
A NATURAL RIGHT TO COPY

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ABSTRACT

In this symposium, we gather to celebrate the work of Professor Wendy J. Gordon. In this Essay, I revisit her article, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property. In her article, Gordon used the reasoning of John Locke to first justify copyright as natural right and then used his “enough and as good” proviso to limit that right. Her second step turned the natural-rights approach to copyright on its head. Through it, she showed that even if we accept copyright as a natural right, that acceptance does not necessarily lead to a copyright of undue breadth or perpetual duration. Rather, even a natural-rights framework leads to a copyright regime shorter and narrower than we presently have.

While I agree that copyright should be shorter and narrower, I worry that Gordon conceded too much in her first step. Neither Locke’s reasoning nor Gordon’s reading of it can justify a right to prohibit copying as a matter of natural law. It is not the right to prohibit copying to which we have a natural entitlement. Rather, it is the right to copy.

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INTRODUCTION

A human is born into this world with relatively few intrinsic abilities. While research is still revealing the precise nature of our intrinsic skill set, we are not born into this world with the ability and know-how to raise crops, husband animals, build sewers, or make penicillin. We learn these foundations of modern civilization from others, and we learn them by imitation—by copying.¹ Often today, we celebrate the creativity of the genius who shows us a new and better way of doing something or of the author who writes the next great novel. Yet the simple truth is that it has been copying, not creativity, that has given us the life expectancy, the wealth, and the happiness we enjoy today.

Consider for a moment two possible worlds: The first is filled with brilliantly creative people, unable to copy. The second is filled with people able to copy quickly and accurately but unable to think creatively. Over time, the second will advance, but the first never will. In the first world, each individual must work entirely on his or her own. Without copying, there can be no common language, no shared understanding of one another. Whatever works of genius any individual creates she cannot share with others, and those works will be lost when the individual dies. In the second world, new insights, profound discoveries, and original works of authorship will come more slowly, yet still they will come. All that these advances require is variation in the response to a problem and the ability to discern which variations are best. Even if these variations occur by accident, through unintentionally imperfect copying or by a thousand monkeys banging away on keyboards, still they will occur, and once they occur, they will never be lost. Thus, in the second world, the wheel will be invented, and once it is there will never be a need to reinvent it. With the ability to copy will come a shared language and a shared culture, and so in the second world, but not the first, people will be able to see further by “standing on the shoulders of giants.”² At a fundamental and basic level, copying is the *sine qua non* of civilization. Without copying, there can be no shared language, no shared culture. There can only be isolation.

It is surprising then that some academics purport to find a natural right to prohibit copying, at least for certain creative products in certain specific circumstances. When used in this way, the phrase “natural rights” is, of course, an oxymoron. If the right at issue were truly and literally natural, then humans would be needed neither to define nor to enforce the right. Such natural rights undoubtedly exist. The law of gravitational attraction, I suppose, is an example. Objects would attract one another according to the law even if humans did not

¹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897) (“Imitation is a necessity of human nature Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think.”).

² *E.g.*, Letter from Isaac Newton to Robert Hooke (Feb. 5, 1675) (on file with the Historical Soc’y of Pa.).

exist, and one certainly need not resort to judicial proceedings to enforce this attraction.

Yet in legal circles, the phrase “natural rights” is not intended literally, but rhetorically. It is intended to establish a baseline and to allocate the burden of justifying any departure from that baseline to the other side. It is also intended to disparage the other side’s argument. If I am arguing for a natural right, then the person arguing against my position must be arguing for an “unnatural” right.

In a world of perfect information and zero transaction costs, establishing baselines, allocating burdens of proof, and playing rhetorical tricks would have no influence on the ultimate adoption of perfect legal rules.³ There would be no grey area, no zone of uncertainty about where the line between permissible and impermissible copying should be placed to maximize human satisfaction or human flourishing or whatever other goals one seeks to advance.

Yet in the real world, starting points matter. They matter because we have, inter alia, both limited information and limited cognitive resources to resolve any given issue. If we cannot tell, based on the information available and the limited time given to resolve the matter, whether copying in particular circumstances ought to be allowed or prohibited, then the default rule will control. If the default rule is that copying is generally prohibited, then, in the real world, that will be the rule in those cases where the desirability of allowing copying is uncertain. As a result, less copying will occur. If the default rule is that copying is generally permitted, then that will be the rule in the uncertain cases. As a result, more copying will occur. As the zone of uncertainty expands, the default rule becomes increasingly important, as more and more cases fall under its purview.

At this symposium, we gather to celebrate the work of Professor Wendy J. Gordon. As a basis to explore further the natural rights justification for copyright, I have chosen to focus on her article, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*.⁴ In her article, Gordon used John Locke’s labor-desert theory to justify in authors a natural right to prohibit the copying of their original and expressive works of authorship.⁵ Having recognized this natural right, she then proceeded

³ As R.H. Coase has suggested, in a world of perfect information and no transaction costs, any set of legal rules will yield similar market outcomes. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 10 (1960) (“With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.”). In such a world, different legal rules would have only distributional consequences.

⁴ 102 YALE L.J. 1533 (1993).

⁵ See *id.* at 1544-48; *id.* at 1547-48 (“Most important from the perspective of the laborer’s claim, however, is the laborer’s purposiveness. . . . [I]f someone creates music . . . for the purpose of feeding herself by selling the royalties to it, she can be harmed by a bootleg copyist as severely as if he took the physical sheet music out of her den”); *infra* notes 20-31 and accompanying text.

to use other aspects of Locke's work, including his proviso that "enough and as good" be left for others, to establish limits on that right.⁶ In concluding her analysis, she applied the rules she derived from Locke's work to a handful of contemporaneous copyright cases.⁷ Somewhat surprisingly, having proven copyright to be a natural right, Gordon found that the limitations in Locke's presentation of natural rights required a generally narrower scope to copyright protection and a correspondingly broader reach for the fair use doctrine than copyright law at the time required.⁸

Taken as a whole, the article was a *tour de force* at the time it was written. Gordon showed that copyright could be justified as a natural right. Yet contrary to expectations both then and now, she also showed that accepting copyright as natural right did not lead inexorably to a copyright of perpetually long duration or infinitely broad scope. Even natural rights must have limits. Otherwise, they become a mere excuse for vindicating one person's interests over the interests of everyone else. Exploring those limits as Locke articulated them, Gordon showed that even a natural-rights framework justified a more limited right to prohibit unauthorized copying than copyright at the time provided. In doing so, she helped turn the natural-rights story on its head.

Yet in showing that Locke's reasoning placed limits on copyright, Gordon conceded too much. Before she established the limits Locke's reasoning placed on copyright, she first purported to demonstrate that Locke's reasoning justified copyright as natural law. To do so, she equated copying with theft.⁹ That was and is a mistake.

To be sure, Gordon is not alone in making that mistake. Two years before Gordon's article, a district court in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*¹⁰ had to determine whether a defendant who had sampled the plaintiff's sound recording to create a new song had infringed the plaintiff's copyright.¹¹ In finding the defendant liable for copyright infringement, Judge Duffy thundered, "Thou shalt not steal."¹² In doing so, he too equated copying with theft.

Yet as God knows, copying is not theft. If it were, it would fall within the Seventh Commandment's prohibition, and those of us alive today would never

⁶ See *id.* at 1560-70.

⁷ See *id.* at 1583-605.

⁸ See *id.* at 1592-604.

⁹ See *id.* at 1548.

¹⁰ 780 F. Supp. 182 (S.D.N.Y. 1991).

¹¹ *Id.* at 183.

¹² *Id.* (quoting *Exodus* 20:15); see *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 890 (9th Cir. 2016) (Silverman, J., dissenting) ("True, *Get a license or do not sample* doesn't carry the same divine force as *Thou Shalt Not Steal*, but it's the same basic idea."); *All Nations Music v. Christian Family Network, Inc.*, 989 F. Supp. 863, 864 (W.D. Mich. 1997) (noting that publicly performing musical works without license also violated Seventh Commandment).

have known the Seventh Commandment. As the Bible tells it, Moses became so frustrated with his people that he smashed the original stone tablets on which God had engraved the Ten Commandments.¹³ We know the commandments today only because Moses copied them—and not just Moses.¹⁴ Throughout history, the Ten Commandments have been copied on stone, on animal skin, on parchment, on paper, in metal, and today, in electrical current. Indeed, we have copied the Ten Commandments in every format we have developed for copying and recording information. While I would not presume to know God's will, this seems to have been God's purpose. For rules to become law, they must be copied and shared as widely as possible so that they can become a common framework under which people can live.

The story of the Ten Commandments reminds us of something we seem often to forget: the foundation of our civilization, indeed of any civilization, is not creativity but copying. We learn to talk, to walk, to smile, and to pout by imitating others. Without copying we could not have a shared language. Without copying we could not have a shared culture. Without copying we certainly would not have the Seventh Commandment.

It is not copyright to which we have an entitlement in a state of nature. It is the right to copy. The ability to copy, to imitate, and thereby to learn is perhaps the most important intrinsic ability with which every healthy human child is born. Copying and imitation are rights that humans have exercised since humans have existed. In contrast, there is and can be no natural right to prevent others from copying my work. As a factual matter, copyright is purely positive law and did not exist throughout the vast majority of human history. More generally, from a deontological perspective, it is not copyright that is generally necessary for human flourishing—it is the right to copy. From a consequentialist perspective, it is not copyright that is generally necessary to promote social welfare—it is the right to copy.

Copyright exists as a narrow exception to this general right to copy. While the self-interest of copyright owners leads them to continuously lobby our governments to expand, lengthen, and strengthen this narrow exception, we must take care to ensure that copyright remains the exception and the right to copy the rule.

In this Essay, I revisit the second of Locke's *Two Treatises of Government*¹⁵ and Gordon's *A Property Right in Self-Expression* in an attempt to give the ability to imitate the high place it deserves in the hierarchy of human abilities. Without the ability to copy—and to copy freely—society as we know it today would not exist. If we are going to use the rhetoric of natural rights to enshrine a set of presumptively correct or pregovernmental legal rights, then the right to

¹³ *Exodus* 32:19.

¹⁴ *Id.* 34:27-28.

¹⁵ JOHN LOCKE, *An Essay Concerning the True Original, Extent, and End of Civil Government*, in *TWO TREATISES OF GOVERNMENT* 265 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).

copy freely comes far closer to the optimal legal rule than copyright. In that sense, copyright is not natural law. The right to copy is.

Before attempting this showing, however, I begin with a brief discursive on the possible meanings of the phrase “natural rights.”

I. THE MANY MEANINGS OF “NATURAL RIGHTS”

In a true state of nature there are no rights. Strength, whether purely physical strength or cleverness, is all that matters. Hyenas will gladly steal the lion’s prey if they can and vice versa. In this pregovernmental world, the weak band together not out of respect for the moral equality of each other but out of relentless self-interest—to protect themselves from the predations of the strong. It’s high school all over again. Even after they band together, however, individuals within the group will seek to rewrite the rules or exploit the ambiguity and discretion the rules leave to capture more for themselves. Others can prevent this only through countervailing strength. Appeals to morality or fairness can work in this setting, but they can only work to the extent that others allow those appeals to persuade them or, perhaps more accurately, to fool them.

Such a true state of nature exists today in a variety of circumstances, but it exists most clearly in the relations between states. True, we have moved beyond a time where taking hostages to secure the performance of agreements between rulers was the norm, and we may be moving beyond a system where strength alone is the only law between nations. But strength alone remains sufficiently important in the international arena today to remind us of what a true state of nature looks like.

Locke’s state of nature is not a true state of nature, however. Rather, his state of nature is an idealized state of nature. He takes as a starting point for his analysis that people are born equal “wherein all the Power and Jurisdiction is reciprocal.”¹⁶ Moreover, people are not merely equal but respectfully equal as children of the same God.¹⁷ From this respectful equality, Locke derives the duty not to harm one another.¹⁸ Similarly, in articulating his theory as to how property rights arise, he begins with the proposition: “[E]very Man has a *Property* in his own *Person*.”¹⁹ Of course, neither of these starting points holds in a true state of nature. In a true state of nature, nothing prevents the strong from harming or enslaving the weak except more strength. Historically, government and property are systems that the weak, by ganging up and thereby becoming—at least temporarily—the strong, are able to impose on the strong. Historically, we see this in the Magna Carta in England in 1215 and again in the French Revolution of 1789.

¹⁶ *Id.* at 269.

¹⁷ *Id.* at 271.

¹⁸ *Id.*

¹⁹ *Id.* at 287.

Yet Locke rejects this historical reality as a sufficient foundation for government and property. If “all Government in the World is the product only of Force and Violence” and if “Men live together by no other Rules but that of Beasts, where the strongest carries it,” that would “lay a Foundation for perpetual Disorder and Mischief, Tumult, Sedition and Rebellion.”²⁰ Locke therefore posits an alternative. Rather than a true state of nature, he defines a set of natural rights based on the rules by which “good” people would live together. These rights are not based on mere equality. Equality alone might leave everyone equally free to take whatever they can. Rather, Locke bases his set of “natural” rights on the respect we owe each other as coequal creations of God.²¹

Having posited an idealized state of nature, Locke proposed a set of rights that would exist in such a state of nature. While this set is contestable, Locke’s articulation of such an idealized set of natural rights turned the traditional, pre-Lockean approach on its head. In the pre-Lockean framing, the state of nature represented a descriptively accurate account of life without government. Compared to this true state of nature, government, even if messy and imperfect, was also necessarily an improvement. As a result, the pre-Lockean framing emphasized the desirability of government: however bad government was at times, it was still much better than the alternative of a true state of nature where the strong and powerful could take what they wanted without even bothering with the pretenses and formalities government and laws might otherwise require. In contrast, in Locke’s framing, the state of nature represents an idealized account of life without government. Compared to this idealized account, real-world governments will invariably fall short. As a result, Locke’s framing emphasizes the shortcomings of government: however perfect the set of rules a government adopts, it will still fall short of a perfect system. This is particularly true because Locke’s framing leaves sufficient room for each of us to import into the set of idealized natural rights our own sense of the rules that would exist in a perfect world.

Locke’s framing also changed the rhetorical meaning of the phrase “natural rights.” If “natural rights” refers to the set of rights that exist in a true state of nature, then labeling rights as “natural” is merely descriptive and lacks any normative or persuasive significance. The strong man’s complaint that in the absence of law he could take what he wanted will not persuade many to abolish laws against theft. Yet in Locke’s framing, natural rights become the rights that good people would voluntarily recognize as they live with each other. In this framing, labeling rights “natural” is no longer merely descriptive but carries a normative and persuasive significance instead. Moreover, by labeling any given right as natural, its proponent can sometimes avoid the otherwise messy need to justify the right. If the right is natural, then there is no more need to explain why the right should be than there is to explain why two objects should attract one

²⁰ *Id.* at 267-68.

²¹ *See id.* at 269-71.

another in direct proportion to the product of their masses and inverse proportion to the square of the distance between them. It is enough that they do. In addition, in defining this idealized set of rights as “natural,” Locke identified them as pregovernmental.²² This privileges them vis-à-vis government action. Labeling rights as “natural” either places them beyond the reach of government or imposes a strong presumption against government action that might limit, alter, or reject them.

Beyond reframing the debate and offering a convenient rhetorical trick, the question remains whether Locke specifically or natural-rights analysis more generally offers anything more. With respect to copyright in particular, the question is whether Locke can offer a meaningful and independent alternative to more traditional utilitarian justifications for copyright or is merely reformulating the same justification. It seems obvious to me that neither Locke nor natural-rights rhetoric more generally can offer a true alternative. Copyright did not exist in any human culture before the invention of the printing press. I have considerable difficulty describing a right as “natural” when its existence was historically contingent on the existence of certain technology.

Nevertheless, natural-rights arguments, as a deontological approach to the definition of legal rights, can prove helpful when they offer a sharp contrast with a consequentialist approach. Kant, for example, offers his categorical imperative that we are morally obligated to always tell each other the truth.²³ Otherwise, we are impermissibly treating the listener as a means to our own ends rather than as an end in him- or herself. While telling the truth is easy to justify in a large number of circumstances, whether from a consequentialist perspective or, as the story of the boy who cries wolf teaches us, even from an egotistically self-interested perspective, Kant insists that we must always tell the truth. This insistence leads to challenging scenarios. For example, if we are hiding Anne Frank in our attic during World War II and the Nazis arrive and ask us if there are any Jews hiding in our home, Kant says that we are morally obligated to reveal the truth. Whether we agree with Kant or not, his categorical imperative challenges us to consider our choice more carefully. It runs counter to our intuitive sense of justice and is plausibly contrary to a consequentialist balancing of costs and benefits. It is precisely that conflict that makes Kant’s approach useful. It forces us to reflect on our moral intuitions and think through the implications of our choice more thoroughly.

It is far less clear that Locke offers such a meaningful contrast. In my experience, Lockean arguments like Gordon’s are simply consequentialist reasoning cloaked in the guise of natural-rights language. They usually match our moral intuitions, validate existing legal rules, and reach results similar to

²² *See id.* at 269.

²³ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 15 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) (using example of false promise to illustrate why lying when it is convenient cannot be universal maxim); *see* EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 380 (1953).

those we would reach through express consequentialist reasoning. Moreover, they do so not because two independent, but equally valid, approaches to moral decision-making are likely to reach similar conclusions on, for example, the morality of murder. But because there is no substance to Lockean rhetoric, it offers no meaningful first principles from which to reason. Lockean arguments are nothing more than hidden—and therefore poorly and incompletely done—welfare calculations. Like many fairness arguments, Lockean arguments at bottom are utilitarian calculations done by people unable to do math and, indeed, unwilling to admit that math is what they are doing.²⁴

Consider a simple example. Present copyright law protects the original design of a statue but not the original design of a car. Using consequentialist reasoning, I can justify or at least explain this distinction. I can also use natural-rights arguments, whether Lockean or otherwise, to justify the protection of the statue. However, showing that natural-rights arguments can reach the same outcome as consequentialist reasoning in the case of the original design of a statue may lend those arguments an undeserved legitimacy and suggest that they are a truly independent and alternative justification. This creates two risks: First, there is a risk that we will use that same natural-rights argument as a heuristic shortcut to justify copyright protection for the original car design, even though a more careful utilitarian analysis would establish the need for the law to treat the designs of the car and the statue differently. Second, there is a risk that pointing out the math errors in the hidden consequentialist calculation will no longer be sufficient to overcome the use of natural-rights rhetoric to justify copyright protection for an original car design. Alternatively, a clever natural-rights proponent may simply use *ex post* rationalization and manipulate the ambiguity in the natural-rights rhetoric to argue against copyright protection for the original car design. Such a clever proponent might insist that the car design does not entail the right sort of creative labor or does not leave “enough and as good” for follow-on car designers, and so such protection should be denied. This does not, however, solve the problem. It merely kicks the can down the road and may indeed strengthen the apparent utility of natural-rights rhetoric to resolve these issues independently.

These worries are particularly acute in the case of copyright. We have had copyright for so long and the utilitarian justification for copyright has been so long asserted that we are likely to take the desirability of copyright for granted. Moreover, Locke defines “natural rights” as those rights that good people, living together, would adopt and respect. That definition leads to an easy three-step approach to defining natural rights: I am a good person; I believe in copyright;

²⁴ In saying this, I recognize the intractable problem associated with making interpersonal utility comparisons in utilitarian analysis. That is not the problem to which I am referring. Rather, the problem I see most often with the fairness or natural-rights arguments is that they encourage a form of myopia where only fairness to some, and in particular only the gains or losses to the natural-rights holder, matter.

therefore, copyright is a natural right.²⁵ Because of these concerns, we do not approach natural-rights rhetoric that seemingly justifies a result that we already know—or at least believe—is just as skeptically and critically as we should. We fall too easily into the curious trap of accepting natural-rights rhetoric while simultaneously manipulating it to reach the legal outcome we otherwise know, or at least believe, is right.

II. GORDON, LOCKE, AND COPYRIGHT

In my view, this is precisely what Gordon has done with Locke in her article. She first argued that Locke’s “no-harm” principle justifies a natural right to prohibit the unauthorized copying of an original work of authorship. As her second step, she then argued that his “enough-and-as-good” proviso limits the scope of that natural right. This two-step approach enables Gordon to map a Lockean framework largely onto the existing structure of copyright. Indeed, she was even able to push for a somewhat narrower version of copyright than presently exists. For many of us, Gordon’s reasoning coincides with our priors, and that makes it palatable. However, before we swallow it whole, a more careful consideration is in order.

In her first step, Gordon argued that Locke’s reasoning justified the recognition of a natural right to prohibit the unauthorized copying of an author’s original and expressive work based on Locke’s “no-harm” principle—the principle that “no one ought to harm another in his Life, Health, Liberty, or Possessions.”²⁶ Although most commentators recognize Locke’s “mixing labor” metaphor as his basis for property,²⁷ in Gordon’s view this “no-harm” principle

²⁵ Because Locke’s reasoning leaves plenty of wiggle room to import our views into natural rights, the progression might go: “I am a good person; I believe in broad copyright; therefore, broad copyright is a natural right.” Or it can just as easily go: “I am a good person; I believe in narrow copyright; therefore, narrow copyright is a natural right.”

²⁶ Locke articulated the no-harm principle in Chapter Two of his second treatise: “The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.” LOCKE, *supra* note 15, at 271.

²⁷ As Locke stated:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men.

Id. at 287-88.

was Locke's central justification for a natural right of possession in tangible goods that a person had labored to produce.²⁸ As Gordon articulated it:

To the extent that [Locke's] theory purports to state a nonconsequentialist natural right in property, it is most firmly based on the most fundamental law of nature, the "no-harm principle." The essential logic is simple: Labor is mine and when I appropriate objects from the common I join my labor to them. If you take the objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore I have property in the objects.²⁹

Thus, in Gordon's view Locke's "no-harm" principle established as natural law a prohibition on theft. Having recognized a natural right prohibiting theft, Gordon then extended this right to a prohibition on copying by way of a simple syllogism: "Similarly, if I use the public domain to create a new intangible work of authorship or invention, you should not harm me by copying it and interfering with my plans for it. I therefore have property in the intangible as well."³⁰

While Gordon recognized that copying and theft are different, she reasoned that the harm done an author by unauthorized copying can be the same as the harm done an individual by unauthorized theft of her possessions:

Copying can harm important interests even if the copying does not deprive the creator of physical use of her creation. For example, if someone creates music not only for the sake of listening to it herself, but also for the purpose of feeding herself by selling the royalties to it, she can be harmed by a bootleg copyist as severely as if he took the physical sheet music out of her den or stole the food she had bought. The intellectual laborer requires some kind of anti-copying protection if her property in her creations is to be meaningful.³¹

The syllogism seems straightforward: If I have labored to collect food that I need to eat to survive, then stealing my food harms me. Similarly, if I have composed a song and intend to use the royalties to buy the food that I need to survive, unauthorized copying harms me in the same way. While copying does not directly and literally take food from my table, it deprives me of the money I need to put food on the table. For all practical purposes then, copying, just like stealing, takes the food from my table. For that reason, copying equals theft. The author should, therefore, have a natural right to prohibit unauthorized copying, just as the farmer has a natural right to prohibit theft of her crops.

²⁸ Gordon, *supra* note 4, at 1544-45.

²⁹ *Id.*

³⁰ *Id.* at 1545.

³¹ *Id.* at 1548.

In reaching this conclusion, Gordon acknowledged that copying is different from theft.³² Stealing an apple does not, for example, increase the supply of apples. It merely transfers possession of a given apple from one person to another. In contrast, copying a song can increase the supply of the song.³³ Whereas before the copying there was only one copy of the song, now there are two. Yet Gordon found this difference and other potential differences between theft and copying insufficient to undermine the case for copyright as natural law.³⁴ In particular, Gordon acknowledged that unauthorized copying could drive the price of copies of the work of authorship at issue to marginal cost.³⁵ Unauthorized copying would thereby reduce the deadweight loss that would result from the supracompetitive pricing that a natural right to prohibit copying would otherwise make possible.³⁶ Yet in Gordon's view, this was a distinction without a difference. As she explained:

Nothing in a natural-rights framework gives the public the per se entitlement to cheap access to what the laborer has produced. . . .

"Deadweight loss" merely measures the difference between what society gains from an intellectual product distributed subject to anticopying restraints, and what society would gain from a freely-copied intellectual product. Avoiding "deadweight loss" is a natural right only if the public has a right to free copying. As just discussed, it has no such right.³⁷

Gordon thus rejected any general claim that the public had an entitlement to competitive—or marginal-cost—pricing. As a result, that copying a work of authorship would expand the supply of copies where stealing an apple would not, while certainly a difference, did not justify denying the author a natural right to prohibit the copying of her original and expressive work.

Having established a natural-law entitlement to copyright protection, Gordon then proceeded in her second step to use other aspects of Locke—and in particular his "enough and as good" proviso—to show that even a natural-rights framework justified more limited copyright protection, at least in some respects, than we had at the time.³⁸ As I mentioned at the outset, this twist in some sense represents the key contribution of Gordon's article at the time. Yet to reach it, Gordon gave too much away. Whatever limits on copyright Gordon may find in Locke or other natural-rights theorists, acknowledging that those theories can

³² *Id.* at 1548-49.

³³ *Id.*

³⁴ *Id.* at 1549 ("Unlike physical takings, then, copying produces a positive short-term allocative effect which could outweigh its long-term negative incentive effects on future creators. Does this difference in potential economic effect justify the harm caused by the copyist stranger in a way that the harm caused by apple-taking stranger cannot be justified? From a Lockean perspective, it does not." (footnote omitted)).

³⁵ *Id.* at 1548 n.86.

³⁶ *See id.* at 1548-49.

³⁷ *Id.* at 1549.

³⁸ *See id.* at 1560-78.

justify any sort of copyright as natural law concedes too much. It creates such a strong presumption in favor of copyright—and in favor of a broad and long copyright at that—that whatever limitations such reasoning can justify or rationalize on the back end come too little and too late. If our goal is to end up with a copyright regime close to optimal, it would be better if we could show that Locke’s reasoning cannot justify copyright as natural law at all. To that task I now turn.

III. A PARTIAL CRITIQUE: LOCKE CANNOT JUSTIFY COPYRIGHT AB INITIO

Neither Locke’s reasoning nor Gordon’s interpretation of it justifies a natural right to prohibit unauthorized copying. In my opinion, the key flaw in Gordon’s analysis is that her first step requires an overbroad interpretation of Locke’s “no-harm” principle. Taken in isolation and divorced from context, a “no-harm” principle might carry a variety of meanings. Locke might have intended “harm” broadly, to include any type of injury, whether physical, psychological, emotional, or economic. Alternatively, Locke might have intended “harm” narrowly, to encompass only, for example, physical or bodily injury. Gordon interprets Locke’s principle broadly to encompass, for example, the economic loss a song composer could experience when unauthorized copying reduces her royalties. I believe this broad interpretation of Locke’s “no-harm” principle is wrong, both descriptively and normatively.

Descriptively, Locke did not intend his “no-harm” principle to foreclose the imposition of mere economic loss alone. If he had, then his mixing-labor justification for a laborer’s natural right in the fruits of her labors would have been entirely unnecessary. As long as I am not a thief, the mere fact that a possession has value to me would be sufficient to give me a natural entitlement to the possession that all others must respect. Even if I expended no labor at all in gathering what I possess, still my possessions have value to me. Under Gordon’s broad interpretation of “harm,” nothing more would be required. Under Gordon’s interpretation, Locke’s attempt to justify a natural right of property based on mixing labor with something in the commons becomes so much wasted ink.³⁹ Yet that is precisely where Locke began in Chapter Five of his second treatise, entitled “Of Property,” in which he explained how individuals come to own things.⁴⁰ In contrast, Locke articulated the “no-harm” principle in Chapter Two, entitled “Of the State of Nature,” in formalizing his idealized state of nature.⁴¹ He did not reference it again in Chapter Five when explaining the origins of property. Moreover, Locke’s phrasing of the “no-harm” principle emphasized the tangible: “[N]o one ought to harm another in his Life, Health, Liberty, or Possessions.”⁴² That language readily encompasses theft of

³⁹ See *supra* note 27 (quoting Locke’s famous mixing-labor justification for property).

⁴⁰ LOCKE, *supra* note 15, at 285.

⁴¹ See *supra* note 26 and accompanying text.

⁴² LOCKE, *supra* note 15, at 271.

a tangible in my possession, but it is not so easily read to encompass the loss of expected future income. Moreover, when Locke was writing—and even today—not all forms of harm were legally actionable. If an individual asks one person on a date rather than another, disappointing the latter, that action inflicts harm, at least in the literal and ordinary sense of the word.⁴³ Yet no one would contend that such a choice violates natural law. It seems unlikely that Locke intended to describe a state of nature—even an idealized state of nature—in which we would have to avoid inflicting harm of any sort on one another. Rather, Locke likely intended his no-harm principle to encompass only a prohibition on physical or tangible harms.

Normatively, Gordon's broad definition of harm is even more problematic. If copying equals theft because it can reduce an author's expected stream of income, then competing must equal theft for the same reason. Assume, for example, that I devote my labor to creating a successful private grammar school, and that it is the only one in the area. A competitor shows up, forces me to reduce my prices, and takes half my students. By Gordon's definition of harm, I have experienced harm. Should a monopolist therefore have the natural right to prevent competitors from entering its market?

The answer to that question has to be no. Even in Locke's day, the principle *damnum absque injuria* ("harm without legal injury") was already well established. Under this principle, harm alone does not establish legal injury. Courts have applied the principle in a variety of circumstances over the centuries. For our purposes here, one of the doctrine's earliest applications established that a competitor's decision to enter a market is not legally actionable despite the economic losses or harm it can do to an existing business. In the English common law, the *Gloucester Grammar School Case*⁴⁴ established the right to compete despite the economic harm it might do to an established business in 1410,⁴⁵ more than two centuries before Locke wrote his treatise. Even if the new competitor drives the old entirely out of business, the resulting economic harm to the preexisting business is not actionable.

Yet Gordon's broad interpretation of Locke's "no-harm" principle would seem to overturn this result. In Gordon's analysis, a songwriter who labors to create music "for the purpose of feeding herself by selling the royalties . . . can be harmed by a bootleg copyist" in a way that justifies a natural right to prohibit

⁴³ I recognize that there are games we can play with baselines to distinguish between inflicting harm and failing to bestow a benefit. I don't find the games of much interest, but I acknowledge that they can be played and have discussed them in another context. See generally Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 *FORDHAM ENVTL. L.J.* 433 (1995).

⁴⁴ YB 11 Hen. 4, fol. 47, Hil., pl. 21 (1410).

⁴⁵ *Id.* This was an action by the two masters of the grammar school against the defendant for establishing a rival school whereby their receipts were reduced. The court held that the action would not lie. For another early case involving competition, see YB 22 Hen. 6, fol. 4, Mich., pl. 23 (1443) (Eng.).

the unauthorized copying.⁴⁶ But that same reasoning would justify a similar natural right for the monopolist. After all, a monopolist who builds a business to feed herself on the profits she earns can be just as severely harmed in terms of the magnitude of the expected profits lost by a would-be competitor's decision to enter her market as the songwriter facing a bootleg copyist.

It is tempting, of course, to find a way to use Locke's language to rationalize different outcomes between copying and competing. We know—or at least strongly believe—that the right to prohibit unauthorized copying, at least in some circumstances, is welfare-enhancing but that a right to prohibit competitive entry generally would radically reduce social welfare. Yet the question is not whether we can twist Locke's reasoning to match our moral intuitions or consequentialist sensibilities. Rather, the question is whether Locke's reasoning, taken as a set of first principles, leads to sensible conclusions on its own—that is, without distorting his reasoning.

To be fair, although not citing the *damnum absque injuria* principle directly, Gordon acknowledged that not all harm would be actionable under Locke's analysis. In her interpretation, Locke would limit the harms that establish a natural-rights claim to “unjustified or wrongful harm.”⁴⁷ To define what harms would be unjustified or wrongful, Gordon turned to Locke's explanation for why the actions of a stranger who takes the apple that another has labored to gather are wrongful: “The stranger . . . desired the benefit of another's Pains, which he had no right to.”⁴⁸ In Gordon's view, the stranger's actions inflict wrongful harm because he was taking the apples, rather than gathering his own, “only to save his labor.”⁴⁹ As such, the stranger's actions cannot be justified. “[H]e [merely] prefers his own welfare over the gatherer's. . . . [H]e commits a fundamental wrong when he uses another solely as a means toward his own welfare.”⁵⁰ As a result, in Gordon's view, whatever the outer limits of a “no-harm” principle, it is sufficient to “create against such strangers a property right in the gatherer.”⁵¹ She then extended the wrongful-harm concept to the copyright context: “Similarly, someone who creates an intangible has moral rights against noncreative copyists who copy purely from commercial motivation if, like the stranger who takes the apples, their sole aim is to substitute another's efforts for their own.”⁵²

Gordon thus attempts to focus on harm resulting from free riding on another's labor. If you use the labor of another instead of your own without paying, then the resulting harm is wrongful. Unfortunately, while this approach may exclude

⁴⁶ Gordon, *supra* note 4, at 1548.

⁴⁷ *Id.* at 1545.

⁴⁸ *Id.* (quoting LOCKE, *supra* note 15, at 291).

⁴⁹ *Id.* at 1546.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

the harm done the disappointed suitor, it fails to adequately preserve room for many desirable forms of competition. While it would, for example, exclude the harm a new market entrant does to a monopolist where the new entrant competes entirely independently and without benefiting from the labor of the established business in any way, such competition, if it exists at all, is relatively rare. Competition generally involves a considerable degree of copying, imitation, and free riding. In the *Gloucester Grammar School Case* itself, for example, there are any number of ways in which the new school benefited from the labor of those who had established the preexisting school.⁵³ The curriculum, the location, the knowledge that there was a demand for schools at all, and even the new competitor's skills as a teacher all undoubtedly benefited from the labors of those who established the preexisting school. It was not mere coincidence that led the new school to locate just in front of the old.

The central difficulty with Gordon's attempt to confine her overbroad definition of harm by focusing on whether the second-comer benefits from another's labor is that not all copying, externalities, or free riding are socially harmful. In fact, the vast majority of unauthorized copying is socially beneficial. In the 1920s, Kellogg made its shredded wheat to look and taste like Nabisco's because Nabisco's success was precisely what Kellogg was trying to duplicate.⁵⁴ In the 1980s, Ford, Honda, and Toyota started making minivans that resembled Chrysler's precisely because they were trying to copy Chrysler's success.⁵⁵ As discussed, this type of scenario represents the best test of whether a natural-rights framework is a true alternative to utilitarian balancing. Can it justify an outcome contrary to our moral intuitions or a utilitarian balancing? Gordon does not use Locke to argue against these and other procompetitive outcomes. In my view, a Lockean argument for copyright would prove unpersuasive if, to justify copyright, Locke's reasoning must also justify a monopolist's right to bar competitive entry.

To avoid this difficulty, Gordon might alternatively use some of the wiggle room she included in her account of "wrongful" harm. With respect to an intangible, she defined her natural right against copying to extend only to: (i) the "noncreative copyist[]," (ii) who acts "purely from commercial motivation," (iii) whose "sole aim," (iv) is "to substitute another's efforts for their own."⁵⁶ Perhaps Gordon would excuse the harm that the competing schoolmaster caused

⁵³ YB 11 Hen. 4, fol. 47, Hil., pl. 21 (1410) (Eng.).

⁵⁴ See *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 122 (1938) ("Kellogg Company is undoubtedly sharing in the goodwill of the article known as 'Shredded Wheat'; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.").

⁵⁵ See Richard Stepler, *New-Generation Mini-Vans*, POPULAR SCI., Feb. 1985, at 74, 75 (describing Chrysler-led introduction of minivans into U.S. market in early 1980s).

⁵⁶ Gordon, *supra* note 4, at 1546.

on the grounds that he did most of his own labor. She might argue that any benefit he gained from the labor of those who established the preexisting school was merely incidental. Unfortunately, this either is untrue or unduly stretches the meaning of “incidental.” But for the preexisting school, the former teacher would likely not have opened a new school at the time, in the location, and with the curriculum he did. She might alternatively excuse the wrong on the grounds that those who established the first school did not have a natural right to those intangibles from which the second headmaster benefited. Perhaps the curriculum, knowledge of the demand for such schools, or association of the school’s location with education are the sort of intangibles that may not receive protection as a result of the limits on ownership that Locke’s “enough-and-as-good” proviso imposes. Gordon’s interpretation of Locke might therefore leave room for competition that entails some copying to fall outside the scope of the first market entrant’s natural rights.

However, this sort of forced tinkering at the back end to limit the harm Gordon has done at the front end misses the key point: neither copying nor competing is stealing. The financial loss may be of similar magnitude but the harm is different in kind even if the same in degree. An expectation of future revenue for a monopolist or of royalties for a songwriter is always contingent in a way that possession of an apple is not. For the songwriter, the same loss in royalties that she may experience as a result of bootlegging may also occur if consumer taste changes or a better song comes along. For this and other reasons, rents that I expect to collect tomorrow are simply not the same thing as rents that I have already collected and put in the bank (or in my mattress) today. That is part of the reason why possession plays such a key role in establishing ownership. As the law has long recognized, capturing the fox establishes ownership.⁵⁷ Pursuing the fox does not, even with a strong likelihood of a successful hunt.

Unfortunately, Gordon did not address these issues directly. As a result, whether and, if so how, she would reconcile the *Gloucester Grammar School Case* or other applications of the principle *damnum absque injuria* with her interpretation of Locke is unclear. The one thing that is clear from Gordon’s analysis, however, is that it would not be enough to assert that the harm to the existing school is justified and hence permissible because of the benefits of competition. As previously discussed, Gordon affirmatively rejected the notion that the public had a natural right to competitive markets.⁵⁸ Thus, it would not be enough for Gordon’s Lockean perspective to show that society is better off with competitive markets.

At the conference, Professor Gordon offered two possibilities: First, she suggested that sufficiently adverse consequences could override deontological reasoning. However, this merely raises questions as to (i) how adverse is sufficient, and to (ii) whether the supposed deontological reasoning is really a

⁵⁷ *Pierson v. Post*, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805) (“[M]ere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.”).

⁵⁸ See *supra* Part II.

viable alternative to consequential analysis at all. Second, she suggested that where free-riding on labor occurs yet consequentialism overrides labor's entitlement, that compensation is warranted. But new market entrants do not capture sufficient rents when they enter a formerly monopolistic market to compensate the former monopolist for its losses. And if we force consumers to do it, then we have lost the benefits of competition.

In my view, rather than attempt to use sophistry to work around the problems Gordon's overbroad interpretation of the no-harm principle creates, we should simply reject an overbroad interpretation directly. As Gordon herself recognized, "a strict no-harm rule merely enshrines a status quo, so that Locke's natural right against harm is unpersuasively overbroad."⁵⁹ Yet Locke's "no-harm" principle becomes unpersuasive precisely because Gordon reads Locke as prohibiting harm of any sort, whether physical, psychological, emotional, or economic. However, if we read harm narrowly and interpret Locke's no-harm principle to prohibit only physical or bodily injury to another in a state of nature, this problem largely disappears. As a descriptive and normative account of plausible duties in an idealized state of nature, a duty not to injure another physically is far more compelling. Unfortunately, a duty not to injure another physically cannot justify copyright as natural law. Nor can it justify, on its own, a natural-right entitlement to the fruits of my labor.

A no-physical-harm principle can, however, support and reinforce Locke's starting point for a natural-right entitlement to the fruits of labor: "[E]very Man has a *Property* in his own *Person*."⁶⁰ From this starting point, Locke then continued: because he owns his body, "[t]he *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."⁶¹ He then concludes: "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*."⁶²

This mixing theory, not the no-harm principle itself, is Locke's basis for recognizing a property in the fruits of one's labor. Moving beyond Gordon's analysis, the question is whether this mixing theory can justify copyright. It cannot. As Nozick and others have recognized, taking the theory literally is not without its difficulties.⁶³ Nevertheless, even if we accept the mixing theory as

⁵⁹ Gordon, *supra* note 4, at 1545.

⁶⁰ LOCKE, *supra* note 15, at 287.

⁶¹ *Id.* at 287-88.

⁶² *Id.* at 288.

⁶³ Nozick's *reductio ad absurdum* critique is particularly memorable: "If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 175 (1974); see Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 PHIL. Q. 37, 40, 43 (1983); *id.* at 37 ("In this paper I will argue that the idea of the mixing of labour is fundamentally incoherent and that therefore it can add nothing at all, apart from an oddly worded metaphor, to whatever other arguments Locke wants to put forward . . .").

justifying a prohibition against theft, it is a category error to suggest that it justifies a prohibition against copying. Locke's theory explains how an individual comes to hold an initial property interest in a thing, whether a novel or an apple. Yet this initial ownership interest is not the key issue in copyright. Even if we assume for the sake of argument that Locke's mixing theory can justify a laborer's full and despotic dominion over a novel she has written, equal in every extent to the laborer's property in an apple she has gathered, that would be insufficient to justify copyright.

Copyright is not primarily about this initial ownership at all. Copyright matters only after the novel has been shared with others. In other words, copyright is not about initial ownership but about retained rights after the physical copy of the work is transferred to or shared with another. Locke says nothing about why the retained rights of an author should differ from those of a farmer after their respective fruits are sold to or shared with another. Again, let us assume that Locke is correct: When I pick an apple, my labor gives me an initial property in that apple. Moreover, that property gives me full dominion over the apple. I have a natural right to prevent another from eating the apple, from making a pie from it, or from using its seeds to grow her own tree. I have all the rights. However, once I voluntarily sell or give the apple to another, nothing in Locke's reasoning suggests that I have a retained right to prevent the other from (i) eating the apple; (ii) preparing a derivative work, such as apple pie or cider, using the apple; or (iii) attempting to reproduce the apple by using its seeds to grow her own tree. Of course, a farmer may, by contract, extract from the buyer promises on these issues. In the absence of such an express contract, however, we presume that the sale of the apple transfers to the purchaser the full bundle of whatever initial property I may have had in the apple as a result of my labor.

Locke articulates no reason why we should not presume the same for the novel. Again accepting Locke's mixing premise, when I first write my novel my labor gives me an initial property in that first copy. Moreover, so long as I do not share my work with anyone, I have full and absolute dominion over my draft. No one else can read, copy, or prepare a derivative work with it for a very simple reason: no one else has seen it. In that sense, authoring an original and expressive work can, purely as a practical matter, give me property in my novel as a matter of true natural law. Like gravity, so long as no one else sees my novel, my natural rights in my novel do not depend on human interpretation or judicial enforcement. So long as no one else has seen it, no one else is physically able to copy it. This natural right is not copyright, however. If no one else has seen, heard, or otherwise experienced my work, copyright remains entirely unnecessary. Rather, copyright controls what another can do with a copy of my novel even after I voluntarily share my work with her. As in the apple case, I could extract from the buyer express promises not to copy or prepare derivative works based on the novel. In the absence of such an express contract, however, treating these two types of labor similarly suggests that we should presume that, just as with the apple, by voluntarily parting with the novel, I have transferred

to the purchaser the full bundle of whatever initial property I may have had in the novel.

Copyright law in fact followed this approach, or something very much like it,⁶⁴ for centuries under what came to be known as the *Pushman* presumption.⁶⁵ Under that presumption, transferring possession of a copy of the work before publication transferred any common law copyright in the work as well. Congress formally abrogated the presumption in the Copyright Act of 1976.⁶⁶ As a result, copyright law today expressly separates ownership of the work from ownership of the copy.⁶⁷ It reinforces this separation by specifically providing that the transfer of a physical copy does not necessarily transfer the copyright in the work.⁶⁸ We should not, however, read these recent developments retroactively into Locke's analysis or pretend that Locke's analysis somehow foresaw and incorporated these later developments. As it was published in 1690, Locke's mixing-labor justification for property would lead us to treat the farmer's and the author's labor similarly. If we accept Locke's approach, their labor may give both an initial property in the respective fruits of their labor. Yet treating them similarly also means that when either voluntarily transfers that initial property, at least in the absence of an express contract to the contrary, that transfer fully conveys to the purchaser whatever initial property the farmer or the author had. As a result, even if we accept for the sake of argument that Locke's mixing-labor account justifies an initial property in the fruits of an individual's labors, whether apple or novel, it provides no basis for justifying retained property in those fruits after the individual voluntarily parts with possession of them. It certainly provides no basis for providing the author with a set of retained rights different from the set provided the farmer. Attempting to use Locke to justify a natural right to control what is done with an original and expressive work of authorship after the author voluntarily parts with possession thus represents a category error. Locke's mixing-labor rationale attempted to provide a justification for initial ownership, not retained rights after voluntary transfer.

If any part of Locke's analysis could justify copyright, it would be his secondary justification for labor-based property: "For 'tis *Labour* indeed that

⁶⁴ Under a purely physical right of control, the owner of each copy of a work would have the exclusive right to control the copying of that copy. No one would control the right to control the copying of the work in the abstract. In other words, there would be no common law copyright as such.

⁶⁵ See *Pushman v. N.Y. Graphic Soc'y, Inc.*, 39 N.E.2d 249, 251 (N.Y. 1942) (holding that, at common law, transfer of ownership of sole copy of a work presumptively transferred ownership of common law copyright in the work as well); see also *Parton v. Prang*, 18 F. Cas. 1273, 1277-78 (C.C.D. Mass. 1872) (No. 10,784) (same).

⁶⁶ Pub. No. L. 94-553, § 202, 90 Stat. 2541, 2568-69 (codified as amended at 17 U.S.C. (2018)).

⁶⁷ 17 U.S.C. § 202 (2018).

⁶⁸ *Id.*

puts the difference of value on every thing”⁶⁹ In policy debates over copyright, this is the point for which Locke is most commonly invoked. As one congressional witness on copyright issues put it: “Our American society is founded on the principle that the one who creates something of value is entitled to enjoy the fruits of his labor.”⁷⁰ Because a novel can be copied more readily and perfectly than an apple, the author and the novel may require a different set of retained rights after the author transfers possession in order to ensure that these two forms of labor receive comparable and, in that sense, fair returns on their labor.

Yet in articulating this value-based or just-deserts proposition, Locke necessarily moves from the deontological to the consequentialist. Value is not a factual issue but a normative one. In a market economy, value has not one determinable cause but an almost uncountable number. If we say that the value of a novel is the sum of the prices individual consumers are willing to pay for copies in the marketplace,⁷¹ that value is not created by the person(s) copyright law identifies as the author or copyright owner alone. To create the first copy of the novel, the author must use paper and ink others have created, write in a language others have invented, and tell a story invariably influenced by stories that have gone before. Even after the author and these others cause the first copy to come into existence, the novel must then be distributed using printing presses or computers that others have created and that still others operate. Finally, in a competitive market economy, the price a consumer will pay for a copy of a book depends on how much the consumer has left after she pays for food, shelter, clothing, and all of the other things she needs more than the book. In a market economy, then, the value of a thing has not one cause but many.⁷²

It is easy to overlook these other factual causes, however, and ignore the normative aspect of market value. Perhaps because we are focused on the

⁶⁹ LOCKE, *supra* note 15, at 296.

⁷⁰ *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 100 (1966) (statement of Elizabeth Janeway, President, Authors Guild).

⁷¹ See, e.g., 1 PAUL GOLDSTEIN, *COPYRIGHT* § 1.14.2.4 (2d ed. 1996) (stating that copyright’s remedies are designed to “enable copyright owners to capture the value of their works”); *Interview with Former Register of Copyrights David Ladd*, 29 *PAT. TRADEMARK & COPYRIGHT J.* (BNA) 334, 337 (1985) (stating that copyright owner is entitled to “compensation . . . based upon what the public is willing to pay” for every use of copyrighted work).

⁷² See Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *PHIL. & PUB. AFF.* 31, 38 (1989) (“Market value is a socially created phenomenon”); Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 *VAND. L. REV.* 483, 574 (1996) (“Whoever is responsible, factually, for creating the physical product itself, the *value* of the product in our market economy will always be joint because it depends entirely on whether consumers have any ‘surplus’ resources with which to purchase the product.” (footnote omitted)).

copyright issues, we may believe that we only need to focus on the questions of adequate compensation for, and the rules necessary to achieve such compensation for, the authors. Or perhaps we too readily assume that the market will take care of ensuring adequate compensation for all of the other causes of the novel and its value. But if we are trying to allocate a novel's value through an alternative set of first principles, we cannot use a Lockean value-based return for authors and relegate every other laborer who plays a but-for role in the creation of that value to the cost-based return of competitive markets.⁷³ If we accept a cost-based return for every other form of labor in our society and our goal is to ensure authorship-as-labor a comparable, and in that sense fair, return on the value to which they contribute, then authors too must receive a cost-based return for their efforts. While it may be that some degree of copyright protection is necessary to ensure authors such a fair, comparable, and cost-based return, that is an empirical and consequentialist question. It is not one that Locke can or did answer.

As a result, neither Locke's reasoning nor Gordon's interpretation of it justifies a natural right to prohibit the unauthorized copying of an original work of authorship.

IV. TURNING NATURAL RIGHTS ON ITS HEAD: A NATURAL RIGHT TO COPY

I believe that we can go further, however. Rather than justify copyright as natural law, Locke's framework implicitly and necessarily recognizes a natural right to copy. As a dedicated consequentialist, I hesitate to lend any support to the suggestion that Locke's reasoning contains anything of value. Nevertheless, if we are going to use the rhetoric of natural rights to enshrine a set of presumptively correct, pregovernmental rights, then a natural right to copy comes far closer to optimal than a natural right to prohibit copying absent permission. As discussed at the outset, the abilities to imitate, copy, and learn are probably the most important intrinsic skills with which humans are born. The right to use these abilities is the foundation of our civilization. And, as it turns out, a natural right to copy is implicit in Locke's framework.

As Gordon correctly identified in her analysis, the "enough-and-as-good" proviso is central to Locke's framework.⁷⁴ Although I believe that her interpretation of it as applied to original works of authorship is highly contestable,⁷⁵ Locke used the proviso to help his mixing-labor theory provide a

⁷³ See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 286 (1970) ("In fact, why is the author's moral claim to be paid more than his persuasion cost any stronger than the claim of others also responsible for producing his book: the publisher, the printer, the bookseller, and those responsible for the literature of the past that inspired him?").

⁷⁴ Gordon, *supra* note 4, at 1562.

⁷⁵ Personally, I agree with both Gordon's description and application of the proviso in the copyright context. Yet I acknowledge that her interpretation of the proviso is contestable at

satisfactory alternative to unanimous consent for moving an item from common to private ownership. The puzzle Locke set for himself was simple: If all things of this Earth are initially owned in common, how can they come to be privately owned?⁷⁶ One possible solution to this puzzle was unanimous consent. If we all agreed to transfer a given item from common to private ownership, that would be sufficient and satisfactory to transfer ownership. Locke, however, found this mechanism unworkable and, therefore, sought to offer another.⁷⁷ To that end, he conceived and articulated his mixing-labor account: My body is my own; therefore, my labor is my own. When I mix my labor with something in the commons, I make that something my own as well. The obvious objection to Locke's mixing-labor approach is that it might allow one person to come to own too much.⁷⁸ To address that objection, Locke offered, *inter alia*, the "enough and as good" proviso.⁷⁹ Mixing labor could move a thing from commonly to privately owned, but only if there was "enough and as good" of the thing left for others.

Taken together, the mixing-labor justification for acquiring property and the "enough and as good" limitation provided a more defensible justification for transferring a thing from common to private ownership. As Nozick has noted, taken together, the two come very close to and arguably represent a Pareto-optimality standard.⁸⁰ When satisfied, these two requirements recognize the private property of the laborer and thus improve the laborer's position. Yet by ensuring that there is enough and as good left for others, that recognition improves the laborer's position without harming anyone else.

Thus, for land, mixing one's labor with the land established a basis for ownership: "*As much Land as a Man Tills, Plants, Improves, Cultivates, and can*

both the general and specific levels. It is straightforward to insist that the proviso means that a later author may not use the copyright on her work to take some preexisting aspect of literature out of the public domain. Yet Gordon used the proviso to go much further. She insisted that once a person has been exposed to certain aspects of an original and culturally influential work, it would be impossible for her to put those aspects entirely from her mind when she sets out to write her own stories. *Id.* at 1570. In Gordon's view, the "enough and as good" proviso would bar copyright from extending to those aspects of a work, even if both original and novel. *Id.* Does that mean an airline should not have a right to exclude coach passengers from business class because, as my wife said after recently flying to Europe in business class, she "can't go back to coach"?

⁷⁶ LOCKE, *supra* note 15, at 289 ("Though the Water running in the Fountain be every ones, yet who can doubt, but that in the Pitcher is his only who drew it out?").

⁷⁷ *See id.* at 288-89.

⁷⁸ *Id.* at 290.

⁷⁹ As Gordon noted, Locke also included other limitations, such as a prohibition on taking so much that it spoils or is wasted. *See* Gordon, *supra* note 4, at 1582.

⁸⁰ *See* NOZICK, *supra* note 63, at 178-82; Hettinger, *supra* note 72, at 43-45 (interpreting proviso similarly); Herman T. Tavani, *Locke, Intellectual Property Rights, and the Information Commons*, 7 ETHICS & INFO. TECH. 87, 95 (2005) (same).

use the Product of, so much is his *Property*.”⁸¹ Yet recognizing that ownership harmed no other so long as there was enough and as good leftover, Locke continued, “Nor was this *appropriation* of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use.”⁸² Similarly, a person could obtain private ownership of apples and acorns by picking them in the forest.⁸³ So long as there was enough and as good left for others to pick, recognizing the private ownership of the picker would benefit the picker and leave no one else worse off. Or a person could use a pitcher to gather water from a fountain and thereby obtain private ownership of the water so gathered.⁸⁴ Again, so long as there was enough and as good left for others to drink, recognizing such private ownership would make the pitcher-filler better off and leave no one else worse off.

The “enough and as good” proviso is thus central to Locke’s justification for private property. It ensures that each acquisition of property satisfies the Pareto-optimality standard. That helps Locke’s framework coincide with our moral intuitions and makes his framework morally defensible.

What has gone unrecognized however is that the “enough and as good” proviso implicitly relies on the existence of an underlying natural right to copy. The proviso insists that others are not harmed by the recognition of one farmer’s private ownership of his land because there is enough and as good land left for the others. As a result, the others can farm some of the remaining land for themselves. Similarly, others are not harmed by recognizing private ownership of gathered acorns or apples because there are enough acorns and apples left for the others. As a result, the others can gather some of the remaining acorns and apples for themselves. And others are not harmed by recognizing ownership of the water that one person has collected in their pitcher because there is enough water left for the others. As a result, the others can use their own pitchers to collect water for themselves.

Yet how do the others know to farm the land, to gather acorns or apples, or to collect water in a pitcher? These are not intrinsic skills or knowledge with which humans are born. All of this behavior must be learned. And in this context, learning means copying: we observe others doing the behavior at issue and imitate their actions.

Thus, Locke’s framework for recognizing a natural right to property implicitly rests on the existence of an underlying natural right to copy. Without an underlying natural right to copy, the promise of Pareto optimality that the “enough and as good” proviso makes is empty. If that promise is empty, then the persuasive force of Locke’s mixing-labor account for initial property ownership is lost.

⁸¹ LOCKE, *supra* note 15, at 290.

⁸² *Id.* at 291.

⁸³ *Id.* at 288.

⁸⁴ *Id.* at 289.

V. HARD CASES, EASY CASES, AND NATURAL-RIGHTS RHETORIC

At this point, some die-hard proponents of a natural-rights justification for copyright will remain unconvinced. Of course, they will insist, there should be no legal prohibition on copying basic life skills or laws, such as the Ten Commandments. These are easy cases. Whether we deal with them by denying them copyright protection at the outset, by narrowing the scope of copyright at the back end, or by relying on some notion of implied consent,⁸⁵ no one contends that copyright should go so far. Yet that does not mean, they would continue, that there are not also easy cases on the other side. File sharing, for example, where a consumer obtains an unauthorized copy of a song for free instead of purchasing the song in the market, might represent such an easy case. As Gordon argued, copying sometimes has nearly the same consequences as theft and so should be recognized as such.⁸⁶

While tempting, the belief that we can readily separate desirable from undesirable copying with a set of simple, natural-rights heuristics is mistaken. First, hidden consequentialist impulses drive our intuitions about easy and hard cases. Everyone should have the right to copy the basic life skills they observe around them or the laws of society. Doing otherwise would prove unworkable and unwise. But it is those consequences that enable us to recognize those cases as easy ones for a right to copy. Second, as history itself demonstrates, the line between permissible and impermissible copying will move as technology and market structures change. What may seem an easy case in favor of copyright today, such as exact copying to avoid a market purchase, would not have been an easy case prior to the printing-press era, when each manuscript had to be laboriously copied by hand. Third, our intuitions as to whether a case belongs on one side or the other of the line between permissible and impermissible copying may prove surprisingly wrong when tested empirically.

Consider file sharing and music as an example. Copyright protection for sound recordings in the United States began in 1972 and ended, in some ways, with the rise of file sharing in 1999.⁸⁷ We can trace the rise and fall of copyright protection for sound recordings in the rise and fall of revenue from sales of recorded music. In the precopyright 1960s, revenue from such sales in constant 2013 dollars (“\$2013”) began at under four billion dollars annually in the early

⁸⁵ As discussed, the problems with explicit or implicit consent are what led Locke to his mixing theory. Rather than relying on some constructed notion of consent to make the commonly owned water a person gathers in her pitcher into private property, Locke relied on the mixing of the person’s labor. In the same way, rather than relying on some fictional consent to permit copying life skills or the Ten Commandments, we should rely on the fact of copying itself.

⁸⁶ Gordon, *supra* note 4, at 1548.

⁸⁷ I have presented this story more completely elsewhere. See GLYNN LUNNEY, COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY 59-83 (2018).

1960s.⁸⁸ With the recognition of the sound-recording copyright, sales rose more or less steadily through the 1970s and 1980s to a peak of over twenty billion dollars (\$2013) in 1999.⁸⁹ Then, with the introduction of file sharing, sales of recorded music began to fall, amounting to less than seven billion dollars (\$2013) in 2014.⁹⁰

While there has been much debate over whether file sharing caused, in whole or in part, this decline in revenue, the real question from a consequentialist perspective is whether this rise and fall in revenue drives a parallel rise and fall in the output of music. From a consequentialist perspective, copyright's fundamental premise is that more protection yields more revenue for copyright owners, and more revenue for copyright owners leads to more and better original works.⁹¹ If copyright's premise is true, then we should be able to find a steady improvement in the quantity and quality of music output from the 1960s through the 1990s. With the introduction of file sharing in 1999, a steady decline should then begin. Moreover, this should be an easy test for copyright to pass. The change in revenue over this time period was not small and gradual, but large and sharp. In constant dollar terms—that is, after accounting for inflation—revenue from sales of recorded music in 1999 were more than five times the revenue in 1961, and nearly three times the 2014 revenue. In the light of these very sharp changes in annual revenue, we should see corresponding and obvious changes in popular music output in both quantity and quality—or at least we should see these changes if copyright's fundamental premise is true.

Yet copyright's fundamental premise did not hold for the U.S. recording industry over the last six decades.⁹² Using a variety of measures of music output,⁹³ I searched for a correlation between revenue and music output. In hundreds of regressions, I found no support for copyright's fundamental premise.⁹⁴ No matter the measure of music output I used, there was no positive and statistically significant correlation between increased revenue for the recording industry in one year and better or more music the next.⁹⁵ To the contrary, where I found a statistically significant correlation between revenue

⁸⁸ *Id.* at 68.

⁸⁹ *Id.* at 68-69.

⁹⁰ *Id.* at 75.

⁹¹ *Id.* at 57.

⁹² *See generally id.* at 84-156 (examining statistics showing that copyright did not increase amount or quality of music in past fifty years).

⁹³ These measures included: (i) SoundScan album count; (ii) *Rolling Stone*'s list of the 500 greatest albums of all time; (iii) unique song count on Billboard Hot 100 list for each year from 1962 to 2015; and (iv) Spotify stream count, song count, and average stream count for the top 1001 songs from 1961 to 2005 streamed worldwide in 2014. *Id.* at 84-121.

⁹⁴ *Id.* at 120-21, 155-56.

⁹⁵ *Id.*

and music output, the correlation was negative. More revenue in one year led to less and lower quality music the next.⁹⁶

The problem with simple intuitions, whether of the natural-rights variety or of naïve consequentialism, is that the economy is a complex and, to some extent, chaotic system.⁹⁷ The notion that paying more money to the recording industry in return for popular music will yield more and better music seems simple, intuitive, and straightforward. Too bad it is wrong. Thus, even seemingly easy cases may, on closer inspection, turn out to be more difficult to place on the right side of the permissible-impermissible copying line than first appears. Natural rights rhetoric is simply too blunt a tool to do so effectively and consistently.

VI. THE PERILS OF AN UNDULY NARROW FOCUS

When we work primarily or exclusively in copyright, it is easy to mistake the rules in copyright for the rules that apply generally. But copyright is the exception, not the rule. It may be that we can justify a prohibition on unauthorized copying within a very narrow sphere of human activity, i.e., for specific products of human creativity against a very narrow range of imitations. Nothing could be more dangerous to human welfare, however, than a general prohibition on copying or to broadly equate copying with theft.

In this regard, the notion that copyright represents some natural law, even in an idealized state of nature, is extremely dangerous. If recognized as natural law, the right to prohibit copying can too readily become a threat to the vast array of imitation, copying, and learning that is desirable and, indeed, essential to a well-functioning society and a thriving culture.

In the end, the foundation of our civilization is not creativity but copying. If we are to enshrine any right as natural, it should be the right to copy.

⁹⁶ *Id.*

⁹⁷ The market for sound recordings had a strong, winner-take-all characteristic. Thus, increases in revenue were not shared evenly among all artists but instead flowed disproportionately to a veritable handful of superstars. As it turned out, vastly overpaying the superstars led them to work less. As a result, as industry revenue rose the top new artists each year released fewer Hot 100 hits as principal artists in the first ten years of their careers than the top new artists in low revenue periods. *See id.* at 157-92.