Copyrights and Copylefts: Re-imagining intellectual property

by

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Abstract

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Abstract: Copyright in its modern legal form has a brief history dating back to the early eighteenth century. While initial formulations betrayed some tension between natural rights and consequentialist views, jurisprudence would eventually settle on a form of compromise that attempted to balance the rights of authors with the overall benefit to society. Copyright protections largely mirrored the legal protections afforded to tangible property and the law principally treats intellectual objects as another form of ownership. I propose that this model is predicated on a fundamental misunderstanding of the creative process and what occurs when an expression is created and disseminated to the public. The creative expression as property view fails to account for how the artist imbues an aspect of themselves into their expression and how the audience internalises those aspects. Instead, we ought to formulate a new legal paradigm that acknowledges creative expression as a manifestation of identity and affords the appropriate legal protections.

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Chapter I

A Brief History of Copyright

Copyright is a much discussed, and often maligned, concept of Western jurisprudence. Fundamental features of copyright, such as its justification and proper manifestation, receive as much attention as the more routine details, such as appropriate term lengths and the importance of harmonising regulations internationally. Many justifications proceed from a Lockean view of property or an appeal to consequentialist features of overall benefit. It is my position that both the fundamental premises and the realised outcomes of prevailing notions of copyright are founded on a faulty property-based understanding of creative expression. I believe that a property-based model results in many of the inadequacies of our current copyright jurisprudence. I intend to establish my claim in three chapters, which will:

1. lay the foundation for what led to our current system of copyright, the values at play, and its current implementation;
2. examine what is actually occurring when a creator engages in a creative process and how the resultant work is received by the audience; and
3. reflect on where the Lockean and consequentialist justifications fail and how we might better realise a copyright system predicated on identity rather than property.

Copyright terms[1] have been steadily increasing in length and instituting more restrictive provisions since their introduction to Western jurisprudence two hundred years ago.[2] The discussion of the rights of the creator as well as the value of freedom of information seem to have been largely skewed in favour of the interests of individual copyright holders. The current granting of exclusive

[1] For the purposes of this discussion, 'copyright terms' refers to the length of time afforded by law for exclusive rights to a creative expression.
[2] Epstein, 'The Dubious Constitutionality of the Copyright Terms Extension Act'.

rights to copyright holders significantly departs from the original legal conception that originated in Western democracies. Although current copyright laws can be traced back to these historical roots, the values and considerations relied on to justify their respective iterations have significantly evolved, leading to differing, and often opposed, motivations and objectives. This tension is largely due to a shift from a consequentialist view of the purpose of copyright to a view that intellectual objects are merely a type of property and should be treated as such. This property view has resulted in an obdurate progression of copyright terms and protections with little discussion of the actual purpose of granting exclusive licenses and with little understanding of the competing values at play. The neglect of the consequentialist aspects of copyright law has distorted the relevant legal systems and allowed the unabated extension of copyright terms.

Evolution of copyright

While legal efforts to formalise copyright protections did not develop in earnest until the eighteenth century, early strands of thinking about intellectual property can be traced as far back as the Eastern Roman Empire. Justinian I ordered the consolidation of Roman law into the *Corpus Juris Civilis,* which incorporated the view of *usufruct* as the right to enjoy the fruits of one's labour and the right to goods produced from a regenerative origin.[3] Although copying of intellectual property was not specifically addressed or legislated, many of the contemporary principles surrounding the concept of ownership originated in the early Roman model of *dominium*, or ownership, as the source of the associated rights.[4] Some claim to the notion of exclusive ownership of the expression of ideas can be found even earlier in Roman culture with the practice of *ius imaginum*, the nobles' right to display the images of their forebears in the atrium of their domicile.[5] While it is difficult to establish

[3] Atkinson and Fitzgerald, *A Short History of Copyright*.
[4] *Ibid.*
[5] Stephens, 'The Ius Imaginum of Ancient Rome: Was It the First Copyright Law?'
ver Steeg, 'The Roman Law Roots of Copyright'.
Taylor, 'Cicero's Aedileship'.
Silva and Leite, 'Reinventing the Concept of Homo Novus in Rome'.

a distinct lineage to the modern implementation of intellectual property copyright, the general notion of having rights to certain expressions of ideas, nevertheless, has deep historical roots.[6]

Victor Hazan, a barrister and scholar of Jewish law, claims that the origins of a rudimentary form of copyright can be found in the Torah and ancient Talmudic Law.[7] This assertion rests on a passage from Jeremiah 23:30, which states, "[t]herefore behold saith the Lord. I am against the prophets that steal my words everyone from his neighbour." This text led to the rabbinical precept of making one's expressions their own rather than adopting the words of others. This view of preserving the ownership of one's words would widely influence Jewish studies and practice. As Hazan observes, "[o]ften it was considered even more important to abide by the principle of authorship after the death of 'the teller' than during his lifetime, and Jewish Rabbis sitting as Judges very often gave judgments for the protection of author's heirs."[8] Talmudic study and Jewish theology appear to offer early evidence of a rudimentary form of copyright, emphasizing principles of attribution and acknowledgement.

The advent of the printing press occasioned some of the earliest clamouring for a system of protections akin to copyright. These protections sought to defend the work and interests of publishers and, ostensibly, authors. The latter half of the 15th century saw Johann de Speier of Germany introduce the novel technology of the printing press to Venice under the welcome arrangement of an exclusive five-year period of protection for his published works.[9] De Speier would have likely felt such an arrangement necessary to support his collection and editing of Cicero and Pliny's assorted works in light of similar previous transcription projects undertaken by Fust and

[6] Bettig, *Copyrighting Culture*.
[7] Hazan, 'The Origins of Copyright Law in Ancient Jewish Law'.
[8] *Ibid.*
[9] Mathers, Brander. 'The Evolution of Copyright'. *Political Science Quarterly* 5, no. 4 (December 1890): 583–602.

Schoeffer, which were swiftly copied by other printers.[10] The accessibility of easily reproducible text, courtesy of Johannes Gutenberg and his invention of the printing press, largely instigated the perceived need for a system of legal rights for the publishers of literary works. While this could be viewed as the seed of the system of jurisprudence that would spawn the protections of copyright, the Venetian grant of exclusive rights is better viewed as a show of consideration to a remarkable individual (Johann de Speier) rather than a step in the development of a robust conception of intellectual property.

Great Britain and Early Copyright

The first formalised law enshrining copyright as a legal apparatus was introduced by Great Britain in the early eighteenth century. If we take a step back to the 17th century, we find the Parliament of England passing legislation restricting the installation and use of printing presses, as well as the importation of books, in a bid to prevent the circulation of "seditious treasonable and unlicensed Books and Pamphlets."[11] All printing presses needed to be registered with the Stationer's Company, which effectively provided the stationers with a monopoly on printing in England and Wales for much of the latter half of the 17th century. The act, and subsequent renewals, was limited in term, with the original expiring after only two years. After a series of legislative renewals, Parliament finally let the act lapse in 1694, which resulted in a concerted campaign by the stationers for a new, permanent form of monopoly over printed works.[12] After finding no appetite in Parliament to reinstate their monopoly in service of censorship, the stationers shifted their argument, claiming that authors ought to retain the rights to their works or to bear the fruits of their

[10] Armstrong, Elizabeth. 'English Purchases of Printed Books from the Continent 1465–1526 [1]'. *The English Historical Review* XCIV, no. CCCLXXI (1979): 268–90. https://doi.org/10.1093/ehr/XCIV.CCCLXXI.268.
[11] Astbury, 'The Renewal of the Licensing Act in 1693 and Its Lapse in 1695'.
[12] Patterson, 'Copyright and "the Exclusive Right" of Authors'.

labours.[13] This led to new legislation, titled the *Copyright Act* of 1710, or more informally, the Statute of Anne, which marked the first legal conception of copyright as declared and enforced by the government and courts.

It is difficult to understate the impact of the Statute of Anne on the modern Western system of copyright and exclusive licensing of creative works. Ray Patterson and Craig Joyce refer to the legislation as "the watershed event in Anglo-American copyright history."[14] The purpose and intent of the statute is made clear in the preamble of the Statute, which states:

> An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned. Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books.[15]

From their stated motivation, Parliament recognised authors' rights to manifest a form of control over their works. The implicit principle underlying the need to protect the authors of literary works was that one who creates a written work ought to be entitled to control of, or at least financial benefit from, that work. There was also some concern that the book-writing trade could not sustain the pressures created by the widespread copying made possible by the printing press. The efficacy of

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[13] John Locke, whose labour theory of property would largely influence the modern conception of copyright, is widely believed to have been instrumental in the decision to end the monopoly of the stationers. Locke had actively campaigned against the previous licensing legislation and his close relationship with Edward Clarke, chair of the committee appointed to examine the publisher's monopoly situation, is thought to have widely influenced the government's eventual course of action.
Deazley, *On the Origin of the Right to Copy*, 2-3.
[14] Patterson and Joyce, 'Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution'.
[15] *Ibid.*

the statute, however, was not so clear as the stated intention to preserve some form of rights for the authors. British legal scholar and copyright historian Ronan Deazley provides a useful analysis, concluding that the true effect of the legislation was to encourage some form of compromise between the bookseller lobby and the general public.[16] From the earliest legal conception, copyright existed as a tension among the public looking to consume works, the authors looking to obtain some form of meaningful living from their labours, and the economic interests of publishers and those who would facilitate commerce between the first two groups. An important distinction to bear in mind concerning this early step towards a robust system of copyright was that the Statute of Anne protected only books, with creative endeavours in remaining fields persisting outside the reaches of government.

Motivational principles aside, the act provided transferable rights to authors upon publication of their works, as opposed to granting the rights automatically to the publisher, as had been the case with the previous stationers' regime.[17] The specific rights entailed by the Statute included the printing and re-printing of the book, but no control over the work once it had been disseminated.[18] These rights would be limited to a term of fourteen or twenty-one years, where works published prior to April 10th, 1710 would enjoy the longer period of protection and those published after would assume the shorter. An additional fourteen-year renewal term was available if the author were still alive at the end of the initial period. Patterson and Joyce claim that the act was seen as a compromise that allowed authors to make a living from their works while limiting the monopolistic control that publishers thereby obtained.[19] The act was as much an effort to topple the publishers' monopoly that had prevailed over much of the previous century, as it was an

[16] Deazley.
[17] Patterson and Joyce.
[18] The lack of control over authorised printings once legally distributed would eventually be subject to another debate over the *First Sale doctrine*.
[19] *Ibid.*

acknowledgement of the rights of the authors themselves. Diane Leenheer Zimmerman maintains that "the most likely reason the statute was passed was because Parliament wanted a compromise between a pesky constituency (the publishers) and its own deep commitment to limiting monopolies."[20] The publishers' monopoly was tremendously unpopular and motivated much of the legislative change that would eventually metastasize into a robust system of copyright focussed on authors retaining control of their creations.

While it had been anticipated that the Statute of Anne address the often precarious position of authors in eighteenth century Great Britain by providing them some security, the reality was that little changed from the previous *status quo*. The previous system of publication had seen authors sell their works to publishers who would then proceed to distribute the books and collect the ensuing profits. The post-Statute of Anne landscape saw much the same system remain, as authors would continue selling their manuscripts to the publishers, but now inclusive of the legal copyrights afforded by the state. Subsequently, sales to the public would be tightly controlled by the same consortium of printers.[21] Thus, the break-up of the old stationers' monopoly would prove to be a glacial affair. As Bracha explains, "much of the actual economic-social change instigated by the Statute, such as establishing the author's status or breaking up the old book trade monopolies, was painfully slow, and it continued to unfold throughout the eighteenth century and beyond."[22] The Statute had been a largely practical act of Parliament in so far as it attempted to mediate growing concerns regarding the stationers' monopoly and the affect on the volume of printed materials available to the general public. As an act of intercession into what was seen as an immediate untenable state of affairs, the ultimate effects of the Statute would not be realised for a number of

[20] Zimmerman, 'The Statute of Anne and Its Progeny: Variations Without a Theme'.
[21] Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant'.
[22] *Ibid.*

years. However, and more importantly, the framework for a legal conception of the protection of creative works had been established and would principally inform the system until the present day.

The "Mickey Mouse Protection Act", more formally known as The Copyright Term Extension Act, cynically alludes to the repeated extension of copyright protection terms that have thus far prevented the eponymous cartoon mouse from falling into public domain. Interestingly, this is not a recent phenomenon, as similar efforts to extend copyright provisions have been made since the very first term limits were established by the Statute of Anne. As the year 1731 approached, and with the impending expiration of copyright protection for the entire corpus of works initially protected by the Statute of Anne, publishers began to lobby Parliament for an extension to the prescribed term of fourteen plus fourteen years.[23] The legislature appeared to have little interest in re-visiting the scheme already in place, so the publishers instead re-directed their attention to the courts to rectify what they saw as shortcomings in the law. These shortcomings were identified as a perceived neglect of the natural rights which are generally protected by common law.[24] While the courts did not seem specifically to have dealt with copyright prior to the passing of the Statute of Anne, it was the publishers' opinion that copyright protections were essentially a part of the author's own natural rights in the creation of the works, so they expected the courts to rule in their favour. The publishers hoped to establish that copyright is a natural right of the creator of a work, and, thus, could not be limited in term by Parliament. The seminal case in the post-Anne era involved a dispute between Andrew Millar, a publisher who initially purchased the manuscript and copyright of *The Seasons* from James Thomson, and Robert Taylor, a competing publisher who began printing his own edition of the same work upon the expiration of its copyright.[25] Millar sought an injunction

[23] Zimmerman.
[24] Patterson, 'The Statute of Anne: Copyright Misconstrued'.
[25] Deazley.

against Taylor on the basis that the defendant was in violation of common-law principles that protected the exclusive rights of authors indefinitely. The court did not sympathize with Parliament's efforts to balance the interests of the stationers' lobby, anti-monopolist sentiment, and the welfare of the general public, concluding that the right to copyright existed in common law, predating any guidelines and regulations established by the Statute of Anne. In justifying a perpetual copyright in the work of an author, Justice Aston ruled that:

> [A] Man may have Property in his Body, Life, Fame, Labours, and the like; and, in short, in anything that can be called His: That it is incompatible with the Peace and Happiness of Mankind, to violate or disturb, by Force or Fraud, his Possession, Use or Disposal of those Rights; as well as against the Principles of Reason, Justice, and Truth. … [B]ecause it is just, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is just, that Another should not use his Name, without his consent. It is fit, that He should judge when to publish, or whether he will ever publish. It is fit he should not only choose the Time, but the Manner of Publication; how Many; what Volume; what Print. It is fit, that he should choose to Whose care he will Trust the Accuracy and Correctness of the Impression; in whose Honesty he will confide it, not to foist in Additions.[26]

The court maintained that property was not limited to tangible objects with demonstrable exclusive use and rights thereof, but also encompassed intangible aspects of an individual, such as their life, reputation, and labours. Whereas Parliament's conception had been one largely of a pragmatic balance of interests, the court deferred to more metaphysical principles of ownership and self. In the court's view, the individual is entitled to the profits stemming from their "ingenuity and labour," without temporal restriction. A fourteen or twenty-eight-year term would be largely incompatible with the view that individuals should have control over profits stemming from their labour. The court's position hewed much closer to a philosophical conception of how we ought to

[26] 4 Burr. 2303, 98 ER 201.

reckon our right to ourselves and to notions of property, doing so in a manner that imported the principles of property rights into the discussion and applied them to creative expressions. Traditional conceptions of property rights were largely uncontroversial in asserting that rightful owners should control the use and benefits of their possessions, but it is not entirely clear how such a model can be imported wholesale to apply to creative expressions with equal force. Regardless, the first case brought before the courts in the modern copyright era involved precisely such a presumption.

The view of perpetual copyright would only prove to have a brief sojourn in British courts. The very same work, Thomson's *The Seasons*, found itself at the centre of another case brought by an entirely new set of parties seeking remedy in the law. The rights to *The Seasons* had been subsequently sold to a publisher named Thomas Becket. Again, unlicensed copies were printed by two brothers, John and Alexander Donaldson, and again, relief was sought in the courts by an application for an injunction by the rights holder.[27] The case wound its way through the courts until it was eventually appealed to the House of Lords to decide the fate of the common-law principle of perpetual copyright. After careful and protracted deliberation, the House of Lords concluded that such a common-law principle had never existed, and the Statute of Anne would stand as the final piece of law governing the granting and terms of copyright.[28] In their finding, Lord Camden, speaking for the House of Lords, proclaimed that even if a precedent to perpetual copyright existed it would be "totally obnoxious to the common law."[29] This reversal in the jurisprudence not only muddled guidance and confused the notion of compliance in the publishing industry, but also amounted to a rejection of the previous underlying rationale relied on by the courts to justify the common law of

[27] 1 Eng. Rep. 837.
[28] Abrams, 'The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright'.
[29] *Ibid*, 1162.

copyright. It is remarkable that the first two major legal decisions involving the formative iterations of copyright would revolve around the same work and yet invoke two distinct conceptions of property. Where the initial *Millar v Taylor* decision held that individuals are entitled to all the products of their labour and talent, the sweat of their brow, in perpetuity, the House of Lords found such a conception reprehensible in *Becket v Donaldson,* enforcing term limits on copyright. Lord Camden, speaking for the House of Lords, took the position that a perpetual copyright, or unending ownership of the expression of an idea, would be monopolistic and untenable:

> Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work. All our learning will be locked up in the hands of the Tonsons and Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.[30]

The *Becket* decision was based largely on concerns that giving monopolistic control over works to authors would hamper the public's ability to acquire knowledge. The contrast between the decisions in *Millar* and *Becket* largely mirrors opposing philosophical conceptions of the role and justification of private property. *Millar* seems to be largely motivated by principles of liberty and the natural rights with which every individual is imbued. Unsurprisingly, Locke's conception of natural law and natural rights figure prominently in discussions surrounding the justification of private property, and, by extension, intellectual property. On the Lockean view of the justification of private property, we can lay claim to some portion of the divine providence afforded to humanity by mixing such items with our labour.[31] If we are to respect individual liberty as a fundamental and inalienable natural right of humanity, then combining one's labour with some common good, in this case, creative expression, must extend that liberty into the bounty afforded to us by providence.

[30] 17 Parl. Hist. Eng. 953, 992 (H.L. 1774).
[31] Locke, *Princeton Readings in Political Thought*.

Individuals must own the fruits of their labour, just as they own themselves, and the claim to self-ownership is not relinquished when it is combined with external objects. Therefore, people can acquire the right of property by investing themselves in articles of the external world and extending the liberty of self.

The views in *Millar* largely follow the same line of thinking, according to which authors of works acquire the right of ownership by virtue of investing their labour and talent into an activity, the result of which counts as an extension of the self. According to this conception, imposing a term of twenty-eight years to this right undermines the extension of self and violates individual liberty. In contrast, the *Becket* ruling is largely indifferent to individual proclamations of liberty and extensions of self and is more concerned with the full implications of a perpetual claim to copyright. The decision of the House of Lords, as expressed by Lord Camden, is ultimately more troubled by the prospect of publishing monopolies being established in perpetuity, as well as by that of which such a scheme might deprive the public. The political discourse of the day opposed the establishment of monopolies, a concern that had underpinned the initial impetus to establish a copyright law. Beyond economic concerns, there was also a worry about how a scheme of perpetual copyright might stifle collective knowledge and social progress, since it would ensure that whole tracts of knowledge would be forever locked behind the will and caprice of authors and publishers. Thus, early copyright law in Great Britain was supported by two conflicting justifications. These differing justifications reflect entirely different views of how rights to creative expressions should be established or justified, a fundamental disagreement that would persist over time.

The American Case

The American colonies were not included in the British copyright legislation and subsequent legal rulings, and so they independently developed their own regime of protection. The case for American copyright developed similarly to that of their British counterparts, with comparable arguments being advanced concerning natural law, liberty, and monopolies.[32] The first venture into a scheme of copyright in American law occurred in 1641, when the General Court of Massachusetts implemented a colonial law stipulating that "[n]o monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Country, and that for a short time."[33] Connecticut soon followed suit, along with a number of other colonies, by providing an exclusive period of protection for inventors through a patent scheme ranging from two to twenty-one years.[34] Piecemeal regulations would subsist in each individual colony for over 140 years until more substantial developments in the late eighteenth century. March 1783 saw the Continental Congress establish a committee to "consider the most proper means of cherishing genius and useful arts throughout the United States by securing to the authors or publishers of new books their property in such works."[35] The committee's report adhered largely to natural law principles of liberty and the sanctity of the notion of the fruits of one's labours as being inviolable. Protecting individuals and the product of their exertions was also believed to serve the instrumental purpose of furthering innovation, invention, and the development of the arts. Thus, according to the committee's view, a scheme of copyright would not only preserve the sanctity of individual liberty, but also foster important innovations useful to society while enriching the arts for its members to enjoy. This approach kept an eye on both the rights of the atomic individual and consequentialist concerns about the overall good. Given these somewhat opposing principles, the committee ultimately passed

[32] Ochoa and Rose, 'The Anti-Monopoly Origins of the Patent and Copyright Clause'.
[33] The Body of Liberties 1641.
[34] Ochoa and Rose.
[35] Papers of the Continental Congress, No 36, II.

a resolution urging individual states to implement a balanced system of copyright, as the Continental Congress lacked the authority to impose such laws upon them.

The establishment of the United States Constitution provided the first semblance of a national and unified copyright law. Specifically, Article I, Section 8, Clause 8 stipulates that Congress shall have the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[36]

Absent from this declaration is the mention of natural law and individual liberty that had been traditionally relied on to justify conceptions of copyright and the exclusive granting of rights. Instead, it emphasises the relationship copyright should have to social progress. America's founding fathers had observed the situation unfold in Great Britain, where they abandoned anti-monopolist efforts in favour of perpetual common-law copyright, before returning to upholding the Statute of Anne as the law of the land. The possibility of copyright being manipulated by publishers in such a way as to foster monopolies was a sincere concern of the founders. The purpose of copyright, they believed, had more to do with benefitting society than the intrinsic rights of individuals.[37] Thomas Jefferson repeatedly expressed deep reservations about the possibility of any sort of copyright scheme that might result in the foisting of monopolies upon the people. He would proceed to attempt to formalise in the Bill of Rights specific term-lengths to the granting of copyright, although his efforts would ultimately be unsuccessful.[38] The text of the Constitution is the outcome of a strident debate over, among other things, the role of copyright in society, the threat of monopoly, and the role of natural law. While these tensions continue to manifest themselves in contemporary

[36] United States Constitution, Article I, Section 8, Clause 8, (IP Clause).
[37] Ochoa and Rose.
[38] Jefferson, 'On the Liberty to Write, Speak, and Publish and Its Limits', 28 August 1789.

debates surrounding the nature of copyright, it is clear that the American founding fathers did not straightforwardly acquiesce to the appeal to the natural rights of the individual above all other considerations. A concern for the overall progress of society better reflects a consequentialist understanding of morality than any sort of deontological interpretation predicated on individual rights. The idea follows along the general lines that it would be beneficial for society if creators had some incentive to bring their works into the commons for the profit of all, but that copyright limits should not be so lengthy that they detract from the public's ability to benefit from the work. Since granting a perpetual monopoly was anathema to the framers of the United States Constitution, a limited form of copyright was seen as a compromise between competing deontological and consequentialist values.

The Berne Convention

The nineteenth century saw several nations implement their own versions of copyright with varying conceptual foundations, establishing differing terms and levels of protection. While the British weighed the natural law conception of individual rights against the possibility of fostering monopolies, the French arrived at a starkly different view of the nature of creative expression and what sort of rights should follow from it. French copyright law is centred on the notion of the 'right of the author' and comprises two distinct phases: the creation of the work and the dissemination of that work to the public.[39] The creation phase extends from the moment the creator conceives of the work and begins planning its design to the release of that work to the public. During this initial phase, creators retain absolute rights to their creations, in whatever state they may be in. When authors decide to release their works to the public, a more limited subset of rights is retained, based

[39] Sarraute, 'Current Theory on the Moral Right of Authors and Artists under French Law'.

on the extent to which a given work may be said to embody the artist's personality[40]. In the French system, the author retains four moral rights:

1. the right of disclosure (the right of the creator to decide when to unveil their work to the public);
2. the right to withdraw their work from the public sphere or disavow their attachment to the work;
3. the right of paternity (essentially, the right to attribution); and
4. the right to the integrity of the work.[41]

While the British and American systems of copyright focussed on the economic concerns of the production and dissemination of a creator's works, the French system viewed a work as an extension of personality and held that creators should be afforded some of the same moral considerations that we owe to individuals themselves for their own personhood. With such drastically different conceptions of the nature of copyright, and the different legal regimes that manifest these views, it was difficult to reconcile the protections a work might enjoy in one country with those available in another. The two opposing systems of copyright ultimately arrived at a middle ground upon which they could agree. Both the British and French had a practical motivation in seeking to align global copyright practices, as they were international leaders in creative output in the eighteenth century.[42] The impetus for global alignment was also intensified by a general aversion on the part of national governments to grant robust copyright protections to foreign creators, which led to a thriving grey market of copying and duplication. In order to provide relief to creators who saw their products distributed largely unfettered in foreign markets, as well as to facilitate better international trade by

[40] The French *Code de la propriété intellectuelle* specifically uses the term "personnalité civile," which is a conception in French law of the "legal person."
[41] *Ibid.*
[42] Dutfield and Suthersanen, *Global Intellectual Property Law*.

standardizing legal environments, an international treaty was drafted by ten European countries in 1886. The Berne Convention detailed the legal principles and protections to be afforded creative expressions, thereby harmonizing the regulatory framework across much of Europe.

The stark difference in underlying principles between the British and French approaches to protecting creative expression were initially difficult to reconcile. Rather than subordinating one country's legal framework to that of the other, The Berne Convention offered minimum protections that must be met by all signatories. Specifically, the convention outlines the following minimum standards to be met by each signatory's regulations:

- at a minimum, works originating outside of a signatory's jurisdiction, but still within a member state, must be afforded the same standard of protection as domestic works;
- creative works must automatically qualify for protection without the need for registration or any other opt-in procedure;
- a minimum standard of copyright protection must include works from the "literary, scientific and artistic domain, whatever the mode or form of its expression;"[43]
- the protection provided must allow for the moral rights of authors to protect their work from modification or derogatory actions; and
- the duration of protection must, in most cases, last a minimum of 50 years beyond the death of the author.

Although the United States was somewhat reluctant to implement the convention's provisions, eventually all but twenty of the nations of the world would sign on and realise the requirements of the treaty in their respective legal codes. While the convention stipulates the minimum standards

[43] Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

that must be met, many countries maintain a more robust system of copyright, offering longer terms and tougher protections. The convention also attempts to encapsulate the principles underlying the various member states' views of what copyright does and what it ought to protect, although, in practice, it has largely followed the dominant economic interests of the United States.[44] While early discussions about the role and fit of copyright in the United States and Great Britain were tempered by concerns about the creation of monopolies and the possibility of perpetual ownership, revisions of the laws steadily increased the periods of protection available for creative works.

Intellectual Property and Real Property

From the very beginning of the modern era of copyright, a tension has existed among competing principles of liberty, natural law, monopoly and consequentialism. The British conception is an attempt to adjudicate between individual rights to the fruits of our labour and overall social benefit. The Americans appeared to be much more reluctant to establish their copyright protections on the principle of individual liberty, despite that principle lying at the heart of the nation's founding. Modern[45] discussions surrounding copyright in common-law systems and its place in a nation's jurisprudence have largely abandoned principles of liberty, autonomy and natural law, favouring markedly to modified consequentialist model of efficient markets, international trade deals and thriving creative industries.[46] The most recent extension of copyright term in Canada was passed alongside a broad suite of unrelated measures and was not even recognised in the government's own press release.[47] Copyright term extensions have been relegated to a form of international treaty legal

[44] Fleishman, 'The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law.'
[45] The use of the term modern in this case refers to the time period of contemporary copyright law from the early 18th century to present.
[46] Yen, 'Restoring the Natural Law: Copyright as Labor and Possession'.
[47] Department of Finance Canada, 'Government of Canada Introduces Legislation to Grow Our Economy and Make Life More Affordable'.

fine print rather than embodying a view of how a society can best weigh the rights of creators with the public's benefit.

The founding fathers of the United States appear to have been motivated by a careful evaluation of the benefit a society might realise by affording a limited incentive to creators. In contrast, the modern consequentialist position is mostly informed by technical legal definitions and an ever-fluctuating standard of appropriate incentive for creators. Determining the purpose and extent of copyright has been largely relegated to philosophers and interested advocates. As a result, little consideration has been given to concerns about the purpose of copyright in the legislative process or, more broadly, a general view of the importance of societal access to knowledge and ideas. The nascent copyright scheme implemented by Western nations struggled with how to balance these considerations appropriately and seemed to take a largely consequentialist view of what protections would provide the best overall outcome for both the creator and the public. More recent trends in the law have reversed the relationship, as political and business interests now seem to be the prime sources of motivation rather than the overall social benefit. The revision of copyright legislation has historically only moved in one direction: towards lengthier terms.

There is a fundamental confusion in the concept of modern copyright, which is reflected in the description of all forms of creative expression as "intellectual property." It is clear from the earliest conceptions of copyright across major Western powers that the notion of granting terms of exclusivity aimed carefully to balance the benefit of society and creators alike. The dangers of monopoly, or depriving society of the progress of the useful arts, was a key factor in formulating laws that would govern the applicability and terms of copyright. The assumption that these creative expressions were a form of property, entitled to the same protections as tangible goods, is clearly absent from these early deliberations. This is reflected in two important details. The first is the lack

of reflection during the formulation of these early laws about whether creative expressions should be considered just another form of property. The second concerns the actual formulation of the legal apparatus used to fulfil the purpose of copyright. The original law surrounding copyright in Western nations did not formalise the treatment of an expression as property. Expression was not treated explicitly as property nor were existing legal frameworks against theft extended to cover creative objects. The history of theft has a much more robust historical record of jurisprudence than the more recent concerns surrounding unauthorised copying. The Code of Ur-Nammu, dating from 2100 BCE on tablets found in Mesopotamia, identifies robbery as an offence under the law, the violation of which warrants the penalty of death.[48] It would have been both simpler and more effective to have included offences of unauthorised copying under such existing legislation on theft than for nations to have developed copyright law in the way that they did as discussed above. The implementation of copyright regimes and the concerns that were effectively weighed demonstrate that creative expression was never meant to be considered mere tangible property. Instead, copyright was something else altogether, requiring a unique appreciation of the relationship between authors and their creations.

The view of intellectual objects as a form of property has largely supplanted any more nuanced consideration of their metaphysical and ethical status. If we were to regard intellectual property as another form of property ownership, in the same way we do as a plot of land, a pile of bricks or sixty fibre-glass geese, then a series of copyright term extensions would seem justified. Although rejected in nascent British jurisprudence, the notion of perpetual copyright appears to be asymptotically approachable by a succession of lengthened copyright terms. A forty-year-old author publishing a work today would enjoy approximately one-hundred-ten years of copyright protections,

[48] Roth, Hoffner, and Michalowski, *Law Collections From Mesopotamia and Asia Minor*.

assuming an average life span of eighty years. If previous trends in copyright extension continue at their historical pace, authors might realistically expect their work never to enter the public domain. This would principally align with the view of creative objects as property, as there would be no reason to relinquish your rights to something you own merely due to the passage of time. No other facet of ownership is limited by such stipulations, other than some specific claims of adverse ownership, such that your claim to your house, pile of bricks or decorative geese expires after a particular period of possession.[49]

If the historical case for the property conception of intellectual objects is dubious, one might question how we have arrived at the current state of affairs. In answer to this question, we can look to the principle of the tragedy of the commons, according to which individuals are encouraged to maximise their self-interested gains rather than coordinate as a group for the mutual benefit of all. In the evolution of copyright, we can see this manifested in cases where the active stakeholders in intellectual objects, copyright holders and related businesses, have a vested interest in maximising their specific positions. This maximisation is more readily facilitated by lengthy copyright terms that not only allow creators a longer period to collect the commercial proceeds of their work, but also ensure that the value of the license for the same work to increase, just as prospective buyers, in turn, can rely on a longer period of earnings once they have acquired the rights. Both individual creators and ancillary interests of the commercial market have a stake in maximising potential returns. Conversely, the depletion of common goods, where society at large has fewer intellectual resources upon which to depend, does not figure prominently into the individual calculus of rational self-maximising behaviour. While there are incentives in place for creators to maximise available

[49] There may be an argument that estate taxes also fulfill this conception, but I would argue that they are predicated less on natural rights claims to ownership, or the relinquishment thereof, and more on the general principle of the government's claim to portions of economic activity in general. It would be beyond the scope of this argument to analyse the relationship between taxes and natural rights, but there are some parallels to be drawn.

protections, the notion of communal benefit is speculative, thus, it is more difficult to motivate committed advocates.

The dull reality of free markets cannot be ignored when considering the resources available for supporting efforts to advocate for legislative change. The aforementioned industries surrounding the creation, publication and dissemination of creative objects, with a vested interest in maximising their individual positions, can bring more resources to bear on the effort to lobby legislators. While I would avoid endorsing the cynical view that legislators respond only to appeals that have significant financial backing, it is difficult to ignore the fact that those advocating for longer copyright provisions, in line with the property view of intellectual objects, have more resources than those who might promote a more balanced conception. The original legal conception of copyright as a balance between individual and group interests may find fewer advocates with extensive resources upon which to draw.

Problems in Copyright

It seems reasonable that there ought to be some sort of regulatory environment for intellectual objects, and our current legal conception, including the property model of creative works, appears to be at least adequate for the task. However, the property model presents a number of unique difficulties, due to confusion about the nature of intellectual objects and their relationship to creators and audiences alike. While we might object that all laws run the risk of being misapplied, the fundamental underpinning of the property conception fails to uphold the original purpose of maximising the benefit to society and produces disproportionately adverse outcomes.

An examination of the conditions that resulted in the Statute of Anne reveals a legislative process primarily motivated by anti-monopolist sentiment and a desire to avoid the consolidation of

control amongst a small cartel of publishers.[50] And yet, the anti-monopolist sentiment of the early eighteenth century eventually sought refuge in a separate form of monopoly that involved an exclusive license to publishing rights. From its inception, this system treated authors as creators of goods over which they could exercise exclusive control for a limited term. A first reading of the historical record might produce bewilderment that one form of monopoly was replaced by another, but this development always seemed to represent a compromise between individual rights and consequentialist concerns. Three hundred years later, we are confronted by a media sector in the United States where five companies control the majority of publishing. A proposed merger between the largest and fourth-largest publishers, Penguin Random House and Simon & Schuster, would see a single company assert control over two-thirds of the commercial publication industry.[51] The United States Department of Justice contends that, if allowed, the deal would create a monopsony[52] in which a single buyer greatly controls the market available to multiple sellers. In this scenario, the joint Penguin Random House and Simon & Schuster enterprise would present monopoly-like conditions for potential authors by significantly limiting their options for bringing their works to market. The initial application to halt the merger by the Department of Justice was eventually granted by a United States federal judge. Although Bertelsmann, the media group which owns Penguin Random House, initially indicated that it would appeal the decision, lamenting that the court's ruling was "an unfortunate setback for readers and authors," the merger proposal was dropped.[53] For now, the status quo remains, with the Big Five publishers retaining their majority control, providing few options for authors looking to break into the major distribution markets.

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[50] Ochoa, 'The Legacy of the Statute of Anne'.
[51] Complaint 1:21-cv-02886.
[52] A monopsony is a market situation where there is only a single buyer for a given commodity or service. In this case, the convergence of buying power among only a few publishers would create a monopsony where authors have a limited market to sell their works for publication. A monopoly, in contrast, is a market condition where there is only a single seller of a product but many buyers.
[53] The Associated Press, 'It Would Be a Behemoth of a Book Publishing Company. But a U.S. Judge Says No'.

Allowing literary rights to be traded in much the same way as real estate has dealt a large share of market control to a handful of large companies with the resources to significantly control the market. The traditional market model, predicated on the exchange of property, has left the general literary market in the United States largely in the control of dominant publishers, who not only directly determine which works to make available for widespread distribution, but also the economic fortunes of the authors who create them.

A necessary element of a concept of property is that there must be an owner to receive the vested bundle of property rights. Common goods that evade ownership, such as the breathable air or the fish stocks of the ocean, are not considered property but, instead, some sort of communal resource.[54] The notion of property without a holder seems to be a conceptual impossibility, as it is necessary, by definition, for an owned object to have an owner. The application of the property model to intellectual objects has, thereby, resulted in the unique condition of orphaned works, where the rights holders are indeterminate or untraceable. A work normally eligible for copyright, which would be automatically granted without application or registration, may be locked behind a wall of rights, of which there are no holders. This situation can arise when a creative work has been published as an initial release, thereby enjoying the accompanying copyright protections. If the work is neither financially nor critically successful enough to warrant further printings, conscious interest in the work will eventually die along with the author. As the copyright term extends for seventy years beyond the author's death, and no publishers clamour for the rights to print another edition, the copyright subsists independently of a holder, unless extensive probate work manages to determine the rights of inheritance. Even then, legal research may not reveal the identity of the rights holder. Such a situation not only poses logistical problems for anyone seeking to consult or

[54] Ostrom, 'The Challenge of Common-Pool Resources'.

make use of such a work, but also effectively prevents that work from providing any sort of benefit to anyone at all. The public is unable to enjoy, refer to or even discover the expression of the ideas contained within the work, while the author receives no recognition or compensation for, and is unable to maintain control over, the expression. The property model of intellectual objects effectively removes such works from public access.

The issue of orphaned work is not merely a theoretical possibility. A 2009 report from the Joint Information Systems Committee (JISC) estimated that there were some 25 million orphaned works in the United Kingdom alone.[55] Through an extensive process of surveys, questionnaires and in-depth interviews with various public-sector stakeholders[56], the JISC was able to examine the problem and scope of orphaned works. This estimate, which the JISC authors claim is a conservative figure, represents millions of works that are effectively inaccessible to anyone, and as such, fail to yield any sort of public or personal benefit. In addition to their inaccessibility, orphaned works also increase the administrative costs of those exercising due diligence to ensure compliance with the law. In an effort to confirm legal compliance, and avoid potential costly litigation, a publisher may choose to conduct an extensive investigation into the origins of a seemingly abandoned text to verify its copyright status. Such investigations into orphaned works not only result in additional expense, with the very real possibility of not producing any sort of useful outcome, but may also encourage the unscrupulous to make baseless claims. Thus, even more resources are expended in defence of frivolous and vexatious claims to determine ownership, where no such determination is possible. The JISC report on orphaned works identified the burden on public sector institutions dealing with intellectual objects, concluding that "89% of participants'

[55] 'In from the Cold: An Assessment of the Scope of "Orphan Works" and Its Impact on the Delivery of Services to the Public'.
[56] Workers in the public sector such as those employed at museums, galleries, archives, libraries and other facilities dealing with historical records and creative objects.

service delivery is at least occasionally affected, whilst 26% noted that the issue of Orphan Works either frequently affects them or affects everything that they do."[57] The problem is especially significant when it comes to institutions engaged in digitisation work. Orphaned works either cannot be traced to their copyright holders and are thus incapable of being digitised and made available, or staff must expend inordinate amounts of time in locating the holders and seeking their permission to share their works.

The problem of orphaned works has not escaped the notice of the legislatures in various jurisdictions and a range of solutions has been proposed to address the predicament. Section 77 of the Canadian Copyright Act allows for application to the Copyright Board of Canada for a license to utilise an otherwise protected work if the applicant has "made reasonable efforts to locate the owner of the copyright and [if] the owner cannot be located."[58] This may initially be seen as sound policy, however it is emblematic of two separate problems concerning the idea of expressions as property upon which the law is predicated. The first issue arises from the nature of an application process that involves a bureaucratic solution to a bureaucratic problem. While this is not necessarily a fatal problem, it does highlight how administratively burdensome the property model of copyright has become. An individual attempting to trace the lineage of some work, for digitisation or other iterative purposes, must engage in a genealogical project that will satisfy the Copyright Board. While I will refrain from attempting to determine of what constitutes the legal threshold for what counts as a "reasonable effort," it is obvious that this standard represents an imprecise target for any individual seeking to gain license to some work. The hypothetical concerns raised by the first issue lead directly to the second, according to which the actual implementation of the review process indicates that the system is not providing much relief. A review of the past five-year period of

[57] *Ibid*, 6.
[58] Copyright Act.

Copyright Board decisions on applications for the use of orphaned works reveals thirty-nine decisions issued with only twenty favourable results.[59] The nearly 50% rate of unsuccessful applications provides some evidence to justify the concern that the standard for determining what constitutes a reasonable search is difficult to ascertain. Another troublesome point about the data is the low number of applications made to the Copyright Board for the issuance of licenses for these works. While it can be difficult to establish any firm correlations between the estimates of orphaned works in the United Kingdom and applications for similar works in Canada, the proportion of affected works reveals something about how this issue is being addressed. As public access to media continues through digitisation, this problem is likely only to worsen over time. The inelegant administrative solutions on offer fails to provide a robust remedy for a problem created by the inappropriate application of the property model to intellectual objects. As the output of creative expressions accelerates, orphaned works will impose increasingly burdensome restrictions upon creators and the public alike as they attempt to navigate the dense thicket of copyright genealogy and broken ownership chains.

In this introductory chapter, I have discussed the history and evolution of copyright law. I have argued that the confusion surrounding the purpose and principles of copyright in modern jurisprudence has resulted in an unwavering push towards longer copyright terms. The legislative changes appear to be a welcome development for the authors themselves and those involved in creative industries at large, but they fundamentally neglect the original intent of copyright as a mechanism to improve the lot of both authors and society at large. Laws designed to encourage the progress of the useful arts were originally seen as a means of promoting human flourishing. Progress was to be achieved by increasing access to information, perspectives and expressions. This goal

[59] 'Unlocatable Authors'.

could be sought by carefully weighing the contending interests of authors seeking to maximise their creative control and security and those of members of the community who would enjoy widely available creative goods. By adopting the property model of intellectual objects, the goal of human flourishing has been largely set aside, leading to a relentless march to longer copyright terms and exacting regulations.

Chapter II

On Originality, Creativity and Identity

Seeking Originality

In this chapter, I identify what occurs in the creative process and how a completed work forms a relationship between the artist and the audience. I begin by examining how the courts have defined originality and what distinguishes a creative work which is eligible for copyright protections from one which is not. I contend that the courts' definitions are not only unclear but also fail to represent the actual creative process and what we are seeking to protect in our legislation governing intellectual objects. I will argue that at the core of the creative process is the realisation of an autonomous relationship between creator and audience. For the purposes of practically administering the law of copyright, we will likely need to keep the court's rather vague definition of originality. However, we shouldn't let this definition obscure what is really important about copyright protection. When authors engage in a creative process, they invest aspects of themselves into their works, and it is the inviolability of their autonomy that supports the protections accorded to their works. Any legal conception of copyright should rely on this understanding rather than the property model, i.e., the idea that a creative expression is a form of property.

Noted independent-film director and musician, Jim Jarmusch, discussed his personal tenets for successful motion picture production with *MovieMaker* magazine, providing insight into topics ranging from inter-personal relationships to creative vision. His concluding words of advice addressed the creative process and the instigation of inspiration:

> Nothing is original. Steal from anywhere that resonates with inspiration or fuels your imagination. Devour old films, new films, music, books, paintings, photographs, poems, dreams, random conversations, architecture, bridges, street signs, trees, clouds, bodies of water, light and shadows. Select only things to steal from that speak directly to your soul. If you do this, your work (and theft) will be authentic. Authenticity is invaluable; originality is nonexistent. And don't bother

> concealing your thievery—celebrate it if you feel like it. In any case, always remember what Jean-Luc Godard said: "It's not where you take things from—it's where you take them to."[60]

When confronted with allegations of uncited appropriation in her writings, German author Helene Hegemann responded in a way similar to Jarmusch, favouring the value of authenticity over originality. Hegemann remarked that "the joke of it is, they say I stole that [uncited appropriated sentence] from Airen, when in fact it's originally from Jim Jarmusch, who I think saw it on a gallery sign somewhere, and then the line 'I steal from anywhere' is Jarmusch quoting Jean-Luc Godard."[61]

In a world full of surviving creative works, the notion of originality would seem to have become an absolute standard. If a standard of originality were to require a complete separation from the influence of the body of works that preceded it, we might conclude that it is altogether unworkable. The alternative may be a descent into the throes of unfettered scepticism, according to which anything could be original. It is difficult to support the claim that the creative output of an individual must be independent of the influence of previous works. First, it is entirely unreasonable to require creators to demonstrate the absence of some specific influence from their works. Second, such a proposal would require a paradigm of atomic separation, where each work would somehow be isolated from all others and bear no similarity at all to its predecessors. And yet, this standard does not reflect the collaborative nature of society, or even the science which has facilitated many of the conditions for the discussion (the media of creation, the network of dissemination, and even the techniques employed to produce the works). Even artistic works themselves often reflect the prevailing conditions of society or speak to major contemporary events at the time of their creation.

One could read the words of Jarmusch and Hegemann, as previously quoted, and conclude that the search for originality is futile, since all works, in some way, are derivative. However

[60] Jarmusch, 'Things I've Learned'.
[61] Connolly, 'Helene Hegemann'.

tempting the doubtful impulse may be, rejecting the notion of originality entirely is an unhelpful surrender to scepticism. When a creative object elicits awe and wonder, that reaction can be tempered, in one way or another, by the discovery that the work has been appropriated. In other words, it matters to us whether we deem a work to be original or appropriated. The concept of originality implies that there must be some threshold or difference beyond which works count as unique and new. However, in order for an object or concept to be comprehensible, it must be situated within a framework of experience and understanding. If a creation cannot be easily linked to some prior experience, it would qualify as original, but also be void of all connection to humanity, including our framework of understanding. Aside from its incomprehensibility, this view of originality would also appear to set the bar for any creation to qualify as original entirely too high.

Perhaps there is available an agreeable middle-ground between these two poles. A creative spectrum with 'entirely derivative,' on one extreme, and 'ontologically foreign,' on the other, requires some element of the novel, while retaining the framing of human experience in order to be understood. Darren Hudson Hick, discussing the criteria for originality, identifies the difficulty posed by a definition that requires an origin in nothing. The specific problem, for Hick, is that our notions of originality are bound up in a Victorian conception of genius, where the creator is "imbued with superhuman talent and, because of that, placed forever outside ordinary society. His existence [is] one of noble isolation, and his tortures [are] of a kind unknown and unknowable to ordinary men."[62] This seems an impossibly high bar to meet, especially in an age in which various forms of creative media endlessly proliferate. How might we reasonably expect our mythical geniuses to produce works free from the influence of all that came before them? How can we defend the *creatio ex nihilo* principle from the imitative doctrine of *ex nihilo nihil fit*? Reconciling the

[62] Hick, *Artistic License*.

extremes of 'entirely derivative' and 'ontologically foreign' would provide a useful account of originality. This would not only clarify the notion of originality, but also provide a means or ensuring that originality is acknowledged and preserved. While philosophical definitions of originality have intrinsic value, a much larger question remains, namely, how we ought to employ the law to protect the essential elements of originality. In fact, Canadian jurisprudence concerning the subsistence of copyright has largely focussed on questions of originality. How we collectively assess the notion of originality shapes the application of copyright provisions, while attendant restrictions alter the economic and social landscape.

Originality and the law

Originality is a fundamental focus of the legal protections afforded an intellectual object by the state. This is clearly identified, but not defined, by legislation in both Canada and the United States, as well as in other common-law jurisdictions, with 'original' works qualifying for copyright protections. In Canada, the *Copyright Act* of 1985 established that copyright protections are available "in every *original* literary, dramatic, musical and artistic work"[63] (emphasis added). Similarly, the United States has codified copyright protections for "*original* works of authorship fixed in any tangible medium of expression"[64] (emphasis added). In neither case, however, does the legislation stipulate how we can assess whether a work is original. Consequently, this question has had to be addressed in the courts in order to provide a working definition to clarify and enforce copyright protections.

I will begin with an analysis of how the American legal system arrived at a definition of originality, as the Canadian formulation draws from this discussion. The pivotal moment in the

[63] Copyright Act.
[64] United States Code, 2006 Edition, Supplement 5, Title 17 - COPYRIGHTS.

defining of originality in American jurisprudence hinged on a mundane debate between a telephone co-operative and a publishing company that produced local phone books.[65] Rural Telephone Service Company (RTSC) offered telephone services to areas in Northwest Kansas as a co-operative arrangement among local communities. Part of the arrangement was to maintain a directory of all the customers in the community and make it available to them. A larger publisher, Feist Publications, which specialised in the production of telephone directories, had assembled its own directories for several other local communities and sought to license RTSC's directory to bolster its offerings. RTSC, however, refused to license their directories to other publishers, which subsequently led to Feist flagrantly copying the directory, including several fictitious customer entries, that RTSC had inserted to detect such transgressions. RTSC then filed suit against Feist for copying the materials in violation of RTSC's copyright. The lower courts would initially side with RTSC, supporting their claim that, since they had originally compiled the information and produced the work in question, they retained a copyright monopoly over the directory listing. No provisions of originality in the creative expression were required to establish this ownership claim, as United States copyright law largely followed the 'sweat of the brow' doctrine, which awarded ownership to the author who had invested the greatest effort to produce whatever work was subject to protections. The case was appealed to the Supreme Court of the United States (SCOTUS), which addressed the legal question of the purpose of copyright and how the monopoly of an expression of ideas ought to be governed in law.

SCOTUS consulted the Constitution, in particular those provisions that conferred on the legislative branch the power to grant copyrights to and monopoly over works.[66] Specifically, the Court held that mere authorship, or sweat of the brow, was not sufficient to meet the standard

[65] Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340.
[66] United States Constitution.

mandated by the Constitution. Instead, the Court maintained that "the constitutional requirement necessitates independent creation plus a modicum of creativity. Since facts do not owe their origin to an act of authorship, they are not original, and thus are not copyrightable."[67] Copyright privileges only apply when works are original, and works are original only when there is a "modicum of creativity."

The concept of originality, in the Court's opinion, is the criterion that distinguishes mere facts from a copyrightable work. This criterion furnished the foundation for their ruling against RTSC's published directories. Central to the Court's deliberations was the belief that originality need not meet some impressive threshold of creative expression. Justice O'Connor specified that the work in question need only meet a test of a "minimal degree of creativity" in order to satisfy the standard of originality necessary for copyright protection. While RTSC's production of a telephone directory would indeed have been due to the "sweat of their brow", an alphabetical listing of names hardly constitutes an original work of authorship. Instead, it was, in the Court's opinion, a mere assembly of uncopyrightable facts, produced in such a way that lacked the originality necessary to be afforded the protection of copyright status. At the heart of this conception of copyright protection lies the idea of originality invested in a work by the author.

In the Canadian context, the question of what defines originality is a direct consequence of legislation that identifies the requirement, albeit in somewhat ambiguous terms. The SCOTUS interpretation of copyright and its stipulation concerning the minimum threshold of originality required to grant such status informed the Supreme Court of Canada's (SCC) analysis of the same issue. Although Canadian legislation makes specific mention of "original literary, dramatic, musical and artistic work," it again would fall to the courts to determine what constitutes an original work

[67] Feist Publications, Inc. v. Rural Telephone Service Company, Inc.

that is eligible for copyright protection. This would all unfold in 2003-2004, when CCH Canadian Limited, Carswell Thomson Professional Publishing and Canada Law Book, Inc. filed suit against the Law Society of Upper Canada for copyright infringement.[68] The Law Society offered a legal research library, named the Great Library, which included photocopies of relevant materials to Law Society members and other authorised researchers. The materials contained in the Law Society libraries consisted of legal articles, statutes and decisions. The group of publishers, which produced and distributed some of the materials available through the library, sought to establish a subsistence of copyright for these works, as these materials contained headnotes, summaries and indices produced by the companies. They claimed that the Law Society had infringed upon their rights as copyright holders and sought an injunction preventing the photocopying practice from continuing. In response, the Law Society maintained that a subsistence of copyright should not be granted, as the photocopying service they provided was the only feasible method of distributing these materials to interested researchers, especially to those who lived distant from the geographic area of the library. Consequently, the Law Society's activities ought to be considered a "fair dealing" of these materials as provided by Canadian copyright legislation. The Law Society maintained that "copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service photocopier for the purpose of research."[69] It was the Law Society's position that a single copy made for a specific purpose should easily satisfy the fair dealing exceptions in legislation and, thus, not be considered a violation of copyright.

In a unanimous decision, the SCC would eventually side with the Law Society of Upper Canada and rule that there was no infringement of copyright. The decision touched on many

[68] CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339.
[69] *Ibid,* at para 3.

interesting facets of the considerations relevant to intellectual objects, the most salient of which, for our discussion, was the court's determination of the when a work is copyrightable. In an evaluation of what might qualify for such protections, the court considered two opposing positions. The first was the "sweat of the brow" doctrine, rejected by SCOTUS, which offered that the critical element in conferring ownership is the labour invested in transforming some element of nature into a completed work. The alternate position, favoured by SCOTUS, was that the work must be imbued with an element of originality in order to enjoy such protections. On this view, copyright protects the expression of an idea rather than the idea itself.

The SCC found that both of these positions were too extreme and that the correct conception would require a compromise between conflicting values. Specifically, the Court held that a work "need not be creative, in the sense of being novel or unique," in order to be copyrightable. This represented a stark departure from the American position, which requires an integral role of creativity for a work to receive protection. While the Canadian ruling was not as restrictive as the American requirement of strict originality, it was not as permissive as the "sweat of the brow" principle. Specifically, Chief McLachlin maintained that:

> What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgement. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgement, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgement will necessarily involve intellectual effort. The exercise of skill and judgement required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.[70]

[70] *Ibid* at para 161.

Ultimately, the Law Society would not be found to be in violation of the plaintiff's copyright. What might constitute an exercise of skill and judgement would need to be considered from an inclusive perspective comprising all of the elements of the work. Trivial modifications, such as a change of font or correction of a typographical error, would not satisfy such a standard, but each case would rest on the particular facts of ownership. While the court found that the publishers did participate in an exercise of skill in judgement in generating indices for and summaries of various legal decisions, the Legal Society's library enjoyed fair-use provisions that exempted them from copyright claims.

Both courts' discussions of the cases hinged on the importance of originality, but the judgement in the Canadian case was based on the notion of fair use. While the courts do not normally indulge in inquiries into the metaphysical qualities of the concepts set before them, they could not escape the challenge of defining the notion of originality due to the role it plays in the law of copyright. Each nation's highest court would ultimately settle upon their own definition of originality that would uphold legislative intent, while providing some means of settling future legal claims. The notion of originality forms the core of the legal principle of copyright, serving to distinguish between mechanical copies devoid of any creative value and the *creatio ex nihilo* of the genius. While both courts set the bar of what ought to enjoy copyright protection at a fairly low level, the respective decisions, nonetheless, enshrine the view that originality lies at the heart of copyright. Both nation's laws stipulate that intellectual objects are to be afforded the protection of the state and the court has interpreted the distinguishing feature of those objects as their originality.

The principle of originality appears to be intact in the mildly differing legal conceptions, but we might wonder what to make of the standards of a "minimal degree of creativity" and the "exercise of skill and judgement." It is easy enough to conclude that these definitions are, in essence,

synonymous. The Canadian standard of exercising skill and judgement sets an altogether lower criterion to be satisfied, but the two definitions do not seem so outlandishly disparate as to abandon a shared metaphysical ground. One might be concerned, however, that the SCC has taken one set of questions (concerning the threshold of originality) and replaced it with another (concerning the threshold of creativity or the threshold of skill and judgement).

In March of 1990, the National Gallery of Canada announced that it had purchased Barnett Newman's *Voice of Fire* for a sum of $1.76 million (over $3.5 million in 2023 dollars, adjusted for inflation). The 18-foot-tall canvas, depicting a vertical red stripe set against a blue background, had originally been painted for the 1967 World Expo in Montreal as part of the United States Pavilion exhibition. This acquisition was not without controversy, as many members of the public decried both Newman's foreign citizenship and the seeming lack of skill required to produce such a work. A Progressive Conservative Member of Parliament lamented, "I think Canadians do not see $1.8 million worth of painting,"[71] while speculating that he would be equally capable of producing such a work. Another MP offered that "[i]t looks like two cans of paint and two rollers and about 10 minutes would do the trick."[72] Newman was a part of the abstract expressionist movement which rejected the traditional commitment of translating the three-dimensional world onto a two-dimensional canvas. Abstract expressionism is a reaction against conventions of all kinds, including conventional forms of representation in art. Abstract expressionists, such as Newman, seek liberation from conventional depictions of the sensible world so that they can explore abstract and elusive aspects of existence. Determining whether this narrative is compelling or not is not my intention, but it seems to explain the motivation behind Newman's *Voice of Fire*. One person might not find these motivations compelling, seeing nothing more than three large rectangles, while

[71] Simpson, 'Newman's Revenge'.
[72] Gillmor, 'Appreciating "Voice of Fire"'.

another may find the work a persuasive expression of the rejection of a broken society and a lofty depiction of trans-human sentiment. Artistic merit aside, should *Voice of Fire* be considered original? It seems reasonable to believe that the three vertical stripes may fail to satisfy a standard of a minimal degree of creativity, depending on how you assess Newman's motivations and approach. The work would more likely than not qualify as an exercise of skill and judgement, although that assertion may invite scepticism as well. Eager to wade into the debate, and challenge the artistic merit of the work, John Czupryniak took it upon himself to re-create Newman's work in his home in Nepean, Ontario.[73] Mr Czupryniak indicated that his version took only seven hours to complete, adding that, had he devoted himself to this art at a younger age, he would be a "multi-millionaire by now." While the National Gallery clearly regarded *Voice of Fire* as sufficiently worthy to justify its cost, there must at least be some question of whether the painting is copyrightable should Mr Czupryniak attempt to launch a line of reproductions.

We might question whether originality actually captures what it is we are attempting to protect in creative objects. While Newman ought to be afforded some sort of protection for his work, originality does not appear to provide sufficient justification for why we protect this and other such copyrightable objects. At the very least, the perception of originality varies considerably between observers. As we have seen with respect to the definitions provided by the courts, there is no consensus on an evaluative standard. Even if we were eventually to provide a sufficiently refined definition of what ought to qualify as original, it still does not quite capture what it is that we are seeking to protect. The elusiveness of the courts' attempts to anchor the concept of copyright in the notion of originality indicates that there must be something more going on than what their definitions can offer. Did *Voice of Fire* qualify as an original work? While the work would likely pass

[73] '*When Voice of Fire Drew Flames of Criticism from (Some) Canadians*'.

the test of established legal standards, public opinion was rather divided on its originality. It may not be unusual for the legal standard to diverge from public opinion. However, when the state is offering a monopoly on creative expressions, we might expect a standard that more accurately represents what it is we deem worth protecting.

Originality and the Self

I propose that we value what we call "original works" because they are infused with an aspect of the identity of their creator. In order to assess this claim, it is helpful to determine where originality is and is not valued. Most obviously, originality is valued in creative pursuits. Specifically, the arts place considerable value on originality in assessing the significance of particular works. In contrast, one might expect to find some of the more mundane pursuits, such as parking enforcement or commercial air travel, devoid of creative expression.

What the audience encounters when experiencing a creative expression are aspects of the artist who created the work: experience, skill, perspectives, the sum total of their existence that has culminated in a moment in which they have translated some aspect of their identity into a particular medium. Prior explanations of originality fail to account for the connection between artist and audience in its various forms.

The practical approach adopted by the judiciary involves an appeal to an Aristotelean golden mean between two contending states of excess and deficiency of conceptual value. At one extreme is a threshold of originality so high that any imputed derivation of a work from others would disqualify it. At the other is a threshold so low that even phonebooks, and other arrangements of mere fact, would qualify for copyright protection. As we have already seen from the courts' attempts, this approach is also fraught with subjective values and interpretations to the point of offering little

practical, including predictive, value. What is missing from these contrasting claims is a recognition of the connection between artist, work and audience.

When an artist creates a work, it is not produced in isolation from the larger world. In both the conceptual content of the work and the limitations of the medium, artists find themselves bound by a shared ontology with the rest of society. Unless we were willing to attribute originality to a divine spark, we would be forced to recognise the various sources of inspiration and, ultimately, expression. It is unlikely that Bach would have been able to compose *The Brandenburg Concertos* had he been isolated in a dark room with a quill and parchment, instead of being employed as Kappellmeister at Köthen during the eighteenth century. One experience begets another, which shapes some other belief or experience, which in turn informs another experience. The causal chain of experience and belief ultimately culminates in artistic expression. Just as the individual is shaped by the temporal accumulation of experiences, so too is the artist's creative expression. Philosopher and archaeologist R. G. Collingwood likened the activity of the historian to the determination of the "infinite whole of fact."[74] While this seems like an untenable task for any individual, Collingwood proceeds to clarify that historians can only adduce what is immediately before them or determine "a world whose centre is the historian's 'immediate' perception, and whose radius is measured by the depth to which he can see into the significance of that perception."[75] Correspondingly, artists (or creators) exist at the centre of their own perception and can only draw from elements within their sphere of experience. Just as the task of historians is to recount some portion of the infinite whole of fact that is accessible to their perspective, so the artist's task is to create a work drawn from that same sphere. How the artists choose to express their sphere of experience and perception can take many different shapes. The Rococo ornamentation of the early eighteenth century and the geometric

[74] Collingwood, 'Nature and Aims of a Philosophy of History'.
[75] *Ibid.*

planes of Cubism share only the most tenuous connection in form and style. However, at the centre of both forms is the artistic attempt to communicate some experience to a wider audience. All artists, regardless of their style, draw upon the sum total of their experiences and perspectives in order to create a work that expresses some aspect of themselves. Or, at least as a partial motivation, the artists seek to communicate important facets of their identity in the works they create. While the most prominent inspiration may be an emotion or some other reaction, or an urge to experiment, artists ultimately express some fact about themselves through these creative efforts.

What the courts have come to identify as originality in intellectual objects is only a nebulous component of the actual process of creative expression. A standard noted in a legal concept of originality says very little about what happens when the artist creates a work and presents it to the world for enjoyment and scrutiny. The court's definition implies that all that need happen is some sort of exercise on the part of the artist of skill and judgement. At its core, this definition removes any element of emotion, leaving us instead with a standard that emphasises labour and proficiency. What this legal conception neglects is the connection established between artist and audience. As the source of creative expression, artists impart an aspect of themselves to their work, which is precisely what accounts for that work's creative status.

Consider the way Miles Davis describes the style of Bill Evans' piano playing:

> Bill had this quiet fire that I loved on piano. The way he approached it, the sound he got was like crystal notes or sparkling water cascading down from some clear waterfall. I had to change the way the band sounded again for Bill's style by playing different tunes, softer ones at first.[76]

Evans has had a lasting influence on jazz piano. His rise to prominence coincided with the cool and modal eras of jazz, which saw a highly expressionistic style arise from an earlier focus on

[76] Davis and Troupe, *Miles, the Autobiography*.

arrangement and the mastery of blistering speed. Although skilled in most aspects of jazz-piano, Evans was especially known for his chord voicings. Prior to Evans, jazz pianists adopted the traditional structure of a chord root along with the key intervals broken out into an *arpeggio*. Evans abandoned the root structure, instead allowing the bassist of a trio to pick up the note or part of the beat of another measure. While this structure is quite commonplace in contemporary jazz piano, Evans had to draw on inspiration from Debussy and Ravel to pioneer his novel playing style. This distinct method and style is easily recognisable throughout his extensive catalogue. According to Evans' understanding of jazz music, "words are the children of reason and, therefore, can't explain it. They really can't translate feeling because they're not part of it. That's why it bugs me when people try to analyze jazz as an intellectual theorem. It's not. It's feeling."[77] Defining originality simply as an exercise of skill and judgement obviously fails to account for what Evans accomplished. The sphere of Evans' perspective and experience, which is the history of jazz, modified by his exposure to Debussy and Ravel, made him capable of musical expressions that represent an aspect of himself. For example, Evans' recording of "Autumn Leaves*"* is not merely an exercise of skill and judgement, but also a representation of Evans himself. When Evans blocks out the chord progression of "On Green Dolphin Street," he imparts an aspect of his identity to his voicings that the audience can absorb and appreciate rather than a mere demonstration of skill and judgement. Although Evans tragically died in 1980, his work continues to represent both his skill and his musical identity. In common discussions of originality and creativity, we acknowledge the ways in which artists manage to impart their identity to a work and how important it is that we make an effort to understand that expression.

[77] Nelson, 'Interview with Bill Evans'.

When artists impart some aspect of their identity to their work, they are initiating a communication and pursuing a connection with the audience. The communication of identity is what makes the creative process unique and explains why we find expression valuable. The idea or emotion being expressed may be rather banal, or visceral and complex. Consider Picasso's "Guernica," which depicts the shocking aftermath of indiscriminate warfare, and how it has aroused emotional responses of horror and sorrow in viewers for decades. Expressions may even be meta-commentaries on the value and place of creative endeavours. The same expression may also be a subtle indictment of the customs and standards that the creator believes have contributed to an unsatisfactory state of affairs. Regardless of intention, artistic expression proceeds from individual perspective by imparting distinct experiences to creative works. Such works are then cast broadly to the larger public for them to experience and critique, whether positive, negative, or indifferent. When a work is experienced, the artist begins to form a relationship with an audience. It is precisely this connection that the property model of copyright fails to adequately identify and why the attempts to define copyrightable objects by the courts have resulted in vague assessments of what makes the creative process valuable. On the view I am proposing, copyright is designed to protect the value of particular inter-personal relationships, those that are creatively established by imparting elements of one's self to works. At the core of the creative process lies the relation of artists to the ideas they wish to express, and their unique way of expressing that idea necessarily reveals elements of their own identity.

Chapter III

An alternative proposal

Property and the Individual

While the literature surrounding the nature and justification of property is immense and wide-ranging, I will indulge in a brief exploration of what is entailed by the concept of property and consider how one might make sense of its purpose and application. As a generalised concept, property rights determine the relations of access and management of some item, process or idea. It is helpful to conceive of property rights as those that an individual or group retain over an entity to the exclusion of others.[78] This general definition is largely uncontroversial, but it does not take much reflection to arrive at conflicting views on the specific nature of property and associated rights. David Hume believed that property was a necessary development in human experience due to our excessive needs and relative limitations in comparison to the rest of the animal world.[79] Our comparatively poor allotment of natural gifts and disproportionately higher needs, at least compared to other animals, are further exacerbated by our seemingly endless desires. Hume compares the human experience to that of a lion, which is bestowed with the hunting acumen and physical talents to satisfy its comparatively modest needs, while human beings require shelter, clothing, companionship and sustenance, as well as the satisfaction of a litany of non-essential desires, to fulfil their lives. The only advantage that humans seem to enjoy, according to Hume, is our ability to organise into society, which compensates for our numerous failings and, ultimately, attempts to satisfy our endless wants. The totality of society is greater than the sum of its constituent parts. Where many natural rights theorists claim that property is an extension of the individual's inalienable right to some aspect of themselves, Hume claimed that property results from our organising into

[78] Waldron, 'Property and Ownership'.
[79] Hume, 'Book III: Morals Part II - Of Justice and Injustice'.

societies and is largely motivated by the scarcity of goods. Once we are all collected into social groups, our desires could be more readily satisfied by simply appropriating any object of our desires from the bounty produced by the community in which we find ourselves. It does not require much reflection to conclude that if all other members of society could satisfy their desires by the same means, the resulting chaos would ensure that most would be unable to satisfy any of their desires. Here, Hume appeals to the law of equal liberty, where respecting the position of others will maximise the satisfaction of my own desires. According to Hume, this form of extemporaneous order is motivated by rational self-regard, as "it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me."[80] For our purposes, the important conclusion to draw from Hume's account is that property requires the element of scarcity to support its status as a convention. This account is, perhaps, the most promising among those that do not appeal to some form of natural rights. As intellectual objects are generally not beset by any sort of practical scarcity, intellectual property must involve some discussion of natural rights.

As discussed in the first chapter, the Lockean view of property played an important role in establishing the regime that recognises intellectual objects as a form of property.[81] While there is direct evidence that Locke had been active in the campaign against the Stationer's monopoly, he was also, surprisingly, outspoken against the idea of perpetual licenses for authors and publishers to their works.[82] Locke seems to have concluded that there is no nexus at all between the works of authors

[80] *Ibid.*

[81] For a very brief reminder, the Lockean labour theory of property follows this general outline: the bounty of the world was provided in common through God's providence in order for humans to succeed and flourish. The individual, although a creation of God, retains dominion over themselves and, consequently, ownership over their labour. By infusing one's labour with an element of common nature, the individual extends their ownership to that element as it is necessarily combined with their labour. In order to prevent a land-grab scenario of minimal exertion being combined with maximum natural elements (see Nozick's can of tomato juice mixed into the ocean), Locke qualified his conception with a *proviso* stipulating "there is enough, and as good, left in common for others."

[82] Hughes, 'Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)'.

and his theory of property. In a letter to Edward Clarke discussing the notion of perpetual copyright, Locke claims that such an idea "is a great oppression upon scholars, and what right can anyone pretend to have to the writings of one who lived a thousand years ago,"[83] as the rights to printed works could be locked away forever at the whim of copyright holders. In the same letter, Locke draws attention to the idea that a scheme of perpetual copyright would allow some people or corporations to enjoy property rights to works created by people who have long since died:

> This I am sure, it is very absurd and ridiculous that any now living should pretend to have a propriety in, or a power to dispose of, the propriety of any copy or writings of authors who lived before printing was known or used in Europe.[84]

It is clear that Locke does not view intellectual objects as regular, tangible property since he believed their status as protected works of a creator should not survive an author's death as tangible property does. Accordingly, it would be difficult to conclude that Locke felt that intellectual objects can be justified in this theory in the same way as tangible property.

Regardless of Locke's personal views on intellectual objects, his theory of property has often been employed to justify intellectual property in the same way we might justify owning a bicycle or a flamingo lawn ornament.[85] Adam Mossoff contends that Locke's conception of labour includes both physical and intellectual criteria, so that to view labour as solely the sweat of one's brow is to narrow the definition unjustly.[86] On Mossoff's interpretation, Locke's notion of the mixing of labour should be broadly construed as a metaphor for any sort of productive activity that advances human ends. That is, the most important element of Locke's theory is the mixing of one's labour, physical or intellectual, and the inviolability of one's right to that labour. That with which labour is mixed need

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[83] Locke, Clarke, and Rand, *The Correspondence of John Locke and Edward Clarke*.
[84] *Ibid.*
[85] See footnote #81 for an explication of Locke's theory of property.
[86] Mossoff, 'Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory'.

not be part of nature's bounty, but can be anything, including intellectual expression. If we were to accept this generous interpretation of Locke's theory of property, we would still be left with several unanswered questions about how it applies to intellectual objects.

The first question we should ask concerns his overall model, but becomes especially salient when applied to cases of the ownership of intellectual objects. Locke's theory rests upon the notion that labour and objects can be mixed, resulting in a new object ownership of which can be claimed by whoever provides the labour. Locke's original formulation is grounded in the idea that God bestows the bounty of nature for the individual's use and subsequent ownership. Locke does not consider cases where the original source of the resource is human thought, and not God, as is arguably the case with intellectual objects.

Now, let us consider how one creates a tangible good, on the one hand, and a creative expression, on the other, and what constitutes ownership in each case. A talented wood-carver walks out into a nearby forest, supplied by God's providence, and selects an appropriate limb of a tree. The carver applies their labour to removing the tree limb, preparing their tools and carving the wood into a beautiful sculpture of a small child holding the hand of an adult in a symbol of parental love. On Locke's account, the mixing of the carver's labour with the wood allows the claim of ownership over the resulting product and enjoyment of the rights entailed by this status. Now, let us turn our attention to how the same carver might own not just the physical carving of the child and parent, but also the creative expression of the love and commitment captured by the work. The creator applies their labour, to which they have an inviolable right, and mixes it with some material to produce a creative expression. On Locke's account, this mixing of labour with the raw resources of a creative expression affords the creator ownership of that expression. However, there is an important difference between this case and that involving the wood-carving, since the creator is mixing their

labour with something altogether different from God's bounty. Whereas it is clear that in making the wood-carving the artist combined their labour with the unowned wood and should now retain the rights to the new labour-mixed object, it is not clear that in making the creative expression the artist combined their labour with any sort of unowned commons of ideas and should now own that particular expression. That is, this Lockean interpretation of how we can come to own creative expressions is based on the idea that the commons of ideas is an unowned resource. Whereas wood is available independent of any human involvement, the ideas, and even emotions, are products of human beings. So, on a Lockean interpretation of how a creator comes to own a creative expression, it is not clear what unowned object has been mixed with the creator's labour to produce the work. Ideas and emotions are human expressions, and for the creator to claim ownership of such an expression, the Lockean justification would require that some of these ideas and emotions are unowned. Therefore, we would need to rely on a non-Lockean theory of property to make sense of which emotions and ideas are unowned. It is unclear what sort of status we should attribute to the commons of ideas from which creative expressions are fashioned, and even whether they are the sorts of things that could be owned at all.

Even if we were to set aside the questions about conceptual clarity, we might also question why the mixing of labour with some object (or idea) results in ownership. Robert Nozick considered why such an action is regarded as gaining an object rather than the loss of labour.[87] Nozick famously cites the example of an individual pouring a can of tomato juice into the ocean and then claiming ownership of the entire body of water. Advocates of the Lockean view might respond to this difficulty by citing Locke's famous *proviso,* according to which ownership claims can only be justified where there is enough in common and as much left to others.[88] However, there remains a difficultly

[87] Nozick, *Anarchy, State, and Utopia,* 174-178.
[88] Locke, *Second Treatise of Government*, ch V, para 33.

in determining the threshold of the *proviso*. If we have rights to our labour, and those rights are preserved through the acquisition of property when that labour is mixed with some object, then how can any sort of *proviso* limit our claims? As long as our own labour is involved, then we should never be required to relinquish our claims to any resulting product. To put it more plainly, why does mixing my labour with a carving knife and a tree stump result in my owning a wooden sculpture, while my pouring a can of tomato juice into the Atlantic results in a loss of my ocean-stirring labour? Perhaps the Lockean would invoke some sort of threshold principle in order to distinguish cases where objects are gained from those where labour is lost, but it is unclear when one principle overtakes the other. The rules governing when labour is retained or lost by the individual invariably rely on perspective and normative mores.

This concern is compounded by the nature of intellectual expressions, where both the labour and the common goods available to creators are unclear quantities in the ownership equation. As previously discussed, the courts have formulated an interpretive standard of creative expression to establish copyright, such that mere listings in phone books do not qualify, but vertical stripes on canvases can. In both cases, labour is mixed with some common good, but while one instance results in the loss of labour, the other results in the securing of copyright. For the courts, the qualification of labour, or "sweat of the brow," is further focused by requiring sufficient evidence of creativity, which raises the question of how we are protecting the inviolable right of one's own efforts where intellectual objects are concerned. If labour also requires meeting some creative threshold in order to establish claims over the resulting product, then labour alone is not enough to determine ownership.

It may also be tempting to rely on the portion of Locke's *proviso,* "at least where there is enough, and as good, left in common for others," to determine how we should establish the labour

and ownership thresholds, as it implies a level of fairness and access for all. However, the Lockean conception of property as applied to intellectual objects yields a situation where, concurrently, the claims can be both very limited and exceedingly broad. The commons of creative expression constitute an inexhaustible landscape by means of which artists are only bound by their imagination[89]. Where individuals can combine their labour of creative expression with a piece of the common good, the Lockean *proviso* might be preserved, if enough of the bounty of ideas remains available to all. Unfortunately, directly at odds with the bounty of available creative expression is the ease with which the individual creator may capture an outsized portion.

This sort of scenario is helpfully illustrated by an analysis of a recent lawsuit where the rights holders to Marvin Gaye's "Let's Get It On" advanced a copyright claim against Ed Sheeran for his song "Thinking Out Loud." The suit was filed by Structured Asset Sales (SAS) which had obtained Ed Townsend's rights as songwriter of Gaye's track as part of an investment security in song rights.[90] At the centre of the lawsuit was the claim that "the combination of the chord progression and the harmonic rhythm used in 'Thinking Out Loud' is substantially similar to that in 'Let's Get It On,' and thus infringes the work." The purportedly infringing chord progression is the I-iii-IV-V phrasing, although the songs are in different keys, with Sheeran's in D major and Gaye's/Townsend's in E flat major. This would have been a reasonable claim on SAS's part if that chord progression was in any way unique or novel, but the I-iii-IV-V series is a frequent feature of rock and pop styles of music. One does not need to look very far in either genre to find other

[89] It could be said that an artist is also limited by the same realities of tangible object ownership, where their creative expression will often require a medium of conveyance. For example, the sculptor wishing to construct a 100-metre rendition of their pet cat in solid gold may quickly encounter financial obstacles preventing the expression of their creativity. It is true that creators are bound in some ways by the constraints of their chosen media, but the economically feasible options, say a 30-centimetre paper mâché likeness of the same cat, are so vast that they may be practically assumed to be limitless.

[90] Seabrook, 'The Case for and Against Ed Sheeran'.

popular songs which employ the same chord structure and pre-date Townsend's original composition.[91]

Thus, it was with some disbelief and consternation that Sheeran found himself the defendant of a claim centred on a practice in musical composition that generally does not allow broad ownership claims to suppress the writing and recording of new songs. At the trial, Sheeran's defence attorney concluded their arguments with the rhetorical query, "[d]o we have to tell the eleven-year-old next Ed Sheeran that they better find out who owns that chord progression?"[92] Jenna Andrews, who co-wrote BTS' "Butter" and "Permission to Dance," expressed concern that such fundamental elements of musical authorship would become subject to copyright claims. In an interview on the subject, Andrews lamented, "there's only so many chords that you can use."[93] Sheeran would ultimately prevail in the case, but not before he publicly mused about the possibility of leaving music entirely should the outcome not go in his favour. After the conclusion of the trial, Sheeran stated, "I am obviously very happy with the outcome of the case and it looks like I am not having to retire from my day job after all. But at the same time I'm unbelievably frustrated that baseless claims like this are allowed to go to court at all."[94]

The entire affair is a useful case study in how Locke's theory of property and the application of his *proviso* does little to provide a coherent justification or ownership of intellectual objects. SAS's claim is somewhat analogous to Nozick's tomato juice example, where the mixture of some level of individual effort extends a perceived right of ownership over a vast swath of creative territory. Should Townsend be required to relinquish the labour he has with the common resource of pop-rock musical composition? Or does the inviolability of the right to the sweat of his brow grant him

[91] See The Beatles, "I Feel Fine"; Elton John, "Crocodile Rock" and Rod Stewart, "Have I Told You Lately".
[92] Seabrook.
[93] Andrews, *Rolling Stone Music Now*.
[94] Beaumont-Thomas, 'Ed Sheeran Beats Second Lawsuit over Thinking Out Loud and Let's Get It On'.

the rights to an ocean of songs utilising the same chord progression? Locke's theory does not provide a satisfying answer to this question. If we allow Townsend to retain ownership over a certain family of chord progressions, then those rights would readily be extended to a nearly unlimited catalogue of musical compositions utilising the same underlying structure. Conversely, in order to leave as much and as good for others, Townsend is only entitled to his own particular composition and not the chord structure at its root.

Copyright and legal consequentialism

Our exploration of the history of modern Western copyright has focused primarily on the impetus behind and justifications for such a regime. To determine the reasoning behind a set of laws we must consider the outcomes the laws are aiming to achieve. While the original Statute of Anne can be said to have been directed more at disrupting monopolies, the jurisprudence quickly became an instrument for promoting overall social benefit. Legislatures needed to grapple with the question of how far community access to knowledge could be tolerably diminished in order to facilitate the goal of encouraging novel expressions and recognising the merit of individual creations. In short, legislatures have used copyright laws to seek a particular regulatory outcome. The specific manifestation of this outcome is, of course, subject to challenges about what constitutes an ideal creative environment and how much public access to the community of ideas should be preserved. Finding the balance between these opposing ideals is not only a matter of individual opinion, but also requires some sense of how much regulation will yield a desired level of output.

While the prospect of balancing the optimal quantity and quality of expressions with an acceptable level of social access to ideas might seem difficult, such questions have produced many pages of analysis in legal and philosophical journals. William Landes and Richard Posner conducted

an extensive investigation into the optimal length of copyright terms consistent with an "efficient allocation of resources."[95] After proposing a formal model to account for copying supply curves and profit margins, an author's projected profits, marginal prices of additional copies, and welfare effects of copyright protections, Landes and Posner arrive at some relatively meek conclusions. Although copyright terms of lifetime plus fifty years (the legislated copyright term in the United States at the time Landes and Posner published their paper), may seem excessively long, it is possible that terms of this length effectively motivate authors to continue creating. Landes and Posner suggest that "perhaps the term is neither excessively lengthy nor arbitrary."[96]

Ultimately, what precisely constitutes an optimal outcome is a matter of dispute, as evidenced by the debate surrounding copyright terms along with the seemingly inexorable march towards lengthier periods of protection. While it may be unsettled what would constitute an appropriate copyright term, and, therefore, an optimal outcome, the length of protection has only increased since the initial adoption of the Statute of Anne. When the United States first implemented copyright laws, the term was set at fourteen years, with an additional fourteen years available as a renewal. Subsequent amendments to the legislation gradually increased the length of protection to the widely observed international standard today of the lifetime of the author plus seventy years (Fig 1). As previously discussed, when one camp comprises vociferous advocates motivated by the financial success of their industry while the opposing camp is made up of supporters appealing to an intangible sense of social well-being, an imbalance of resources is likely to result.

[95] Landes and Posner, 'An Economic Analysis of Copyright Law'.
[96] *Ibid.*

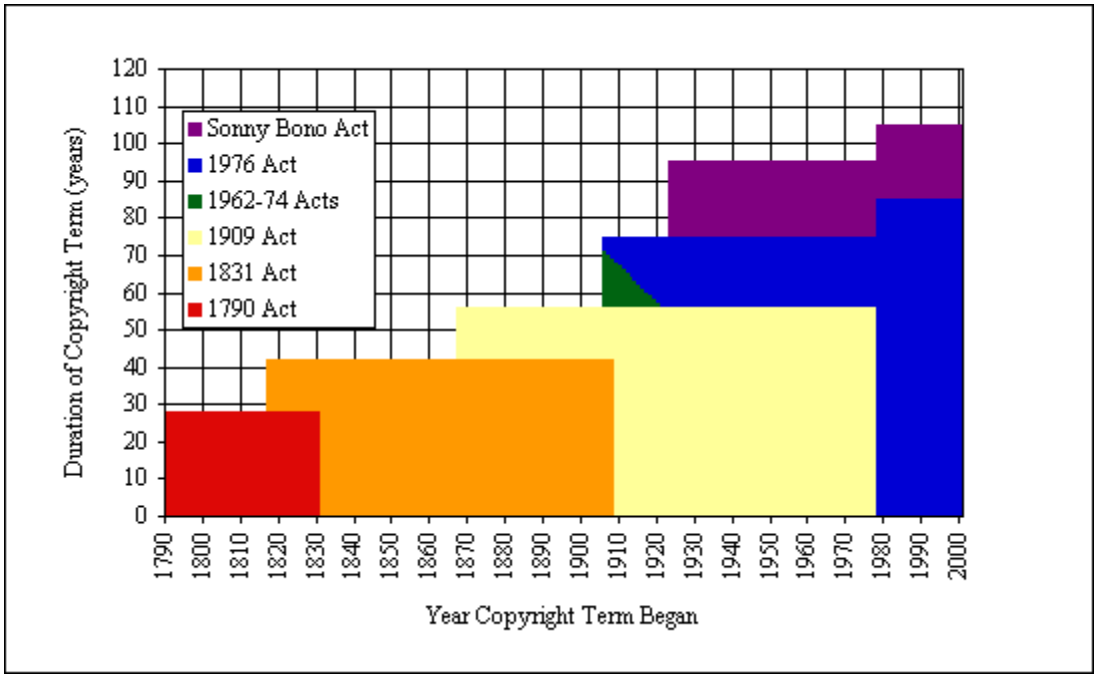

Figure 1.[97]

Length of copyright protections over time in the United States.[98]

It is clear that copyright terms have become increasingly lengthy, but evidence that they constitute a net societal benefit is more elusive. In addition to expanding the length of copyright terms, the types of works eligible for protection have also multiplied. Copyright initially covered only written works, but eventually grew to encompass musical compositions, performances, artistic depictions, motion pictures, computer software and architectural designs.[99] But while copyright has clearly expanded in both scope and duration, can we faithfully conclude that the overall benefit to the community has likewise increased? As my remarks above have already made clear, I conclude it has not. One of the most recent attempts in the United States to increase copyright protections

[97] Bell, 'Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works'.
[98] The 1976 Copyright Act introduced terms that included the lifetime of the author plus an additional fifty years from their death. For the purposes of the graph, the author has assumed a creator age of thirty-five years and death at age seventy.
[99] Bell.

further was proposed in December 2020, when Congress attempted to institute a large COVID relief budget package. The omnibus bill was preceded by threats of a government shutdown unless legislation was quickly passed to authorise the release of funds.[100] Buried within the 5,500-page bill were two copyright-related items specifically addressing unlawful streaming of copyrighted content for commercial purposes as part of the Copyright Alternatives in Small-Claims Enforcement (CASE) Act. The commercial streaming provisions in the CASE Act strengthened the law by making such activities a felony crime. More relevant to our discussion was a proposal to establish a Copyright Claims Board within the Copyright Office. The Board would hear claims of copyright infringement of less than 30,000 US dollars, as an alternative to the courts. Proponents of the proposal highlighted the benefits of the streamlining of the copyright process and the Board's ability to allow both the plaintiff and defendant to opt-out if they did not want to participate in the process. Critics of the proposal emphasise that the process would be a default opt-in, so that, if defendants failed to opt-out, they would be subject to a default judgment by the Board.[101] More pointedly, the system would provide fewer protections and accountability than the regular courts, such as limiting the right to appeal. Crucial to our discussion is the lack of discussion surrounding these proposed changes concerning what overall benefit the community might realise.

If we are to engage in a consequentialist analysis of these new provisions, the legislation seems to be another rung on the ladder leading to inexorably stricter copyright restrictions, but without any clear overall benefit. Those who regard copyright as a mechanism for consequentialist good appear thwarted by the resources brought to bear by rights-holder lobbies. As Thomas Bell summarises, "[t]hose who create, own, and distribute expressive works know who they are, what they want, and

[100] Rosenbaum, 'Congress Passes CASE Act as Part of COVID-19 Relief Bill'.
[101] Gagliano, 'Some Answers to Questions About the State of Copyright in 2021'.

how badly they want it."[102] Lacking a financial incentive, those who might benefit from a less restrictive copyright regime tend to be more disparate and unorganised.

Lest we believe that Canada has escaped the continued legislative drive toward further copyright restrictions, we need look no further than Prime Minister Justin Trudeau's 2021 mandate letter to the Minister of Innovation, Science and Industry. Among the expected instructions was an order to "[w]ork with the Minister of Canadian Heritage to amend the *Copyright Act* to further protect artists, creators and copyright holders, including to allow resale rights for artists."[103] The Canadian government's stated priorities seem to treat extending copyright restrictions as an uncontroversial goal without the need to study what precisely we are attempting to accomplish and how we might go about doing so.

It is unlikely that any given work owes its existence to a copyright term of lifetime plus seventy years, in the sense that the work would not exist if the copyright term was less. In fact, it is difficult to imagine how any potential instances of creation, save the most peripheral, would result from any copyright term extending beyond the lifetime of the author. An entire lifetime plus an additional seventy years hardly generates any greater incentive to create than the much shorter terms historically legislated. This sort of incentive calculus also implies, the greater the incentive, the richer our creative expressions might become. As these expressions are generally highly personal, motivated by individual or group experience and resistant to causal predictions, it is unclear why we ought to assume that increasing incentives will ensure any sort of improvement in the quality of the works. There may be an argument that longer terms result in a greater quantity of expressions, but there is certainly no way to conclude that the quality of those works will improve.

[102] Bell.
[103] Trudeau, 'Minister of Innovation, Science and Industry Mandate Letter', 15 December 2021.

Since our regulatory framework appears to have resulted from the efforts of a thinly veiled lobby of industry-affiliated groups, it is tempting to conclude that it fails to represent the best interests of society. In fact, I am inclined to strengthen that suspicion by suggesting that the quasi-property model upon which copyright law is based can never deliver the social benefits we seek. Our current system of copyright law is built upon the wrong principles, while also failing to secure desirable outcomes. It is due to the confluence of these two fatal defects that I propose a radical shift in paradigm for understanding and justifying copyright protections.

Identity and Fraud: A New Paradigm

As I argued in chapter two, one of the primary features we are seeking to protect in any sort of copyright regime is an author's original expression as an aspect of the self. Balanced against those objectives are the consequentialist values that underpin much of democratic governance in creating regulatory environments to ensure the best outcomes for the community. In order to adequately address these two priorities, I propose a system of copyright that is predicated on the protection of identity balanced with the value of the dissemination of ideas to society as a whole. This paradigm would abandon the property model that has been entrenched in the law. The view that an intellectual object embodies some aspect of the identity of the creator is more appropriate to the kind of author-audience relationship that is made possible when creative expressions are disseminated. The prevailing property model reduces this relationship to a merely transactional matter, in which one person wishes to sell a widget, which another wishes to buy. Intellectual objects require the unique quality of creativity to be afforded their status.[104] A property model is unable to capture those aspects of identity that are invested in creative objects. Instead, we ought to base our

[104] As ruled by the Supreme Courts of Canada and the United States. See chapter two.

laws on protecting the unique relationship formed between artist and audience. I argue that this would be both a more accurate paradigm upon which to formulate any sort of copyright regulations and more likely to improve social outcomes.

This proposal would require a fundamental realignment of copyright law such that the central object of legislation would not be the work itself but the relationship between creator and audience. As the law currently stands, rights and privileges relate directly to the object itself, which can be bought, sold, licensed or abandoned in much the same way as tangible property. As we know, though, the property model fails to accommodate the essential element of creative expression: the relationship between creator and audience. Instead, the law ought to be grounded in principles of protecting that very relationship, in much the same way it guards against identity fraud. The *Criminal Code of Canada* regards identity fraud as a case where:

> (1) Everyone commits an offence who fraudulently personates another person, living or dead,
>
> (a) with intent to gain advantage for themselves or another person;
>
> (b) with intent to obtain any property or an interest in any property;
>
> (c) with intent to cause disadvantage to the person being personated or another person; or
>
> (d) with intent to avoid arrest or prosecution or to obstruct, pervert or defeat the course of justice.[105]

If we view creative expression as a reflection of, or at least an attempt to establish, a relationship between a creator and an audience, then it is clear how the concepts of identity fraud could be used to protect that connexion. To use the creative expression of a creator and disseminate that work in some public forum without permission is to violate that creator's expression of identity by creating relationships against their will and without their involvement. Consider a case where I produce a

[105] Consolidated federal laws of Canada, *Criminal Code*.

painting with my own skill and creative vision, but instead of signing my own name, present it as a lost work by Vermeer. Few would defend this practice as an acceptable exercise of creative expression, and even fewer would regard it as appropriate for me to disseminate the work publicly. Falsely representing artists' work falsely represents the artists themselves, violating their autonomy.

Or consider a case where I remove my name from this thesis and replace it with that of former President Barack Obama. Let us assume that the public is persuaded by my argument in favour of re-defining copyright and re-evaluating its legal foundations. Let us assume, further, that it sparks discussion among, not just examination committee members, but political thinkers and copyright scholars. Perhaps it prompts some manner of copyright reform that eventually benefits society as a whole. Still, it seems wrong to misattribute my work to the former President, even if I sincerely believe that doing so will instigate positive change. Regardless of my intent, few would defend my misattribution.

Current copyright legislation in Canada alludes to how creators retain some moral rights to their work, beyond licensing and monetary aspects. However, these rights are quite limited in scope and seem directed only at the most egregious cases of interference with a creator's original artistic expression. The moral rights recognised in the *Copyright Act*, rights of attribution and association and rights of integrity, protect the work and cannot be transferred to another individual. While these rights cannot be included within a licensing agreement, creators are able to waive them, either of their own volition or as part of some other contractual agreement.[106] In practice, this provision is more relevant to academic discussion than to the practical administration of a copyright regime. A cursory review of existing case law yields only a handful of legal disputes involving the moral rights of the author. The relative rarity of these sorts of legal questions provides some evidence that moral

[106] Copyright Act.

rights rarely form the nucleus of disagreements over our legal conception of copyright and do not seem, therefore, to amount to a problem in search of a remedy.

At any rate, the moral rights enshrined in Canadian law do not fully account for the creator-audience relationship, nor do they provide a sufficient basis upon which we might formulate some scheme of protection. Providing a mechanism to seek relief, either financial or injunctive, where an author's expression is "distorted, mutilated or otherwise modified"[107] fails to address the full range of ways that works are disseminated. To protect the creator-audience relationship, a suitably re-worked set of laws would require accommodating moral rights far more convincingly than the current property conception allows.

On this view, we can formulate a legal regime protecting creative expression in much the same way that we currently protect identity and privacy, and prosecute misrepresentation. The *Personal Information Protection and Electronic Documents Act* outlines the rules governing the collection, use, dissemination and appropriate disclosure of personal information by organisations. In some cases, a creator may intend for the aspect of their identity represented by a given creative expression to be made available only to a select audience. In that case, the wrong committed by the misappropriation and dissemination of a work could be conceived as a violation of privacy. However, the notion of a violation of privacy does not sufficiently address the whole of the wrong being committed. Instead, we need to take a broader view, insisting on a robust copyright regime based on principles found in laws governing defamation and fraud.

Section 298 of the *Criminal Code* defines defamatory libel as a "matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is

[107] *Ibid.*

published."[108] While this offence does not entirely capture the nature of wrong of copyright infringement, it does hint at the sort of wrong that occurs in an unauthorised use of intellectual objects. If we accept my claim that creator and audience enter into a form of relationship when intellectual objects are produced and disseminated, then we can understand the wrong that occurs when these same works are used in a way unauthorised by the author as something akin to defamation. Specifically, we can understand copyright infringement as an unwarranted representation of the creator, which, while perhaps not directly injurious, is an affront to their autonomy.

An objection might be raised that works can be disseminated in many legitimate ways that do not involve misappropriation or misrepresentation. If I buy a portrait from an artist to hang in my living room, my family members and guests will likely be able to view the painting and engage in a creative relationship. It is true that the artist did not explicitly agree to enter into this creative relationship, but it is reasonable to believe that the artist would accept that possibility when they sold me the painting. Creators cannot provide consent to every possible relationship that could form as a result of the dissemination of their work, but they can at least consent to the initial conditions of sending their work out into the public. An artist would reasonably expect a painting sold to a gallery to have hundreds or thousands of potential viewers. An artist would not reasonably expect that unauthorised copies of their work would be sold on a website and disseminated to strangers around the world. As with fabricated quotations or misattributed essays, the harm lies in denying individuals the autonomy to represent their own identity to the broader world. When a work is copied without consent, the creator becomes an unwilling participant in an extension of the creative relationship with the audience. Misappropriating a creative expression is the theft of an aspect of the creator's

[108] Consolidated federal laws of Canada, *Criminal Code*.

identity. Whereas the creator may have consented to extend an aspect of their identity to the broader audience to form a creative relationship, no such consent is given when other individuals make unauthorised copies and present them to new and unanticipated audiences. It may be the case that the creator would have consented to their works being shared with those audiences, regardless of the actions of the copier. It may also be the case that the creator will realise some material benefit through this exposure, by way of increased interest in their body of work. However, the possibility of positive outcomes does not ameliorate the moral wrong committed when an individual's autonomy of expression and interaction is violated.

We can also consider the *Criminal Code* provisions for fraud to help define the legal principles that protect the autonomy of creators. Fraud is defined in the *Criminal Code* as an action which "defrauds[109] the public or any person, whether ascertained or not, of any property, money or valuable security or any service,"[110] while *Black's Law Dictionary* specifies that defrauding a person involves a determination "to cheat or trick; to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice."[111] An infringement of the creator-audience relationship is not as clear in this provision of the law, as it is with the law of privacy and defamation, but it manages, nevertheless, to illuminate the wrong of copyright infringement. If we were to extend the criminal definition to include the misrepresentation of works either by deceit or unauthorised dissemination, then it would protect many of the creative efforts of the author. When a work is copied without authorisation, the creator is deprived of the right to decide how that work will enter the public sphere. An unscrupulous copier might even claim the work as their own, depriving the creator of an

[109] Unfortunately, the *Code* does not provide much amplification on its definition of "fraud" in terms of defrauding for the purposes of specifying the criminal offence. *Black's* also commits itself to this circular definition, according to which "fraud" and "defraud" are used to explain each other. It has been suggested by some legal practitioners that this definition is purposefully broad in order to facilitate the complex nature of these cases.
[110] *Ibid.*
[111] *Black's Law Dictionary* entry for 'Defraud'.

accurate representation of those elements of their identity that are infused in the work. Several of the adjacent sections of the *Criminal Code* address situations which would capture the unjust use of intellectual objects. As specified in Section 361 of the *Criminal Code,* "a false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it." Forgery provisions prohibit the falsification of documents that are designed to prejudice individuals about the authenticity of these documents. Laws concerning the trafficking of illegally obtained property could be invoked to address issues of the continued dissemination of misappropriated creative works. In other words, much of the foundation needed to preserve the essence of the creative relationship is already established in Canadian criminal law. Developing more fully an identity conception of intellectual objects would only require minor alterations to existing legislation.[112]

A critic might question the point of modifying the law of defamation and fraud so that we need not rely on copyright provisions. It would be fair to assume that this exercise would only arouse the curiosity of legal scholars, while providing no practical benefit to those embroiled in copyright disputes. However, the primary benefit of extending fraud and defamation-related portions of criminal law to cover copyright protection would be to remove confusion caused by the property conception of intellectual objects. Our brief analysis of current legislation on copyright protection yielded a conception of copyrightable ideas and expressions as property. While fraud frequently involves the unlawful acquisition or use of tangible property, tangible property is not fundamental to the legal conception of fraud. Instead, fraud, as well as defamation, are concerned

[112] Analogies might also be drawn between the unauthorised use of creative expressions and forced marriages. In each case, an individual is having their identity and autonomy violated by being forced into a relationship to which they did not consent.

with dishonest representations of facts. Property need not be involved for these offences to take place. This is an important detail, since, as I have maintained, construing intellectual objects as property has led to many of the difficulties in the current copyright regime.

My claims might also face the objection that the unlawful dissemination of creative expressions is not, fundamentally, a case of misrepresentation. The objection might run as follows: the creator has already engaged in a creative process, so whatever aspects of the creator's identity have been imparted, by now, are a settled matter of history. How could a creator be misrepresented when it is the creator's own representations that are on display? And yet, this is based on too narrow a view of what the expression of identity entails and how one chooses to manifest it to the world. A private communication of my affection for and devotion to both my spouse and this thesis are two expressions of my own identity. However, I only consent to one of these expressions being made available to a wider public for review and critique. While my note to my spouse is an accurate representation of my identity, circulating it without permission would misrepresent the intended audience, as well as the emotions and thoughts that I intended to convey. Regardless of my intended audience, it should still be my right to decide the circumstances when my identity is presented to the world and who will constitute my audience. The audience is free to arrive at whatever opinions they like about my expression, positive or negative, but it still should be my choice to subject myself to that relational judgement.

The practical problems surrounding orphaned works would be largely ameliorated in an identity-based system of laws protecting intellectual objects. A work that is unclaimed or of indeterminate lineage could be used without misrepresenting anyone's identity. Thus, an identity-based system would free up resources currently used to discover the authorship of orphaned works. While it is true that with orphaned works we have gained access to aspects of some individual's

identity, perhaps against their will, it is not clear who is being violated. To say that some person, at some point in time, communicated these specific aspects of identity, is to say very little. It is difficult to conceive how a specific individual might be aggrieved by the dissemination of a work which they authored but have abandoned or about which they are unaware.

We also ought to consider how the impact of current legislation has tied up creative expression and its effect on creative works. The current property-based approach to copyright law has resulted in a copyright market—where copyright is traded between publishers—which does not obviously protect creators or benefit society. When large companies are able to acquire vast libraries of copyrighted works from various authors, they gain significant influence over the market. The financial resources and distribution channels available to these corporations ensure that authors must either acquiesce to terms favourable to these companies or settle for self-publication. An identity-based, as opposed to a property-based, conception of copyright would wrest much of the market control away from the major publishers. Large companies would be unable to acquire vast libraries of identities, eroding much of their control over the market of expressions.

An identity-based conception of copyright would result in an arrangement where the rights associated with a creative expression would no longer be transferable and the subsequent market for those rights would be more directly funneled to creators as opposed to large publishers. In an effort to establish a relationship with a wider audience, a creator does not create a commodity to trade any more than cultivating friendships or the love between family members would create a market. While it would be difficult to make the transition away from the expression-as-property paradigm, it is unwise to remain committed to a confused and detrimental grounding for copyright law. Just as Locke felt we should not be forever controlled by our forebears, nor should we continue tolerating an untenable state of affairs just because it is the way it has been done for hundreds of years. Now,

this sentiment would not preclude some form of exclusive licensing provisions within a revamped approach to copyright law. It would still remain a tenet of legal contracts that a creator could agree not to license their work to any other user for a period of time in exchange for appropriate consideration. Just as individuals can elect to enter into non-compete agreements as part of an employment contract, so too could a creator agree to the exclusive use of their work as established in contract.

An immediate objection might be that an identity-based conception of copyright makes some of the problems of the current system even worse. Specifically, though we bristle at some of the terms of protection currently provided under law, we might be equally unhappy with an identity-based system, which may entail that rights to an expression never expire. After all, at what point would it be acceptable to tread upon the identity of an individual, even one who has long been dead? Here we can appeal to Locke's view of identity, extending it to creative expressions. In his *Essay Concerning Human Understanding*, Locke regards the self as a manifestation of human consciousness that persists through that consciousness. In Locke's view, the individual is "a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking."[113] If we equate personal identity with the continuity of consciousness, then it is plain that an identity paradigm of copyright can make sense of the eventual termination of those rights. Specifically, where a creative expression represents some aspect of the individual's identity that has been imparted to the world, we can appreciate how those expressed aspects may lose their relevance over time. To further refine this argument of how the identity model can make sense of copyright terms, we can draw upon Derek Parfit's ideas on psychological continuity and connectedness to

[113] Locke, 'Essay Concerning Human Understanding'.

make sense of the links that constitute our identity over time. In *Reasons and Persons,* Parfit explains that the essence of what links previous selves with our current self is the psychological continuity between these selves.[114] When we speak of identity, we are merely appealing to convention, since what we are really discussing are the psychological links among various life-stages. A corollary of this view is that, the more distant our earlier self is, the fewer identity links we can claim with it. I feel more psychologically continuous with experiences that I had yesterday than I do with those of my childhood. As such, I identify more with the person I was yesterday than with the person I was as a child. Time, and the continued consciousness of experience, has a distancing effect between current and past versions of ourselves. In the same way, an expression created at a certain point in time will represent fewer aspects of the creator's identity, as the creator is temporally and psychologically distanced from the consciousness which produced it. This increased distance between current and past versions of the self weakens the creator's claim to the rights of creative expression, while reducing the moral weight of any transgression, should the work be appropriated by another.

Of course, delineating empirical thresholds for remaining claims of representational identity would be beyond the capacity of legislative acts governing copyright. Nor could such a task be accomplished by an assembly of bureaucrats or judges. Obviously, some term limit on copyright will need to be established, the length of which will be an imperfect representation of one's claims to their past identity,[115] but such compromises are frequently necessary for the administration of laws.[116]

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[114] Parfit, *Reasons and Persons,* 245-252.
[115] After all, it is possible that I am much the same person twenty years from now as I am now, writing this thesis. It is also plausible that I may have undergone radical changes in my beliefs and character that my twenty-year in the future self bears almost no resemblance to who I am now.
[116] See age of majority.

Since the identity-based conception of copyright results in limited copyright terms in much the same way as the current property-based conception, one might question the point of switching from the latter to the former. And yet, the value of such a conception is to act as a framing device for understanding how to formulate our copyright laws and for clarifying what we are seeking to accomplish with them. The American Constitution makes provisions for the subsistence of copyright in order to "promote the Progress of Science and useful Arts."[117] It appears, though, that arguments for different copyright terms rely on vastly different conceptions of what constitutes an adequate incentive to promote such progress through the creative efforts of individuals. Since we lack any mechanism to test these hypotheses, such claims can only remain unverified, thereby adding fuel to the on-going debate. An identity-based conception of copyright, however, would not only more closely align with the principles implicit in our initiative to protect creative expression, but also help focus the discussion about what constitutes an appropriate term of protection. If links to our expressions of identity weaken over time, then the need for protection would weaken in turn. Plainly, it would be difficult to justify the dead having much claim over their expressions, so it would be reasonable to envision an upper limit of copyright terms ending at the lifetime of the author. The current property model appears to be committed to no upper limit. It would be difficult to conclude that it is reasonable for Plato to retain rights to expressions of his identity some 2,500 years after his death, but also difficult to justify why lifetime plus seventy years is the appropriate length. Twenty-five-hundred years is obviously far too long, but why should someone retain rights for seventy years past their death? It is not clear why any protection should extend beyond someone's lifetime.

[117] United States Constitution.

Conclusion

A re-evaluation of the concept of copyright reveals that the property model is confused and, therefore, problematic. Not only does the property model of copyright lead to numerous problems in the administration of the law, but it also fails to account for the significance of the author-audience relationship. A new paradigm is required—an identity-based approach to copyright—that shifts the focus from owning creative expressions to respecting the identity and expression of the creator. This new paradigm would reduce the number of bureaucratic challenges surrounding orphaned works and provide relief from the current property-centric copyright system. By shifting the focus from property to identity, a more equitable and sustainable copyright framework could be established, ensuring the protection of creators while benefiting society at large.

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