Decision in Oracle v. Google: Federal Circuit Reverses Sensible Lower Court Ruling on APIs*, ELEC. FRONTIER FOUND. (May 9, 2014), <https://www.eff.org/deeplinks/2014/05/dangerous-ruling-oracle-v-google-federal-circuit-reverses-sensible-lower-court>.

²³⁹ See *Kregos v. Associated Press*, 937 F.2d 700, 715 (2d Cir. 1991) (Sweet, J., concurring in part and dissenting in part).

²⁴⁰ *Id.*

relegated to merely explaining instances of “unintentional similarity.”²⁴¹ Although Judge Sweet recognized the practical argument for a fully developed record made by the majority,²⁴² he concluded that judicial convenience cannot offset the congressional intent behind § 102(b).²⁴³ Under Judge Sweet’s view, evidence that the defendant actually copied a merged expression is irrelevant because, as a matter of copyrightability, that merged expression is precluded from private ownership and reverts to the public domain.²⁴⁴

This debate is not mere academic pedagogy; at stake here are hefty litigation costs and the allocation of the burden of proof at trial.²⁴⁵ If the Fifth and Seventh Circuits’ copyrightability approach is applied, the claimant bears the burden to show that merger has not prevented her expression from being copyrighted.²⁴⁶ Additionally, this approach advocates that a finding of merger result in a dismissal during pretrial litigation, which helps secure a “just, speedy, and inexpensive determination.”²⁴⁷ However, if the Second and Ninth Circuits prevail, then the burden of proof is placed on the alleged infringer as an affirmative defense to be raised at the end of a trial.²⁴⁸ Due to the rise of predatory copyright enforcement firms,²⁴⁹ special consideration should be given to the disparity of power and resources in infringement lawsuits.²⁵⁰ The advent of these “copyright trolls” threatens to chill free speech and the ability of future authors to create derivative works.²⁵¹

²⁴¹ *Id.* at 716.

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *See* Matthew J. Faust, Comment, *What Do We Do With a Doctrine Like Merger? A Look at the Imminent Collision of the DMCA and Idea/Expression Dichotomy*, 12 MARQ. INTELL. PROP. L. REV. 131, 133 (2008).

²⁴⁶ *See* *Ho v. Taflove*, 648 F.3d 489, 492–96 (7th Cir. 2011).

²⁴⁷ FED. R. CIV. P. 1 (discussing the scope and purpose).

²⁴⁸ *See* NIMMER, *supra* note 204, §13.03(B)(3) n.166 (“The Register of Copyrights will not know about the presence or absence of constraints that limit ways to express an idea. The burden of showing such constraints should be left to the alleged infringer. Accordingly, . . . the relationship between ‘idea’ and ‘expression’ will not be considered on the issue of copyrightability, but will be deferred to the discussion of infringement.” (ellipsis in original) (quoting *NEC Corp. v. Intel Corp.*, 1989 U.S. Dist. LEXIS 1409, at 9 (N.D. Cal. Feb. 6, 1989))).

²⁴⁹ *See* Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 55 (2014).

²⁵⁰ *Cf.* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 771 (1981).

²⁵¹ *See* Greenberg, *supra* note 249, at 55–56.

B. Recognizing the Many Faces of the Merger Doctrine: A Pragmatic Solution to the Circuit Split

Upon review of the circuit split, one can see how the different approaches stem from deep-rooted interpretive differences concerning the scope and purpose of the merger doctrine. The copyrightability approach advocated by *Veeck* appears most useful when analyzing whether there is logically only one way to express an idea.²⁵² By emphasizing the language of § 102(b) and rhetoric of *Baker v. Selden*, the copyrightability approach causes divestment of the author’s exclusive right if the claimant cannot show some evidence that there is more than one conceivable way to express the underlying idea; evidence that the defendant actually copied is irrelevant.²⁵³ This view frames merger as a matter of law, a theoretical question with a low evidentiary burden, which is best suited to be argued at a pretrial motion for summary judgment.²⁵⁴

The affirmative defense approach championed by *Kregos* appears most useful when analyzing whether merger applies to a finite set of expressions.²⁵⁵ This is a matter of degree, which is clearly a factual dispute that is best raised at the final stages of an infringement suit after the reviewing judge has examined the entire record.²⁵⁶ This inquiry may address extrinsic factors, such as technology, culture, and the market, that limit the means of expressing an idea.²⁵⁷ As a separate matter, because merger doctrine is most easily determined at the end of trial, the *Kregos* approach constructs merger as merely an affirmative defense that excuses a particular showing of substantial similarity, absent evidence of actual copying.²⁵⁸

To be clear, it seems that the circuit split over the merger doctrine actually illuminates different types of merger. In this vein of thought, Professor Patry

²⁵² 293 F.3d 791, 801 (5th Cir. 2002); see *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990).

²⁵³ See *supra* notes 241–44 and accompanying text.

²⁵⁴ See *Ho v. Taflove*, 648 F.3d 489, 500 (7th Cir. 2011).

²⁵⁵ See 2 PATRY, *supra* note 187, § 4:46.

²⁵⁶ See *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992) (defining merger as barring copyright protection to patentable processes by examining “particular facts of each case” (quoting *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989))).

²⁵⁷ See *Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320, 322 (2d Cir. 1996) (concluding merger requires an examination into the market practices of taxidermists, which is best examined in the context of the alleged infringement).

²⁵⁸ Rogers, *supra* note 170, at 175. This view seems to conclude that the affirmative defense approach is necessary for developing the trial record, when in fact it is merely sufficient. Other courts contemplating issues of merger have achieved Nimmer’s goal of a fully developed trial record without requiring the defendant to litigate a costly affirmative defense. See note 271 and accompanying text.

reasons that, if the merger doctrine is kept at all, it should be split into two different questions, applied at separate stages of the infringement suit.²⁵⁹ First, if there is only one conceivable way to express an idea, then this is a matter of originality and prevents copyrightability. For the purpose of easy analysis, this Comment calls these cases instances of “theoretical merger.” Second, if there is a limited pool of expressions, then the inquiry must consider the degree to which the claimant’s copyright monopolizes the idea.²⁶⁰ This Comment calls this second category “actual merger.” Patry argues that this kind of merger affects the scope of copyright protection.²⁶¹

In light of the expansion of the originality requirement under *Feist*, Patry’s recommendations come into better focus.²⁶² If theoretical merger applies, because there is only one conceivable way to express an idea, then the plaintiff will necessarily fail to show that her work contains a “modicum of creativity” under *Feist*, preventing copyrightability of the plaintiff’s work.²⁶³ According to Patry, for instances of actual merger, “[w]here there are choices regarding the *protectable* content or design of a work, the court should focus not on copyrightability but instead on the scope of protection, an inquiry that occurs at the infringement stage, where the trier of fact will have the broadest evidentiary basis possible.”²⁶⁴ Even though actual merger analysis is best asserted during the infringement stage, Patry argues that it should not be constructed as an affirmative defense. Instead, the burden of production should be imposed on the plaintiff and a finding of merger should affect the scope of her copyright.²⁶⁵

The Sixth Circuit recognized that different types of merger analysis exist in *Lexmark International, Inc. v. Static Control Components Inc.* but failed to delineate precisely how theoretical merger and actual merger function

²⁵⁹ See 2 PATRY, *supra* note 187, § 4:47. Patry actually argues that the merger doctrine should be discontinued because of the confusion it has caused. *Id.* Instead, the same inquiry should be called different names: originality and infringement. *Id.* This however is merely a disagreement over nomenclature.

²⁶⁰ *Id.*

²⁶¹ See *id.* at § 4:46.

²⁶² See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

²⁶³ See 2 PATRY, *supra* note 187, § 4:47; cf. *Feist Publ’ns, Inc.*, 499 U.S. at 340 (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.” (citation omitted)).

²⁶⁴ 2 PATRY, *supra* note 187, § 4:46.

²⁶⁵ See *id.* § 4:46.

doctrinally.²⁶⁶ Following in the spirit of Patry and *Lexmark*, this Comment proposes the following solution to the circuit split.

First, the question of theoretical merger—which asks, Is there only one conceivable way to express the underlying idea?—should take place during the copyrightability stage when addressing the issue of originality.²⁶⁷ If the plaintiff meets his burden by showing that there are at least two ways of expressing the underlying idea, the court may move to the infringement stage, so long as the other requirements of copyrightability are also met.²⁶⁸

Second, recognizing the pragmatism embodied in Nimmer’s approach, the question of actual merger—which asks, Is there is a limited pool of expressions caused by real-world constraints?—should take place at the close of all arguments concerning infringement, after the reviewing judge has fully examined the record.²⁶⁹ If this question is answered affirmatively, the reviewing judge must consider the degree to which the plaintiff’s copyright, in its actual effect, monopolizes an idea.²⁷⁰

Finally, although it is best analyzed at the end of trial, actual merger should not be considered an affirmative defense that merely excuses the defendant’s particular conduct.²⁷¹ The plain language meaning of § 102(b) indicates that a finding of merger should render actual copying permissible; this statutory allowance cannot be overlooked merely for efficiency.²⁷² Thus, any finding of merger should affect the scope of copyrightability and evidence of actual copying by the defendant should not be relevant.²⁷³ By splitting the merger

²⁶⁶ 387 F.3d 522, 536 (6th Cir. 2004).

²⁶⁷ See 2 PATRY, *supra* note 187, § 4:47 (“[P]laintiff’s work should first be examined for copyrightability, beginning with identification of the work’s idea. In the rare instance where there is only one way to express the idea of the work, the work is not original.”); *cf.* *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 801 (5th Cir. 2002); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1464 (5th Cir. 1990).

²⁶⁸ *Cf.* *Ho v. Taflove*, 648 F.3d 489, 499 (7th Cir. 2011) (describing the plaintiff’s failure to support his argument that there is more than one way of expressing the underlying idea).

²⁶⁹ See *Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320, 322 (2d Cir. 1996).

²⁷⁰ See *id.*

²⁷¹ See *Kregos v. Associated Press*, 937 F.2d 700, 716 (2d Cir. 1991) (Sweet, J., concurring in part and dissenting in part); 2 PATRY, *supra* note 187, § 4:46 (“[D]espite a few cases holding that merger is an affirmative defense, it is not; merger is merely a denial that defendant has copied protectible material.”). This is the approach taken by the 10th Circuit when addressing issues of actual merger, applying the doctrine during the “abstraction-filtration-comparison” test during the infringement stage, which keeps the burden of production with the Plaintiff. See, e.g., *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1207 (10th Cir. 2014); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1372 (10th Cir. 1997); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 838 (10th Cir. 1993) (calling merger an “additional filtration doctrine[]”).

²⁷² See *Kregos*, 937 F.2d at 716 (Sweet, J., concurring in part and dissenting in part).

²⁷³ See *id.*

analysis into actual and theoretical questions, both of which impact the claimant's exclusive right, the view advocated here respects the statutory language of § 102(b) by allowing for the free flow of ideas while solving the administrative concerns that Nimmer highlights.²⁷⁴ The *Hart* court reluctantly recognized the existence of what this Comment calls theoretical merger, but underestimated its prevalence in copyright litigation and deemed this approach unnecessary.²⁷⁵

By expounding upon Patry's argument, the legal recommendations made above work to disentangle some of the doctrinal confusion concerning merger. However, taken alone, the power of this argument is merely descriptive; it reconciles the split and establishes better "fit" between the circuits. To strengthen these legal recommendations and provide them normative force, the next Part examines how a contextualist Lockean theory of copyright would resolve the split, finding results that endorse the legal solution this Comment advocates.

C. Lockean Copyright Theory Applied to the Merger Doctrine—Violation of Natural Law and Reversion to the Commons or Diminution of Right

As explained above, the merger doctrine bars copyright protection to an expression that would otherwise confer a monopoly over an idea.²⁷⁶ Because ideas are communal resources that cannot be appropriated without violating the "enough and as good" proviso,²⁷⁷ the merger doctrine can be viewed as a means of expunging the copyright owner's duty to leave "enough and as good" for others.²⁷⁸ Thus, this Comment proposes that if the merger doctrine applies to a particular expression, then the "enough and as good" proviso is violated and the copyright holder's exclusive right is divested or diminished in scope, allowing others to use the merged expression free from infringement liability.²⁷⁹ Hughes's interpretation, which argues that an otherwise ownable expression becomes "depropertized" upon a violation of natural law, suggests

²⁷⁴ See *supra* note 204 and accompanying text.

²⁷⁵ See *Hart*, 86 F.3d at 322 (calling such instances "rare"). Perhaps this is because in general "the copyrightability of a work as a whole . . . is less frequently contested." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 538 (6th Cir. 2004).

²⁷⁶ *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

²⁷⁷ See Horowitz, *supra* note 88, at 222.

²⁷⁸ See Drassinower, *supra* note 157, at 5 (recognizing merger and other fairness doctrines that limit the author's entitlement as compatible with Lockean "self-limiting" rights).

²⁷⁹ See Hughes, *supra* note 89, at 319.

that a finding of merger should affect copyrightability.²⁸⁰ Furthermore, because a violation of the “enough and as good” proviso causes reversion of a privately held expression to the public domain or diminution in the scope of the protection, evidence of actual copying should be irrelevant to a finding of merger under this Lockean copyright theory.²⁸¹ Because ideas are akin to communal resources necessary to sustain society, one would expect for merged expressions that monopolize ideas to be widely “copied” because of their centrality to life as a shared vital resource.²⁸²

Like the personal duty prescribed by the “enough and as good” proviso, compliance with the merger doctrine should be considered a duty that rests with the copyright owner.²⁸³ However, it may be unfair to place all burdens on the claimant to show that complex instances of merger do not apply; how is a private litigant meant to arrive at the “sweeping conclusion” of whether actual merger exists?²⁸⁴ Also, it may also be unrealistic to expect a judge to make sound decisions without examining all the circumstances.²⁸⁵ To better grapple with this question of equity and efficiency, a further examination of Locke’s goal of minimizing the transaction costs of property ownership is needed.

1. *Transaction Costs as Justification for State-Funded Arbitration*

The portrayal of the state of nature as a stagnant concept that presupposes Garden-of-Eden-like abundance is a misrepresentation; Locke describes the state of nature in terms of an evolving narrative, depicting the formation and progression of human society.²⁸⁶ The state of nature first given to all of humanity in common was truly a world of bounty.²⁸⁷ During this time of

²⁸⁰ See *id.* at 319–20.

²⁸¹ See *id.*

²⁸² See *supra* notes 118–22 and accompanying text.

²⁸³ Compare TULLY, *supra* note 33, at 88 (“enough and as good” proviso burdens property owner), with 2 PATRY, *supra* note 187, § 4:47 (merger doctrine burdens copyright owner).

²⁸⁴ Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320, 323 (2d Cir. 1996).

²⁸⁵ *Id.*

²⁸⁶ For an argument describing Locke’s state of nature as a factual description of early human society, see generally LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953). Viewing Locke’s state of nature as a narrative story does not require accepting Strauss’ proposal; the state of nature may just be a thought experiment. Cf. Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 U. KAN. L. REV. 91, 107 (2009) (describing Locke’s depiction of the state of nature as an eloquent story). If Locke’s state of nature is considered a thought experiment, it must not be conflated with the static type of thought experiment espoused by modern social contractarians. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971) (describing the original position as appealing to a “higher level of abstraction” than the compact theory utilized by John Locke).

²⁸⁷ See SECOND TREATISE, *supra* note 26, at 19.

abundance, a laborer could unilaterally appropriate property without much concern for violating the “enough and as good” proviso because “he that leaves as much as another can make use of does as good as take nothing at all.”²⁸⁸ The moral calculus imposed on property owners by the “enough and as good” proviso in the “first ages of the world” was a simple task,²⁸⁹ judged by an objective standard grounded in reason.²⁹⁰ Property owners held executive powers to act as judges of their own conduct and to settle disputes with others.²⁹¹

However, this utopia did not last. Locke recognizes that “the increase of people and stock, with *the use of money*, had made land scarce.”²⁹² While the invention of fiat money made the spoilage restriction less of an issue because value could be stored in non-spoiling gold or silver, the “enough and as good” proviso was more difficult to expunge under conditions of scarcity.²⁹³ As a practical matter, Locke admits that his labor theory of acquisition, during times of scarcity, may lead to overlapping property claims that cause “confusion and disorder.”²⁹⁴ Locke argues that the remedy for such “inconveniencies” is the development of civil government and state-funded arbitration.²⁹⁵

Most scholarship pertaining to Locke’s social compact theory grounds the justification for leaving the state of scarcity and establishing civil government on innate flaws in human nature; because individuals are greedy and self-interested, they are not able to adjudicate claims fairly.²⁹⁶ With “no

²⁸⁸ *Id.* at 21.

²⁸⁹ *Id.* at 22. During this primeval era, “men were more in danger to be lost, by wandering from their company, in the then vast wilderness of the earth, than to be straitened for want of room to plant in.” *Id.*

²⁹⁰ See Helga Varden, *The Lockean ‘Enough-and-as-Good’ Proviso: An Internal Critique*, 9 J. MORAL PHIL. 410, 442 (2012) (arguing that individually enforceable property rights in the state of nature are possible, only if its inhabitants maintain a “natural executive right” to auto-adjudicate property disputes, which requires a reading of the “enough and as good” proviso as an objective standard).

²⁹¹ SECOND TREATISE, *supra* note 26, at 12.

²⁹² *Id.* at 27.

²⁹³ See, e.g., DOUGLAS JOHN CASSON, *LIBERATING JUDGMENT: FANATICS, SKEPTICS, AND JOHN LOCKE’S POLITICS OF PROBABILITY* 234 (2011) (“Before money, judgments based on need and use were sufficient to conduct one’s life in accordance with natural law. With the introduction of money, this direct experiential understanding is obscured. And this change brings about a crisis of probable judgment.”); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 172 (1988).

²⁹⁴ SECOND TREATISE, *supra* note 26, at 12.

²⁹⁵ *Id.*

²⁹⁶ See MACPHERSON, *supra* note 35, at 239 (“For Locke, like Hobbes, held that men are moved primarily by appetite . . .”). There is certainly some truth in this statement. See SECOND TREATISE, *supra* note 26, at 13.

common superior on earth to appeal to for relief,” the civility of the state of nature necessarily spirals into a state of war.²⁹⁷

Rather than appeal to innate deficiencies in human nature, this Comment argues that the complicated administration of rights and duties under conditions of scarcity is too impractical for individuals to self-adjudicate.²⁹⁸ In this light, the “inconveniencies” Locke describes could be considered high transaction costs.²⁹⁹ Because the duty to leave “enough and as good” is difficult to determine under conditions of scarcity, property disputes necessarily arise; to mitigate this instability, property owners are willing to forgo absolute authority over their property in exchange for a neutral arbiter to apply “settled standing rules, indifferent, and the same to all parties.”³⁰⁰ Thus, property owners consent to the creation of the state in order to decrease the transaction costs of adjudicating complicated disputes under conditions of scarcity.³⁰¹

Locke famously proclaims that “*by compact and agreement, [private individuals] settled the property which labour and industry began.*”³⁰² The state, vested with authority by a written constitution and the consent of the citizenry, is empowered with the ability to regulate property.³⁰³ However, according to Locke, the move to civil government does not trump natural law.³⁰⁴ Once society is created, “the law of nature stands as an eternal rule to

²⁹⁷ SECOND TREATISE, *supra* note 26, at 15.

²⁹⁸ While the law of nature is intelligible to all rational people, Locke recognizes that, under conditions of scarcity, people may be “ignorant for want of study of it.” SECOND TREATISE, *supra* note 26, at 66.

²⁹⁹ See Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1185–86 (2008).

³⁰⁰ SECOND TREATISE, *supra* note 26, at 46–47. The Supreme Court has long recognized Locke’s justification for state authority and blind administration of law by a neutral arbiter. See, e.g., *Alden v. Maine*, 527 U.S. 706, 767 (1999) (Souter, J., dissenting) (sovereign immunity case); *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 276 (2010) (Roberts, C.J., dissenting).

³⁰¹ JANET TAILANDA, TRUST, ETHNICITY, AND IDENTITY 79 n.23 (1994) (“By organizing a legal order . . . decision-making costs are reduced because, instead of achieving unanimous consent, which requires numerous bilateral agreements, one social contract is substituted” (citing RONALD COASE, THE NATURE OF THE FIRM (1937))).

³⁰² SECOND TREATISE, *supra* note 26, at 27–28.

³⁰³ See WALDRON, *supra* note 293, at 210 (“Locke appears to connect the age of plenty with the lack of any need for consent to appropriate and the age of money and scarcity with a suggestion that now, after all, property is based on consent.”). This emphasis on consent has led some scholars to conclude that in Locke’s civil society, all property is contingent on whatever the polity decides. See, e.g., TULLY, *supra* note 33, at 164–70.

³⁰⁴ See SECOND TREATISE, *supra* note 26, at 12 (“[M]unicipal laws of countries . . . are only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted.”); John Locke, *Essays on the Law of Nature*, in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE 171, 179 (Paul E.

all men, *legislators* as well as others.”³⁰⁵ Thus, the move to civil society did not substantively change natural law duties; it merely shifted procedural burdens to the state.³⁰⁶

By examining the state of nature as an evolving narrative, one can see how the burden to expunge the “enough and as good” proviso can fluctuate based on transaction costs.³⁰⁷ In the state of abundance, the “enough and as good” proviso was simple to meet; it was a theoretical question that could be deduced from reason.³⁰⁸ In the state of scarcity, the “enough and as good” proviso was nearly impossible to determine as a private individual; it was a factual question that required an expansive examination of circumstances in the market and environment.³⁰⁹ Although individual property owners always retain a duty under the “enough and as good” proviso, because the state was created to alleviate the high transaction costs of property ownership, a judicial magistrate should also carry a burden to resolve complex property disputes with the aim of promoting efficiency and equity.³¹⁰

2. *Structuring Infringement Litigation with Locke’s Dual Concern for Efficiency and Equity*

When this Lockean framework for allocating duties based on relative transaction costs is applied to the circuit split on the merger doctrine, it yields a surprising symmetry. As a default rule, because the duty to leave “enough and as good” is always imposed on property owners as a condition precedent to acquisition,³¹¹ an author seeking copyright protection in court is best situated to carry the legal burden to prove that merger does not apply.³¹² However, the copyright owner may not be able to anticipate, or even fully comprehend, how changes in technology, governmental regulation, or common culture will cause

Sigmund ed., 2005) (“[The law of nature] is a fixed and permanent rule of morals which reason itself pronounces, and which persists, being a fact so firmly rooted in the soil of human nature.” (alteration in original)).

³⁰⁵ SECOND TREATISE, *supra* note 26, at 70–71. Thus in civil society, both public policy and private conduct is governed by natural law; individuals retain the duties imposed by the limiting provisos. *See id.*

³⁰⁶ The Supreme Court has recognized Locke’s social compact theory as shifting adjudicatory burdens to a neutral judicial magistrate. *See Robertson v. United States ex rel. Watson*, 560 U.S. 272, 283 (2010) (Roberts, C.J., dissenting).

³⁰⁷ *See* CASSON, *supra* note 293, at 234.

³⁰⁸ *See* MERGES, *supra* note 5, at 50–51.

³⁰⁹ *See id.*

³¹⁰ *See infra* Part IV.C.2.

³¹¹ *See* TULLY, *supra* note 33, at 165.

³¹² *Cf. Ho v. Taflove*, 648 F.3d 489, 504 (7th Cir. 2011).

actual merger of an otherwise copyrightable expression. Situations like these require a full examination of the record with the analytical sophistication of a learned judge.³¹³

Thus, like moral actors situated in Locke’s initial state of abundance, copyright owners should carry the burden to prove, as an objective standard based on reason and logic, that theoretical merger has not rendered their expression uncopyrightable. This embodies the logic in *Veeck, Kern River*, and other “rare cases” reluctantly recognized by the *Hart* court.³¹⁴ On the other hand, similar to the complex moral calculus of the “enough and as good” proviso under conditions of scarcity, issues of actual merger are best resolved by a judicial magistrate when the litigation record is fully developed.³¹⁵ This respects the concern for prudent judicial administration voiced by Nimmer and the *Hart* and *Kregos* courts.³¹⁶

While these recommendations on the merger doctrine find textual support from Locke’s ruminations on transaction costs, admittedly, the above argument requires an examination of the mischief Locke sought to remedy: namely, royal entitlements and the monopolization of communal resources, both of which inhibit economic growth.³¹⁷ Locke argues that laws should be formulated to “secure protection and encouragement to the honest industry of mankind, against the oppression of power and the narrowness of party.”³¹⁸ In addition to Locke’s theoretical writings, in his political advocacy Locke fervently criticized unfair monopolization of resources granted by royal decree and descent.³¹⁹ Because the merger doctrine functions to prevent the monopolization of ideas, a purposivist reading of Locke’s canon prescribes an expansive reading of the merger doctrine that is cognizant of the disparity of

³¹³ Cf. *Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320 (2d Cir. 1996).

³¹⁴ See *supra* Part IV.A.1.

³¹⁵ Even though an issue of actual merger must be conducted at the close of all evidence, this Comment argues that it should not be considered an affirmative defense. See 2 PATRY, *supra* note 187, § 4:46. The Lockean theory of copyright proposed here would “depropertize” any private property that is in violation of natural law. See Hughes, *supra* note 89, at 320.

³¹⁶ See *supra* Part IV.A.2.

³¹⁷ See SECOND TREATISE, *supra* note 26, at 26.

³¹⁸ *Id.*

³¹⁹ TULLY, *supra* note 33, at 134. Locke’s labor theory of acquisition served as a theoretical tool against feudal entitlement to land based on the inheritance rules of primogeniture and entail. See Huston, *supra* note 56, at 1080.

power in copyright infringement suits and is constructed to ensure fair competition absent of monopolistic entitlement.³²⁰

Large media outlets, seeking to monopolize distribution and use rights by filing frivolous infringement suits in conjunction with copyright troll enforcement firms, impose high transaction costs on independent authors and artists, inhibiting the creation of future works.³²¹ Many Lockean scholars argue that the transaction costs imposed by monopolistic ownership can be buttressed by expanding protection of the commons.³²² Applying the merger doctrine in both stages of the infringement analysis provides a more robust protection of the public domain that coincides with Locke's concern for intellectual progress and fair competition.³²³ Procedurally, the legal solution proposed here mitigates the costs of frivolous infringement suits meant to chill fair competition; defendants are granted relief through expedited dismissals upon a finding of theoretical merger.³²⁴ Furthermore, ratifying these legal recommendations may deter some litigious plaintiffs, like copyright trolls, from filing excessive infringement claims because a positive finding of merger will cause a diminution in the scope of the plaintiff's copyright protection.

Although the recommendations made in this Comment expand the merger doctrine, rational economic copyright holders need not complain. According to the Coase theorem, "in a world with zero transaction costs, initial rights allocations are unimportant; they will be transferred to their highest value use through private bargains."³²⁵ This proposition instructs jurists to be mindful of transaction costs and construct standing legal rules that put property owners on notice of well-defined rights and obligations.³²⁶ Locke's natural rights paradigm has been praised by legal scholars as a means of constructing clear legal rules,³²⁷ while the role of transaction cost reduction in his compact theory

³²⁰ See Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, LAW & CONTEMP. PROBS., Winter-Spring 2003, at 75, 84 (2003) (describing Locke's anti-monopolist sentiments).

³²¹ See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004); Greenberg, *supra* note 249, at 84.

³²² See MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 40-44 (2008) (discussing "the tragedy of the anticommons").

³²³ See Locke, *Memorandum on the Licensing Act of 1662*, *supra* note 70, at 374-88.

³²⁴ Cf. Peckham, *supra* note 250, at 771 ("[P]retrial procedures streamline litigation and thereby cut costs and help equalize the financial positions of the parties.").

³²⁵ Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2656 (1994).

³²⁶ See *id.* at 2656-57.

³²⁷ See Cloud, *supra* note 85, at 67.

reveals the societal importance of maintaining “settled standing rules.”³²⁸ Rules delineated from Locke’s canon offer more efficient, equitable, and predictable legal outcomes when compared to the utilitarian alternatives that currently predominate copyright law.³²⁹

CONCLUSION

By attempting to stretch Lockean doctrine to comport with the libertarian maxim of absolute, unencumbered property rights, Moore and MacPherson have relegated Locke’s vibrant theory to pure dogmatism that has no practical utility for lawyers and policymakers because the possessive individualist interpretation requires radical paradigmatic shifts that will not likely come to fruition.³³⁰ A contextualist reading of Locke’s entire canon reveals a more pragmatic approach that prescribes steps towards piecemeal reform within well-established legal doctrines.³³¹ This contextualist reading of Locke reclaims his theory, for practitioners, as a viable advocacy tool and, for judges, as a powerful means of dispensing a theory of justice that comports with foundational principles embedded within the Constitution.³³²

Not only is the contextualist reading of Lockean copyright theory capable of handling complex issues in copyright law, but upon review it also appears to accurately describe the process of individual authorship as mixing one’s own intellectual labor with ideas kept free in the public domain, forming copyrightable material.³³³ Unlike Locke’s theory of tangible property, which is less applicable today because no land remains in common, the public domain may be the one commons left in which paradigmatic Lockean labor-based acquisitions can occur.³³⁴

This Comment highlights the merger doctrine circuit split and suggests that a contextualist reading of Lockean copyright theory yields a solution. Contextualist copyright Lockeans argue that ideas are communal resources that may be freely used to create copyrightable expressions; any private

³²⁸ SECOND TREATISE, *supra* note 26, at 46–47.

³²⁹ See MERGES, *supra* note 5, at 3–7.

³³⁰ See Moore, *supra* note 11, at 77 (arguing that ideas should be copyrightable).

³³¹ See *supra* Part III.B.

³³² See *supra* Part III.B.

³³³ See MERGES, *supra* note 5, at 32.

³³⁴ *Id.* (“Fresh appropriation from a background of unowned or widely shared material is much more common today in the world of IP than in the world of tangible assets.”).

appropriation of an idea violates the “enough and as good” proviso.³³⁵ In this light, because the merger doctrine bars copyright protection of an expression that effectively monopolizes an idea, this Comment considers the claimant’s burden under the merger doctrine as a requirement dictated by the “enough and as good” proviso.³³⁶

Expanding on the work of other contextualist Lockean copyright theorists, this Comment argues that duties faced by moral actors in Locke’s evolving state of nature can be used to allocate burdens of proof in copyright infringement cases. Simple issues like theoretical merger should be asserted during the copyrightability stage, while complex issues are left for the infringement stage, where the reviewing judge has the benefit of a developed case record.³³⁷ A Lockean rights paradigm allows judges to structure copyright litigation by allocating burdens of proof at trial based on the scope of a moral actor’s duty in Locke’s evolving state of nature.³³⁸ Clear rules that define burdens of proof would streamline the litigation process, and with these clearer expectations, litigants may be induced to settle their disputes.³³⁹

Besides resolving problems of inefficiency, Locke’s theory prescribes that all issues of merger should affect the copyrightability of the claimant’s work.³⁴⁰ Because violations of the “enough and as good” proviso cause divestment of exclusive ownership, and if the prohibition against merged expressions is constructed to enforce this duty, then a finding of merger will cause reversion of the work to the intellectual commons or a diminution in the scope of its protection.³⁴¹

It is evident that a Lockean rights-based paradigm lends itself to easier judicial administration when compared to the confusing utilitarian balancing tests that prevail throughout contemporary copyright law.³⁴² In contrast to the uncertainty created by utilitarian balancing tests in copyright law,³⁴³ Lockean

³³⁵ Horowitz, *supra* note 115, at 222.

³³⁶ *See supra* Part IV.C.

³³⁷ *See supra* Part IV.C.1.

³³⁸ *See supra* Part IV.C.2.

³³⁹ *See* Peckham, *supra* note 250, at 772–73.

³⁴⁰ *Cf.* Hughes, *supra* note 89, at 316.

³⁴¹ *See id.*

³⁴² *See supra* Part III.A.

³⁴³ MERGES, *supra* note 5, at 3 (“The sheer practical difficulty of measuring or approximating all the variables involved means that the utilitarian program will always be at best aspirational. . . . Maximizing utility . . . is not a serviceable first-order principle of the IP system. It is just not what IP is really all about at the deepest level.”).

rights lend themselves to judicial construction of bright-line rules but achieve the same utilitarian outcomes.³⁴⁴ Besides these administrative advantages, adopting Lockean justifications in copyright law may yield other positive benefits for society.³⁴⁵

It seems clear that Locke contemplated a labor theory of acquisition for intellectual objects. Describing his own work as a philosopher, Locke thought himself “employed as an under-labourer in clearing the ground a little, and removing some of the rubbish which lies in the way to knowledge.”³⁴⁶ Here, Locke’s imagery evokes an analogy between mental and physical labor that supports copyright protection under the labor theory of acquisition. This Comment advocates a contextualist reading of Locke’s canon that can be applied to solve complex legal issues disputed in copyright law. While this project may be theoretically cumbersome at the onset, reconciling abstract philosophy with constitutional, statutory, and common law, the result will be streamlined litigation and more certainty for copyright owners.

Locke’s writings influenced the first copyright act of England, which in turn shaped early American copyright law.³⁴⁷ Lockean theory has lain dormant in copyright jurisprudence for far too long. The legal recommendations expressed above concerning the merger doctrine are but a small sample of the usefulness of Lockean theory and rhetoric; indeed, more work remains. It is time for legal theorists to remove the rubbish proliferated by partisan misrepresentations of the *Second Treatise* and focus on piecemeal reform in the spirit of Locke’s endeavor.

³⁴⁴ By using a Lockean fruit-of-labor justification for IP ownership that is structured to achieve utilitarian outcomes, Professor Crowne argues that “much of the confusion . . . can be simplified and rationalized into a coherent body of jurisprudence that is consistent with the underlying goals of the patent system.” Crowne, *supra* note 97, at 763.

³⁴⁵ Many scholars have argued that the Lockean labor theory of value coincides with our most commonly held moral intuitions. *See, e.g.,* Circo, *supra* note 286, at 107. Perhaps adopting Lockean labor-deserts justifications in intellectual property will provide copyright decisions an extra layer of legitimacy. Others have argued that adopting Lockean rhetoric in copyright decisions may induce people to work harder. *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1249 (1996). Historically, the Supreme Court has often evoked a labor-deserts rhetoric in IP cases. *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (“[W]ritings’ . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”).

³⁴⁶ LOCKE, HUMAN UNDERSTANDING, *supra* note 123, at 10.

³⁴⁷ *See supra* Part II.

Locke once considered the vast tracts of unexplored America, full of wild abundance, as the closest approximation to the state of nature that may have ever existed.³⁴⁸ By maintaining a strict reading of § 102(b) of the Copyright Act and upholding public use doctrines like merger, we preserve one of the last and greatest commons left in America and enable Locke's project to continue.

ALEXANDER D. NORTHOVER*

³⁴⁸ See SECOND TREATISE, *supra* note 26, at 29.

* Articles Editor, *Emory Law Journal*; Emory University School of Law, J.D., 2016; The George Washington University, B.A., 2013. I dedicate this Comment to John Locke, the moral philosopher, economic theorist, and political revolutionary who guided us in the art of balancing equity and efficiency as a sustainable model of government. Foremost, I would like to thank Malena Bell for her insightful contributions to this project. I also owe thanks to my comment advisor and mentor, Professor Morgan Cloud, for encouraging me to engage in this philosophical discourse. Thank you to the editors of *Emory Law Journal*, particularly Matt Johnson and Ryan Pulley, for their patience and skillful editing. Finally, I must thank my family, Monica, Willie, Nikki and Sonia, for their unwavering love and support.