on any terms is a greater blessing that I had looked for."[70] Just so. Must Carry litigation might prompt the same sentiments. Still, important First Amendment issues arising over new telecommunications laws will and should be before the Court. Congress soon will be the engine for this change. It is up to the Court, as its First Amendment treatment of new technology evolves, to supply the constitutional guideposts.

70 *Id.* at 867.

FROM DEONTOLOGY TO DIALOGUE: THE CULTURAL CONSEQUENCES OF COPYRIGHT*

BARBARA FRIEDMAN

I. THE PURPOSE OF COPYRIGHT

One of three competing theories is generally used to justify granting property rights in intellectual products. The first two are deontological arguments concerning the inherent justice of such rights, while the third is an argument for the beneficial consequences those rights produce. The first theory is based on John Locke's theory of property, and is essentially an extension of his well-known labor theory of acquisition of tangible property to property in intellectual works.[1] This has been referred to as a "desert,"[2] or natural-law theory.[3] The Lockean argument asserts that ownership in intellectual property created by one's own labor is no less justified than ownership of physical property with which one has mixed one's labor.[4] Thus copyright is a morally deserved natu-

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1 *See infra* part II.A.

2 Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 620 (1992-93).

3 Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1539 (1989).

4 Locke himself never discussed intellectual property; all his arguments were directed toward tangible property. This analysis, therefore draws not on Locke's works directly, but on works of others who have made the logical extension. *See, e.g.*, Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) [hereinafter *A Property Right in Self-Expression*]; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Lacey, *supra* note 3; Jeremy Waldron, *From Authors to*

ral right. The second justification is the closely related Hegelian notion that intellectual property is an extension of the author's personality, and, thus also morally deserved.[5] Professor Linda J. Lacey points out that both the Lockean and the Hegelian arguments "focus on the relationship between the creator and the property, not on the effect of that relationship on society."[6]

The consequentialist theory, in contrast, asserts that copyright is necessary in order to provide incentives for artists to create works and make them available to the public.[7] The argument runs as follows: without the exclusive rights granted by the copyright laws, an author, unable to earn a living from her labors, would be less inclined to create—leading to a state of cultural stasis.[8] Since a thriving culture is one with as many original works available to the public as possible,[9] some degree of copyright protection is necessary.[10]

The enabling clause of the Constitution is generally said to be based on this third vision of copyright.[11] The clause provides that Congress may "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive

Copiers: Individual Rights and Social Values in Intellectual Property, 68 CHI.-KENT L. REV. 841 (1993); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

5 *See infra* notes 66-68 and accompanying text.

6 Lacey, *supra* note 3, at 1564 (footnote omitted).

7 *See infra* part IV; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

8 *See* Pierre N. Leval, *Fair Use or Foul?*, 36 J. COPYRIGHT SOC'Y 167, 169 (1989). The enabling clause "embodies a recognition that creative intellectual activity is vital to the well being of society—and that such creative activity will be stimulated by giving to Authors and Artists the right to reap the benefits and profits of their work." *Id.*

9 *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS *passim* (1991). It is questionable, however, whether copyright really makes the works produced more available. More may be produced, but arguably these works are less widely disseminated then they might have been absent a monopoly.

10 However, some have said it is a necessary evil. *See, e.g.*, ARNOLD PLANT, SELECTED ECONOMIC ESSAYS AND ADDRESSES 60-61 (1974) ("It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated, and the least objectionable way of remunerating them is by means of copyright. . . . The system of copyright has great advantages, and great disadvantages. . . . Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. . . . Monopoly is an evil. . . . For the sake of the good we must submit to the evil. . . .") (quoting MISCELLANIES BY LORD MACAULAY (1901) (speech on bill in House of Lords)).

11 *See* Lee v. Runge, 404 U.S. 887, 889 (1971) (Douglas, J., dissenting); Mazer v. Stein, 347 U.S. 201, 219 (1954); Hughes, *supra* note 4; Rick G. Morris, *Use of Copyrighted Images in Academic Scholarship and Creative Work: The Problems of New Technologies and a Proposed "Scholarly License,"* 33 IDEA J.L. & TECH. 123 (1993); PATTERSON & LINDBERG, *supra* note 9. In *Fair Use or Foul?*, Leval, *supra* note 8, at 168, states that "[T]he governing purposes of the copyright law . . . are the utilitarian goals of stimulating progress in the arts and intellectual enrichment of the public."

Right to their respective Writings and Discoveries."[12] Therefore it seems that copyright protection is not an intrinsically good natural right,[13] but rather a government-granted privilege instrumental to the achievement of good consequences.[14] As Judge Leval has written, the enabling clause "embodies a recognition that creative intellectual activity is vital to the well being of society—and that such creative activity will be stimulated by giving to Authors and Artists the right to reap the benefits and profits of their work."[15]

It has been suggested that the copyright clause promotes two positive cultural consequences.[16] The first and most important consequence is the promotion of learning.[17] The second is preserving and enhancing the public domain (since the grant is only for a limited time, after which all works fall into the public domain).[18] Congress achieves these goals by bestowing an economic benefit upon the author.[19] Whatever the putative intent of the rest of the Constitution, the purpose of the copyright clause appears to be to create a thriving national culture, and only to achieve this end does it recognize a limited property right for an author in his or her creations.[20] Additionally, the Supreme Court has explicitly stated on several occasions that the purpose of copyright is a utilita-

12 U.S. CONST. art. I, § 8, cl. 8. *But see* Gary Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM.-VLA J.L. & ARTS 381, 403 (1986) (footnote omitted) (arguing that "despite current rhetoric, the empowering clause recognizes the rights of authors as its primary purpose.").

13 On the other hand, there is evidence that the natural-rights justification for copyright was explicitly recognized in early America; many state copyright statutes enacted between 1783 and 1786 used explicit natural-law arguments in their preambles. Yen, *supra* note 4, at 528-29. New Hampshire's copyright statute, enacted in 1783, is representative. Its preamble states that secure legal recognition of copyright is "one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind. . . ." An Act of Encouragement of Literature, 1783 N.H. Laws 305, *cited in* Yen, *supra* note 4, at 529 n.79.

14 It should be pointed out, however, that the use of the word "secure" may indicate that the framers perceived the rights of the author to be previously existing natural rights. Had they intended to create a new right they could have used a word like "establish" or "grant" instead. This suggests that, at the time the Constitution was drafted, there was a deontological element in copyright law. *See* Dale A. Nance, *Forward: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 764 (1990). However, the deontological view was soundly rejected by the Supreme Court in the early case of *Wheaton v. Peters*, 33 U.S. 591 (1834). *See* PATTERSON & LINDBERG *supra* note 9, at 63 ("The importance of the *Wheaton* case lies in the fact that the principle chosen—the statutory-monopoly principle—determined the nature of American copyright . . . ."); *see also infra* note 21 and accompanying text.

15 Leval, *supra* note 8, at 169.

16 PATTERSON & LINDBERG, *supra* note 9, at 49.

17 *Id.*

18 *Id.*

19 *Id.*

20 Although it must be noted that permission to use implies permission not to use, so that despite the goal of the copyright clause of granting a limited monopoly to the author in order to encourage her to make her work accessible to the public, the right to withhold is built into the act, thus potentially undermining its very purpose.

rian one rather than a recognition of so-called authors' rights.[21]

Despite the consequentialist moorings of American copyright law, much of contemporary copyright theory tends to be based on deontological theories of personality[22] or natural rights.[23] This Note proposes to criticize such theories of intellectual property and derive a principle consistent with the Constitutional purpose of copyright. A consequentialist analysis will lead to the conclusion that there is no reason to grant to authors the right to prevent transformative derivatives of their work.

Part II of this Note examines the theories of Locke and Hegel that have been used to justify the protection of intellectual property, and concludes that Locke ultimately subordinates property rights to a consequentialist determination of the public good that can serve as the basis for copyright protection without derivative rights and that Hegel's insistence that property rights are inherently valuable as expressions of individuality leads, in the realm of intellectual property, to a monological view of culture that unduly emphasizes self-expression. Unfortunately, as Part III shows, copyright law is evolving in just such a deontological direction towards increasingly expanded grants to authors. Finally, Part IV undertakes a consequentialist evaluation that ultimately defends the need for copyright but criticizes derivative rights protection. This is done in the interest of increasing the stock of different ideas in circulation in the hope that this will "promote the Progress of Science and the useful Arts"[24] and, more broadly, of culture.

II. Deontological Theories

A. *The Lockean Justification*

Perhaps the most widely known deontological argument for the original author's exclusive right is derived from John Locke's theory of property. Although Locke never applied his theory to

21 Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1029 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985); Sony v. Universal, Inc., 464 U.S. at 429; Twentieth Century Music v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); Wheaton v. Peters, 33 U.S. 591 (1834). Congress recently reaffirmed this principle in the Berne Convention Implementation Act: "The primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors." H.R. Rep. No. 609, 100th Cong., 2d Sess. 23 (1988).

22 *See* Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865 (1990); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1 (1985); Lacey, *supra* note 3; Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 Rutgers L.J. 347 (1993).

23 *A Property Right in Self-Expression*, *supra* note 4; *see also* Yen, *supra* note 4.

24 U.S. Const. art. I, § 8, cl. 8.

intellectual property, others have attempted to extend his argument to intangible property.[25] Under one such "Lockean" approach, the original author, having exerted mental labor to create a work, is entitled to exclusive rights in it.[26] Thus, it is argued, the author should be able to use, sell, destroy, and alter his work as he pleases. He should be free to give it to society or withhold it at his pleasure. Derivative authors, under this view, would be considered thieves who have taken another's property without permission.

As part of her effort to construct a multi-dimensional view of intellectual property, Professor Wendy Gordon, while eventually using "the tenets of Lockean natural law"[27] to reach a conclusion similar to that of this Note—namely, that derivative rights are largely unjustified—defends the view that labor can be a source of private property rights.[28] This Note will subsequently call the labor theory of private property the deontological rather than the "Lockean" view. It has been used widely by such libertarians as Robert Nozick[29] as the grounds for opposing government regulation and redistribution of real property, but it is arguably a distortion of Locke's own perspective.[30]

The fundamental libertarian idea is that private property rights are intrinsically just. The libertarian view is therefore deontological rather than consequentialist; it justifies property as a matter of inherent right, not on the basis of its beneficial effects. By contrast, a consequentialist theory of property leaves it to investigation of the empirical effects of the different forms of property to determine whether private property rights should be preserved inviolate, regulated by the state, or even supplanted by some other form of ownership, such as communism, in accordance with one's judgment as to which property regime would produce the best results.

Even if we were to accept that one has an inherent right to own property with which one has mixed one's labor, there is no logical reason that the bundle of rights thereby acquired must

25 Early efforts to extend Locke's theories to intellectual property were made by Blackstone and Herbert Spenser. *See* Lacey, *supra* note 3, at 1539. More recent attempts have been made by Lacey; *A Property Right in Self-Expression*, *supra* note 4; Hughes, *supra* note 4; and by Yen, *supra* note 4.

26 John Locke, Two Treatises of Government, Book II, § 27 (Peter Laslett ed., Cambridge University Press 1960).

27 *A Property Right in Self-Expression*, *supra* note 4, at 1538.

28 *Id.* at 1540 (footnotes omitted).

29 Robert Nozick, Anarchy, State and Utopia (1974).

30 *See infra* notes 32-41 and accompanying text.

amount to absolute individual control.[31]

However, it is far from clear that Locke himself drew the libertarian conclusion often attributed to him. Locke wrote his *Two Treatises of Government* in order to support a right of popular revolution.[32] He never suggested that what justifies this right is the failure of a government to respect libertarian property rights. Were he to have done so, he would have implied that no taxation or any other form of interference with absolute private property rights could be justified. This is not a position Locke or any of his contemporaries took. This libertarian view would have been so threatening to the established order of Parliamentary power that it would have discredited the Whig political movement to which Locke devoted much of his life.[33] More importantly for our purposes, as of the late seventeenth century, nobody had seriously proposed that the results of so dramatically limiting government power would be anything less than disastrous.

Given the then-unimaginable consequences of doing away with the government's power to tax and regulate private property, it is not surprising—although it is too infrequently emphasized—that the absolute private property rights Locke established in the state of nature are done away with once people enter civil society.[34] It is as if we make a bargain when we leave the state of nature: we relinquish our natural, absolute bundle of property rights in exchange for the greater security of a smaller bundle. The contents of this bundle are diminished at the very least by taxation, to which the majority of people, not each individual, must consent.[35] Locke at no point guarantees the inhabitants of civil society security in the sense of prohibitions against the abrogation of individual liberty or the seizure of individuals' property. On the contrary, "every Man," Locke writes, "when he at first incorporates himself into any Commonwealth, he, by his uniting himself thereunto, annexes also, and submits to the Community, those Possessions which he has or shall acquire."[36] After this annexation, one's property, "which was

31 *Cf.* Becker, *supra* note 2, at 628. "Nothing about what property law ought to be follows *immediately* from the desert arguments." *Id.*

32 David Wootton, *Introduction* to POLITICAL WRITINGS OF JOHN LOCKE 55 (David Wootton ed., Penguin Books 1993).

33 On the Whig movement and Locke's involvement in it, see generally RICHARD ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT (1986).

34 LOCKE, *supra* note 26, Book II, § 139. "[T]he Prince or Senate . . . may have power to make Laws for the regulating of Property between the Subjects one amongst another . . . ." (emphasis omitted), *see also infra* notes 36-37 and accompanying text.

35 JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 138 (Thomas P. Peardon, ed., Bobbs-Merrill 1952) (1681).

36 *Id.* § 120.

before free," is "to be regulated by the Laws of the Society."[37]

The transition from the state of nature to civil society may be seen as marking the end of deontological private property in Locke's theory and its replacement by consequentialism. Locke writes, when "[m]en . . . enter into [civil] society [they] give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the society shall require."[38] In turn, the good of society, which Locke also calls the "common good" and the "public good,"[39] is the criterion by which the people are to judge the legitimacy of their government and, therefore, whether revolution against it is warranted.

There is no textual reason to think Locke would have developed a property theory at all were it not for the fact that the absolutist writer whom Locke was attempting to rebut, Sir Robert Filmer, had argued that kings owned literally all the land in their kingdoms as an inheritance from Adam, to whom God granted exclusive possession of the earth.[40] According to one expert:

> Locke's purpose is, evidently, not so much to propose the correct theory of property rights as to deny the political authority Filmer derived from his incorrect theory. Absent Filmer's claim that God gave the world to Adam and hence unlimited authority to kings, one may doubt whether Locke would have needed to discuss property at all in a political tract aimed at establishing a right of revolution.[41]

In order to respond to Filmer, however, Locke endorsed the view that God gave the world to humankind at large, not to Adam exclusively.[42] This raised the question of how God's common donation could be individuated in order to be put to use by its intended beneficiaries.[43] Locke's answer is that each person may mix some of his or her labor with the common donation and, in this way, may acquire a property right in tangible objects, including land.[44] We need not pursue this theory further at this point; what is important is that seen in the context of Locke's explicitly polit-

37 *Id. But see* Jeffrey Friedman, *Introduction to* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 8 (1994).

38 LOCKE, *supra* note 26, Book II, § 131.

39 *Id.*

40 ROBERT FILMER, PATRIARCHA AND OTHER WORKS OF SIR ROBERT FILMER 187-88 (Peter Laslett, ed., Oxford University Press 1949).

41 Friedman, *supra* note 37, at 17-18.

42 LOCKE, *supra* note 35, § 25.

43 *Id.* § 26.

44 *Id.* § 27.

ical purposes, Locke's property theory is a digression made necessary only to challenge the absolutist politics advanced by Filmer. Hence it should not surprise us that Locke is willing to undo private property rights once they have served his polemical purpose—that is, once we leave the state of nature and enter civil society, where a continuation of inviolate property rights would threaten the essential powers of government.

This interpretation[45] not only takes into account the fact that Locke's text does not end with the property chapter, but proceeds to the creation of civil society; it also accounts much better than the libertarian view, for the historical role Locke's property argument played in his opposition to the last Stuart kings, Charles II and James II.[46]

As a recent commentator has written, "Locke never defines precisely what the public good is, save what 'the good, prosperity, and safety of the Society shall require.' "[47] However vague it remains, Locke's invocation of the common good cannot be deontological, or else he could not have insisted that we "annex" our property to the community and no reason for him to equate the property rights that survive this annexation with the public good.[48] In civil society, private property is not what people acquire by mixing their labor with the common stock; rather, it consists of "the goods, which *by the Law of the Community* are theirs."[49] In short, Locke transforms his deontological theory of property in the state of nature into a consequentialist theory in civil society.

Ultimately, of course, Locke has no authority over us; we are interested in his views not because they have any inherent normative force, but because they may contain useful insights. Such an insight, arguably, prompts Locke's reluctance to turn his theory of property in the state of nature into a policy recommendation that would have undesirable consequences in civil society. Once the polemical purpose of his property chapter is served, its libertarian

45 *See* Friedman, *supra* note 37; *see also* THOMAS A. HORNE, PROPERTY RIGHTS AND POVERTY: POLITICAL ARGUMENT IN BRITAIN 1605-1834 (1990).

46 Locke was, after all, arguing for a right to revolution. Libertarian property rights would only issue in such a right if the Stuarts were somehow more guilty of violating property rights than other kings had been. This, however, is not what their opponents charged. They charged that by scheming to impose Catholicism on England, the Stuarts were guilty of advancing their own interests over those of the public. By converting the libertarian property rights of the state of nature into a vague mandate for government to pursue the common good, Locke was able to make his property argument serve his political purposes while avoiding the untoward consequences of libertarianism. Jeffrey Friedman, *Locke as Politician*, 2 CRITICAL REVIEW 64-101 (1988).

47 Friedman, *supra* note 37, at 18 (quoting LOCKE *supra* note 35, § 130).

48 *See supra* text accompanying notes 36-37.

49 LOCKE, *supra* note 35, § 138 (emphasis added).

implications are scuttled. What is particularly interesting about this is that we find the same process at work in modern writers who apply Lockean theory to questions of intellectual property.

Professor Wendy Gordon, for example, who in her article in the *Yale Law Journal* derives the legitimacy of "anticopying rights"[50] from Locke's deontological theory of natural property acquisition, then turns to argue against more expansive copyright protections because such protections would conflict with "fundamental human entitlements;"[51] that is to say, "when the public's claims conflict with a laborer's, the public's claims should prevail."[52] So Gordon, like Locke, defends absolute private property rights in the state of nature only to undo them, at least in part, in civil society. However, Gordon focuses on Locke's deontological state-of-nature theory without considering that Locke liquidates natural property rights when civil society is founded. Therefore, when it comes time for Gordon to limit those rights, she cannot have recourse to Locke's consequentialist invocation of the public good. Instead she relies on questionable interpretations of Locke that have recently been proposed in an effort to give his property theory a more left-wing slant.[53] While Gordon reaches similar conclusions to those of this Note, she does so for deontological rather than consequentialist reasons. This is why she expresses the public's interest in limiting authorial rights not in terms of the cultural gains to be harvested from this limitation, but in terms of protecting "fundamental human entitlements" from violation.[54] One set of rights is to be used to trump another set. This multiplication of rights overlooks the insight that is implicit in Locke's emphasis on "the good, prosperity, and safety of the Society."[55]

Gordon derives the secondary user's right to use the common from Locke's argument that one may only appropriate as much of the common property as one can use without wasting it.[56] But Locke spends many pages explaining that this limitation on appropriation expires with the advent of money,[57] for money allows peo-

50 *A Property Right in Self-Expression*, *supra* note 4, at 1549.

51 *Id.* at 1565.

52 *Id.* at 1538.

53 The *locus classicus* of the revisionist interpretation of Locke's property theory is JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980). Critical views of Tully's textual exegesis may be found in reviews of the book. *See, e.g.*, J.L. Mackie, 32 PHIL. Q. 92 (1982); Jeremy Waldron, *Locke, Tully, and the Regulation of Property*, 32 POL. STUD. 99 (1984).

54 *See supra* text accompanying note 51.

55 LOCKE, *supra* note 35, § 130.

56 *A Property Right in Self-Expression*, *supra* note 4, at 1542 & n.52.

57 LOCKE, *supra* note 35, § 50.

ple to appropriate unlimited amounts of property without it spoiling.[58] In theory, once money is in use, one may appropriate as much of the common as desired; Locke evidences no reluctance to accept that this marks the end of the common and, by the same token, the end of the general right to use it.

Gordon's theory of the commons differs from Locke's in another telling respect. For Locke, the common property was an inheritance from God, untouched by human labor prior to its appropriation by individuals. Gordon, by contrast, in speaking of culture as a common of intangibles, is referring to works and ideas that are manifestly the product of human labor. So while it is true that both Locke's and Gordon's "commons" consist of things that are "already in existence,"[59] the crucial difference is that in Locke the commons are a *gift* of unowned property from its Creator to humanity[60] while Gordon's "common's," *according to the labor theory of appropriation from which she begins,* represents a *taking* of cultural property from its creators—human beings. To assert a universal right to use this "commons," and to equate legal barriers to such use with the imposition of harm, is to directly contradict the argument in Locke's property chapter, according to which labor puts an end to common property and the laborer may rightfully exclude all others from his private property.

Nonetheless, Gordon's approach could be defended on the grounds that, even if Locke did not envision doing so, we may feel free to temper his insight that labor creates a property right with the (arguably) non-Lockean insight that one person's property rights should not be allowed to leave others worse off. This line of argument will not be considered here, except by comparison to what is perhaps a more genuinely Lockean insight: that the ultimate standard by which property arrangements should be judged is the enhancement of the public good, not the defense of "rights"[61]—whether the alleged rights of laborers, of the public, or of both in competition with each other. Ultimately, even in the state of nature, Locke's argument is consequentialist. The reason for individuating the commons is that otherwise, God's donation would not "be of any use, or at all beneficial to any particular Man."[62] Locke similarly defends the appropriation of land not only as a matter of intrinsic justice, but as benefitting everyone by

58 *Id.* § 47.
59 *A Property Right in Self-Expression, supra* note 4, at 1559.
60 LOCKE, *supra* note 35, § 25.
61 *See supra* text accompanying notes 47-49.
62 LOCKE, *supra* note 35, § 26.

"increas[ing] the common stock of mankind."[63] And then, finally, after we leave the state of nature, we cede our property to the jurisdiction of the community[64] and judge the legitimacy of government by its pursuit of the common good.[65] The advantage of taking this tack is that it does not express the concern for human well-being in deontological formulations that preclude the investigation of which laws will, as an empirical matter, advance the common good.

B. *The Hegelian Justification*

Hegel defended a deontological justification of property of the kind that Locke repudiated. Hegel's private property is a moral entitlement not because one has invested one's labor in the work, but because one has invested one's will: "A person has the right to place his will in any thing. . . . The thing thereby becomes [his]."[66] Thus, property, because it embodies the will or personality of its originator, must belong to that person.[67] More specifically, it is only by embodying one's will or personality in physical property that one develops an objective sense of self, recognizable to the individual and to the world.[68] It is because each person's will must actualize itself that "everyone must have property."[69]

Under Hegel's theory, when the property is tangible and unowned, it is the rightful object of appropriation:

> All things . . . can become the property of human beings, because the human being is free will and, as such, exists in and for himself, whereas that which confronts him does not have this quality. Hence everyone has the right to make his will a thing . . . or to make the thing his will, or, in other words, to supersede the thing and transform it into his own.[70]

Hegel claimed that "if I have the whole use of the thing, I am its owner; and beyond the whole extent of its use, nothing remains which could be the property of someone else."[71] This would seem to suggest that Hegel's conception of property is an absolutist one.

63 *Id.* § 37.
64 *Id.* § 138.
65 *Id.* § 131.
66 G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT § 44 (Allen W. Wood ed., Cambridge University Press 1991) (1821).
67 Hughes, *supra* note 4, at 329. For Hegel, "property is justified as an expression of the self." G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT § 44 (T.M. Knox trans., Oxford University Press 1969) (1821).
68 JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 353 (1988).
69 *Id.* at 350.
70 HEGEL, *supra* note 66, § 44.
71 *Id.* § 61.

However, a closer analysis shows that in the case of intellectual property this is neither logically nor textually true. Logically, we must ask whether an author in fact does, or can, have the whole use of the thing. As Professor Jeremy Waldron argues, it is possible with physical property to have the whole use of the thing; for example when one eats an apple "[his] consumption of it makes it unavailable for others' use forever."[72] Intellectual property, however, is different. Any number of people can use a work of authorship without using up or wearing out the original.[73] Thus, Waldron argues, "a copier's use of an author's prose cannot impact on anyone else's actions, and so *a fortiori* cannot impact on the author's freedom of action."[74]

On the one hand, it is true of tangible property that "[w]hen I possess something, the understanding at once concludes that it is not just what I possess immediately that is mine, but also what is connected with it."[75] On the other hand, when the product is a work of art or the expression of ideas, Hegel believes that once the author has decided to introduce it into the marketplace, it is impossible for her to possess all that "is connected with it."[76] The buyer of a book, for example, may "appropriate the thoughts which it communicates, or the technical invention which it embodies, and it is this possibility which at times . . . constitutes the sole purpose . . . of such things and their value as acquisitions."[77]

Hegel rejects copyright (at least in ideas) not only because it is impossible to prevent others from using the original author's work, but because he recognizes the contributions of secondary authors and the embodiment of their personalities in derivative works. Thus Hegel, in what can be seen as an early version of the transformation doctrine,[78] argues that when the copy, or by extension, the derivative work, embodies the "intellectual and technical skill of the copyist," the new author is entitled to property in the creation.[79] As one contemporary intellectual property theorist has explained: "A sculptor or painter physically embodies his will in the medium and produces one piece of art. When another artist copies this piece Hegel thinks that the hand-made copy is 'essentially a product of the copyist's own mental and technical ability' and does not infringe upon the original artist's property."[80] If, however, the copy is merely a product of a "mechanical process" such as a printing press, no property right would ensue because there has been no self-expression, i.e., there has been no imposition of the copier's will onto the copy.[81] Thus Hegel is critical of anthologies and compendia, which merely "alter[ ] . . . the property of others [, giving it the] . . . superficial imprint of being *one's own.*"[82]

Nonetheless, modern commentators have for the most part used Hegel to defend near-absolute copyright protections, including derivative rights. Professor Lacey explains that those who base their support for copyright protection on Hegel are more justified than those who use Hegel to defend general property rights.[83] This is because "works of art are created through a person's mental labor, and thus embody more of her individual essence of being than works created through routine physical labor. Since artistic works are part of an artist's very identity, she never should be completely separated from the work."[84] Another writer suggests that for Hegel, "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self."[85] Here, unlike with Locke, the interpreters are on much stronger ground in seeing Hegel's underlying principle as being deontological. Hegel writes,

> a person in making decisions is related to a world of nature directly confronting him. . . . Personality is that which struggles to lift itself above this restriction and to give itself reality, or in other words to claim that external world as its own. . . . A person must translate his freedom into an external sphere. . . . [T]his sphere distinct from the person, the sphere capable of embodying his freedom, is likewise determined as what is immediately different and separable from him. What is immediately differ-

72 Waldron, *supra* note 4, at 871.

73 *Id.* For this reason, economists have labeled intellectual property a public good. John Cirace defines public goods as "those whose consumption by individual A does not preclude consumption by B, C, D, or others." John Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other than for Profit or Sale Constitute Fair Use? An Economic Analysis of the* Sony Betamax *and* Williams & Wilkins *Cases*, 28 ST. LOUIS U. L.J. 647, 657 (1984) (footnote omitted).

74 Waldron, *supra* note 4, at 871.

75 HEGEL, *supra* note 66, § 55.

76 *Id.*

77 *Id.* § 68.

78 *See infra* notes 171-74 and accompanying text.

79 HEGEL, *supra* note 66, § 68. This seems to be the underlying justification in cases such as *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* which allowed mezzotint engravers a copyright for their reproductions of old masters. 191 F.2d 99 (2d Cir. 1951).

80 Hughes, *supra* note 4, at 338.

81 *See id.*

82 HEGEL, *supra* note 66, § 69. Similarly one would not be free to make facsimiles of another's work except for one's personal use. *See* Hughes, *supra* note 4, at 338 ("The copy sold is for the buyer's own consumption; its only purpose is to allow the buyer to incorporate these ideas into his 'self.' ").

83 Lacey, *supra* note 3, at 1542.

84 *Id.* Lacey notes that the Hegelian view of intellectual property would also support the idea of moral rights. *Id.*

85 Hughes, *supra* note 4, at 330.

> ent from free mind, is that which, both for mind and in itself, is the external pure and simple, a thing, something not free, not personal, without rights[86]

—in other words, property.

Hegelian defenses of extensive intellectual property rights, however, rest on a fundamental misunderstanding of the nature of culture.[87] To view cultural products as fundamentally expressions of the author's original personality presupposes that culture is primarily a matter of self-actualization or monologue[88] rather than communication or dialogue. All authors, if they wish to engage in a culture, must be able to communicate in a language that is understood by that culture. Gordon points out that:

> New creators inevitably and usefully build on predecessors. . . . [T]he new creator speaks out of a history, and the very value of her contribution will depend upon her advancing upon what has come before. . . . Artists learn from their predecessors . . . the very traditions that give meaning to their productions. . . . Communication depends on a common language and common experience.[89]

Unlike the Lockean commons—a donation from God to which the initial owner has made the only human contribution—culture is itself an ongoing enterprise in which the value of one's work, including work that criticizes existing works, depends on the contributions of others. In this setting, there is no particular reason to value the originality of one's contribution. Indeed the more original a work, the *less* culturally valuable it may be. The ultimate in originality would be to express one's self in a language of one's own invention. Such a work, gibberish to others, would be worthless except to its author.[90] Benjamin Kaplan pointedly asks "what a Hottentot would see in *Hamlet*."[91] Shakespeare could not communicate with Hottentots because, one could say, from the standpoint

86 HEGEL, *supra* note 66, §§ 39, 41-42.

87 These views also represent a serious misreading of our copyright regime under which no work is protected in its entirety, only the expressive elements of a work are protected. *See generally* Baker v. Selden, 101 U.S. 99 (1879).

88 *See* Netanel, *supra* note 22, at 359. Hegel suggests "that a conceptual separation between person and external thing is requisite to freedom, self-actualization and moral responsibility." *Id.*

89 *A Property Right in Self-Expression, supra* note 4, at 1556.

90 Many artists, particularly those in the avant garde, will blaze a new path and may not be understood by the general public at first. The point, however, is that being avant garde is not an end in itself; its value lies in the fact that it may be a useful means for discovering new truths.

91 BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 77 (1967).

of their culture, he is *too* original. Conversely, Hottentot art might be too original for Shakespeare to understand.

The consequences of the Hegelian emphasis on self-expression might best be seen in the world of avant-garde art. Daniel Bell argues that avant-garde artists risk solipsism because they are trying to be original—that is, they are too intent on expressing themselves, as opposed to communicating with others.[92] This emphasis on self-expression can be said to have culminated in an "impulse toward the new and original" that is leading in the twentieth century to cultural incoherence.[93] For Bell, valuing art for its originality contradicts the very nature of culture as dialogue by implicitly substituting the view that culture is a collection of monologues, the more original—rather than the more true or beautiful—the better.[94] Bell writes, "Men are enjoined to make themselves anew rather than to extend the great chain of being."[95] Promoting self-expression over communication is thus premised on a misunderstanding of what culture is, and would logically lead to the replacement of a common culture with disconnected monologues. This point would seem to have particular application in defending the value of derivative works.

C. *Conclusions on Deontology*

Deontological formulations of property rights obscure important insights about the goals intellectual property should serve. For instance, Gordon quotes Salman Rushdie's observation that "those who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts."[96] Rushdie may be trying to say that the consequences of people's being able to alter their cultural heritage are desirable; perhaps they will be happier if they do not feel as if they are culture's passive playthings or if they can gain the sheer enjoyment of laughter. This could be an intriguing line of inquiry, perhaps allowing us to compare the benefits of living in modern secular cultures in which individual autonomy, critical dialogue, and even humor are encouraged, against the possible disadvan-

92 *See* DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 33-34 (1976).

93 *Id.* at 33.

94 *Id.* at 132.

95 *Id.*

96 Salman Rushdie, *Excerpts from Rushdie's Address: 1,000 Days 'Trapped Inside a Metaphor,'* N.Y. TIMES, Dec. 12, 1991, at B8, *quoted in* Gordon, *A Property Right in Self-Expression, supra* note 4, at 1536.

tages of cultural instability, cynicism, and disenchantment. Rushdie's power-talk, however, like deontological rights-talk closes down such inquiry in advance. If our goal is to give people the right to retell and joke about their culture, then whether they in fact use this right, and whether they do so effectively, become non-issues. The actual, *a posteriori* effects of a system of law containing such rights are subordinated to the *a priori* assertion that they serve "intellectual, expressive, and artistic needs,"[97] such that we would be injured if these needs were not embodied in rights. Is it possible that for the vast bulk of human history these "needs" went unrecognized? If so, one wonders in what sense they are truly needs. "There is little," Gordon contends, "that could compensate for loss of freedom of expression."[98] Yet for millennia few, if any, human beings had such freedom. Are we really prepared to say *a priori* that there could not possibly have been any redeeming features of premodern, non-Western cultural life?

This question is one example of the type of inquiry that is obscured by the monological view of culture. Once we exchange this view for a dialogical one, we can also move from the deontological assumption that self-expression is an end in itself toward a willingness to evaluate critically the consequences of different types of cultural dialogue. This will be the aim of the final section.

III. History of the Derivative Right

The courts and legislature have, in effect, progressively adopted something very similar to the deontological view of copyright.[99] It has been noted that there has been a "quiet revolution" in the copyright law.[100] For example, the duration of copyright protection has gradually increased from a fixed term of fourteen years with a fourteen-year renewal term under the Statute of Anne,[101] to a twenty-eight year term with a possible twenty-eight year renewal under the 1909 Act,[102] to the current term of the life of the author

97 *A Property Right in Self-Expression*, *supra* note 4, at 1555.

98 *Id.* at 1572.

99 Many commentators have also used deontological language, particularly in evaluating the rights of secondary authors. *See* Waldron, *supra* note 4; Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009 (1990); KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES (1993); PATTERSON & LINDBERG, *supra* note 9; Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991); *see also* KAPLAN, *supra* note 91 *passim*. *But see* Yen, *supra* note 4.

100 Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 209 (1982).

101 Act for the Encouragement of Learning 1709, 8 Anne, ch. 19.

102 17 U.S.C. § 24 (1909).

plus fifty years under the Copyright Act of 1976.[103] The right of the author to prevent others from adapting and transforming her work into new works, known as the adaptation or derivative right, has also been dramatically expanded.[104]

It was only slightly more than one hundred years ago that an author's statutory entitlement comprised no more than the right to control literal reproduction of her work.[105] In an 1853 case, *Stowe v. Thomas*,[106] the Circuit Court in eastern Pennsylvania held that an unauthorized German translation of *Uncle Tom's Cabin* did not infringe Harriet Beecher Stowe's copyright.[107] The court stated that when an author sells his book, "the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed."[108] The *Stowe* Court went on to discuss with approval the argument that "[c]ertainly, bona fide limitations, translations, and abridgments . . . may be considered new [and, therefore, noninfringing] works."[109] The court reasoned that the author's copyright encompassed only the right to prevent literal copying.[110]

The Copyright Act of 1870 added two more sticks to the original author's bundle of rights: the right to dramatize and the right to translate.[111] This was the first legal recognition of derivative rights,[112] although it was not considered an infringement to copy a

103 17 U.S.C. § 302 (1988). In its present form the Copyright Act does not allow for a renewal term as previously allowed by the Statue of Anne and the 1909 Act.

104 Goldstein, *supra* note 100, at 214.

105 *Id.*

106 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

107 *Id.* at 206. See also *Burnett v. Chetwood*, 35 Eng. Rep. 1008, 1009 (Ch. 1720), decided under the Statute of Anne, in which the court found a translation to have been an original work of authorship incapable of infringing on the underlying work because the translation was a *different* book, and the translator was by virtue of the skill brought to the task, its author.

108 23 F. Cas. at 206-07.

109 *Id.* at 207 (quoting Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769)) (Willes, L.J.). Presumably the court considered such works to be new and noninfringing, because of the effort and creativity required in their creation.

110 Even this right was not absolute then or now, since copyright law has never been seen as giving an author the right to prevent another from making copies of a work (at least by pen or typewriter). *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (per curiam). Whether photocopying for personal use is an infringement is less clear after *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). Recently the Second Circuit has clarified that even handwritten copies may be infringing. American Geophysical Union v. Texaco Inc., No. 92-9341, 1994 U.S. App. LEXIS 30437, *36 n.10 (2d Cir. Oct. 28, 1994).

111 Act of July 8, 1870, Ch. 230, § 86, 16 Stat. 198, 212. It has been suggested that the addition of these rights was a direct response to *Stowe*. *See* PATTERSON & LINDBERG, *supra* note 9, at 77.

112 Goldstein, *supra* note 100, at 214.

work for personal use. It was still possible to say, as one court did in 1888, that

> the effect of a copyright is not to prevent any reasonable use of the book which is sold. I go to a book-store, and I buy a book which has been copyrighted. I may use that book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put it upon the market, for in so doing I would infringe the copyright. But merely taking extracts from it, merely using it, in no manner infringes upon the copyright.[113]

The 1909 Copyright Act was more expansive,[114] adding several other derivative rights to the bundle.[115] Section 1(b) of the 1909 Act gave authors the right to:

> translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.[116]

The legislative history of the 1909 Act reveals how the property bundle came to be increased.[117] Of the twenty-five organizations invited by Congress to participate in the conference to reform the copyright law, only two could be said to represent the general public: the American Bar Association and the National Education Association.[118] The remaining twenty-three groups represented the narrow interests of publishers, authors, dramatists, architects, newspapers, theater managers, lithographers, designers, sculptors, and photographers, that is, those who would profit by the expansion

113 Stover v. Lathrop, 33 F. 348, 349 (C.C.D. Colo. 1888).

114 PATTERSON & LINDBERG, *supra* note 9, at 77 ("[T]he 1909 act . . . was the most significant enhancement of the copyright monopoly and thus marked the turning point in American copyright law.").

115 17 U.S.C. § 1(b) (1909).

116 *Id.*

117 Congress, however, was not entirely unaware of the need to balance the grant to authors against the needs of the public. The House Report indicates that Congress realized that if the grant to authors was too extensive "the progress of science and useful arts would not be promoted, but rather hindered." H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909), *reprinted in* LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT vol. 6, pt. S, 7 (E. Fulton Brylawski and Abe Goldman eds., Fred B. Rothman & Co. 1976) [hereinafter LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT].

118 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, *supra* note 117, at vol. 6, pt. S, iii-iv. Even these two organizations cater to special interests, although their constituencies are broader than the other groups represented, and they could conceivably be said to have interests on both sides of the debate.

and extension of copyright protection.[119]

The same criticism has been made of the creation of the 1976 Copyright Act.[120] As the Supreme Court noted, that Act "was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress."[121] This Act is the most generous to authors.[122] It grants five[123] exclusive rights to the author[124] of an original[125] work:[126] the right to make copies of the work,[127] the right to adapt, translate, or make other derivative uses of the work,[128] the right to sell or otherwise transfer ownership in copies of the work,[129] the right to publicly perform the work,[130] and the right to publicly display the work.[131] As we saw, the Act also extends the duration of copyright protection to the life of the author plus fifty years.[132]

119 *Id.* The transcript of the conference shows that none of the representatives from any of these groups took into account the effect of their demands on the general public. Each representative stated what he felt would be in the best interest of his own guild. *Id.*

120 Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

121 Community for Creative Non-Violence v. Reid, 490 U.S. 730, 743 (1989); *see also* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860-61 (1987) ("[T]he statutory language . . . evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."). The Act can be seen as a series of measures designed to "meet the needs of various vested-interest groups." PATTERSON & LINDBERG, *supra* note 9, at 92.

122 *See* Yen, *supra* note 4. Yen postulates that the "continued expansion of copyright would hardly seem surprising" in light of the natural tendency of judges to view property in Lockean absolutist terms coupled with the "plaintiff's economic argument that more copyright protection necessarily improves welfare by inducing more creative labor." *Id.* at 547. Although no one denies that the 1976 Act gives more protection to authors than ever before, one recent book has pointed out that by explicitly preempting common-law copyright Congress has at least firmly rejected the idea of copyright as a natural right. PATTERSON & LINDBERG, *supra* note 9, at 120.

123 Certain visual artists are given the additional rights of attribution (the right to have one's self identified as the work's author) and integrity (the right to prevent one's work from being mutilated or distorted). These rights are commonly referred to as moral rights. 17 U.S.C. § 106A (1990).

124 The word "author" is used throughout this Note in its broad copyright sense as any creator of a work entitled to copyright protection. The 1976 Copyright Act lists eight categories of works entitled to protection: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. *Id.* § 102.

125 The originality requirement generally demands merely that the work owes its origin to the author, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); is more than an idea, procedure, process, system, concept, principle, or discovery, 17 U.S.C. § 102(b); and incorporates a modicum of creativity, Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

126 17 U.S.C. § 106 (1988).

127 *Id.* § 106(1) (to reproduce the copyrighted work in copies or phonorecords).

128 *Id.* § 106(2).

129 *Id.* § 106(3).

130 *Id.* § 106(4).

131 *Id.* § 106(5).

132 *Id.* § 302.

The next section will argue that this trend towards increasingly expansive authors' rights is not designed to achieve the goals of a sound cultural policy.

IV. A Consequentialist Approach

There are two questions that the consequentialist model must answer: What are the best interests of society? And how should the positive law be structured to achieve them? Most consequentialists agree that the goal of copyright law is to make possible the greatest number of works for public use.[133] Under this model, the only reason for giving authors any rights in their creations is to provide them with an incentive to share their works with the public.[134] This is achieved, so it is argued, by striking a bargain with the author granting her a limited monopoly in exchange for which her work must enter the public domain after a fixed period of time.[135] Since the concern is only with the public good and not with rewarding authors for their labor or contributions, the goal of the consequentialist model is to find the minimum level of incentives possible so that society can make the best possible bargain for itself.[136] Another way of framing this issue is to ask what exactly comprises or should comprise what the Constitution calls the authors' "exclusive Right to their respective Writings and Discoveries."[137] That is, if we agree that it is in the best interests of society to have an active new works market and a burgeoning public domain, how should the positive law be structured to best achieve them?

As demonstrated earlier, the greater protections given to authors by both the 1909 and the 1976 Copyright Acts were the result of special interest forces and not the product of a legislative calculation aimed at providing greater incentives in order to achieve a richer cultural library.[138] The fact that works were created in profusion prior to the increased protections of the two Acts would seem to indicate that the additional grants may not have been necessary from an instrumentalist perspective. Patterson and Lindberg, questioning the necessity of *any* copyright protection, make this point rather forcefully:

> A common presumption seems to be that without copyright, authors would not create and publishers would not disseminate works—a presumption whose logic fails in the face of reality. Thousands of books consisting of public-domain works . . . are published now without copyright protection. And both radio and television were born, prospered, and passed through their golden years without the benefit of copyright protection for live broadcasts. Even so, the vested interests composing the copyright industry take the view that only absolute copyright protection can prevent a return to the Dark Ages for our culture.[139]

This point has also been made by others critical of the need for copyright. Recently appointed Supreme Court Justice Stephen Breyer, in an article written during the course of the hearings to compose the 1976 Act, attempted to persuade Congress to question its slide down the path toward greater protection.[140] Like Patterson, Breyer pointed out that "[a]uthors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection."[141] Breyer continues: "In the nineteenth century American publishers sold countless copies of British works and paid their authors royalties despite the fact that American copyright law did not protect British works."[142] Both authors, however, stop short of arguing for the abolition of copyright, recognizing that some incentive structure is necessary in order to keep cultural production at a desirable level.[143] What is

133 *See supra* notes 7-10 and accompanying text.

134 Leval, *supra* note 8, at 168.

135 Patterson & Lindberg, *supra* note 9, at 52; *see also* Pamela Samuelson, *Creating a New Kind of Intellectual Property*, 70 Minn. L. Rev. 471, 511 (1985) (arguing intellectual property is a social contract between authors and society).

136 Litman, *supra* note 120.

137 U.S. Const. art. I, § 8, cl. 8. According to Patterson and Lindberg, the term "exclusive right" must be read in its eighteenth-century context as meaning merely "the exclusive right to publish." Patterson & Lindberg, *supra* note 9, at 51.

138 *See supra* notes 114-132 and accompanying text.

139 Patterson & Lindberg, *supra* note 9, at 192.

140 Stephen Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281 (1970) (citation omitted). *But see* Barry Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. Rev. 1100 (1971).

141 Breyer, *supra* note 140, at 282; *see also* Hurt and Schuchman, *The Economic Rationale of Copyright*, 56 Am. Econ. Rev. 421, 425 (1966) (discussing other motivations for authors to produce, e.g., political partisanship, altruism, desire for fame, desire for tenure, etc.). The dissent in *American Geophysical v. Texaco* makes the argument that since the goal of copyright is to "stimulate *creativity*" as opposed to maxamizing publishers' profits, researchers should be able to freely copy journal articles, since from the perspective of the journal authors—the ones who create—their motivation is "professional advancement and academic tenure," and "[f]rom their point of view, . . . what is truly important is the wide dissemintion of their works to their colleagues." No. 92-9341, 1994 U.S. App. LEXIS 30437, at *96 (2d Cir. Oct. 28, 1994) (Jacobs J. dissenting) (citation omitted).

142 Breyer, *supra* note 140, at 282-83 (citation omitted).

143 Breyer argues that while the case for copyright is weak, at least with respect to "high-cost high-volume" books, there is a risk of loss of production. *Id.* at 321. Similarly, Patterson and Lindberg do not advocate outright abolition. They write that "the only protection that copyright owners need is protection against the piracy of their works by competitors in the marketplace." Patterson & Lindberg, *supra* note 9, at 192. Along the same lines, Landes and Posner concede that "[s]ome copyright protection is necessary to generate the incentives to incur the costs of creating easily copied works." William M. Landes & Richard

called for is an empirical analysis in order to determine what level of copyright protection (if any) is necessary to ensure a continued flow of original works.[144] Unfortunately "the empirical information necessary to calculate the effect of copyright law on the actions of authors . . . is simply unavailable."[145] Quite simply, there are no empirical data available to support the idea that copyright protection encourages authors to produce.

If it is hard to justify copyright protection, however, it is even harder to justify authors' rights to prohibit or benefit from others' derivative uses of their original works.[146] While both Breyer and Posner agree that some incentive is necessary in order to stimulate creation, Breyer notes that "it is difficult to say that the power to sell subsidiary rights is essential to avoid a serious production loss."[147] Breyer explains that the income generated from the derivative or subsidiary-rights market is

> highly speculative and its influence upon the decision to create or to publish must be remote. Also, much subsidiary right income is earned by the creators and publishers of successful high-volume works—works which are few in number and which may well be published without the additional incentive that subsidiary right income provides.[148]

A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 335 (1989); *see also* Tyerman, *supra* note 140, at 1125 (arguing that present levels of book production would decrease if copyright protection were abolished).

144 The guiding principle for anyone contemplating such a study should be an effort to determine what individuals, ignorant of their prospective position in society, as author, or artist, or consumer, i.e., behind a Rawlsian veil of ignorance, would choose as a fair distribution of statutory rights. JOHN RAWLS, A THEORY OF JUSTICE (1971).

145 Yen, *supra* note 4, at 542-43.

146 This analysis assumes that there are only two choices: either free access for secondary users or an absolute property right for the original author that would encompass the right to sell, or refuse to sell, the ability to create derivatives. A third alternative, however, would be to institute a system of compulsory licenses that would allow a secondary author to borrow others' work at will contingent on payment of a fee to the copyright holder. This third alternative can be justified on either deontological or utilitarian grounds. The deontological rationale assumes that the author's bundle of rights include the right to prepare derivatives, and argues that just as an author or artist must pay for paper, ink, and canvas, she should pay for expression taken from another. The utilitarian justification also assumes the status quo distribution of intellectual property rights, but looks to the net benefit to society, in that copyright holders would no longer be able to prevent critical uses of their work, and artists would be freed to utilize their creativity without the specter of a lawsuit.

Both of these traditional justifications accept the status quo distribution without question. However, under a purely consequentialist analysis, one which asks what the bundle *should* look like, it is difficult to explain why a compulsory licensing system for derivative works would be necessary. The question that would have to be answered before such a system should be imposed is whether the expectation of future royalties from the licensee is a *necessary* incentive. That is, would production of original works of authorship shrink to such an extent that it would not offset the new works that would be created by the increased access and dissemination? Based on the forgoing economic analysis, and the history of copyright protection, there is no reason to think that society needs to strike this deal with its authors.

147 Breyer, *supra* note 140, at 311 n.117.

Breyer's analysis implicitly assumes that it is good to encourage derivative works. In opposing the Hegelian notion that originality is valuable in itself, we can find support for treating derivative and original works as being presumptively equivalent, but this is not the same as showing that either original or derivative works necessarily should be encouraged. The argument against viewing culture as a monologue of original works led to the view that culture should be evaluated on the basis not of originality, but of the quality of the dialogue it embodies. (Dialogue is no more an end in itself than monologue.) How, then, can we justify the economists' assumption that when it comes to either original or derivative works, "more is better"?

An argument to the effect that "more is better" is made by John Stuart Mill, who contends that the greater the quantity of works in the marketplace, the more likely that truth or beauty (i.e., quality) will emerge.[149] He writes, "[E]very opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious," and, therefore, ought to be encouraged.[150] The point of the critique of Hegel is that derivatives, no less than originals, are likely to embody some portion of truth or beauty. In conjunction with Mill's argument, then, the proper goal of copyright law should presumably be the proliferation of works, whether original or derivative, in the hope of producing a more valuable dialogue than otherwise. Given this presumption, and the economic arguments about the comparative effects of copyright and derivative protections, it would appear that even if the laws should continue to protect original works they should not prevent subsequent authors from making new original works. Such a system would result in a greater quantity of works because once artists have free access there will be more derivatives created, whereas the economic evidence, while admittedly scarce, is nevertheless fairly conclusive that the resulting disincentive from revocation of the monopoly in transformative works would result in only a slight decrease in the production of new copyrightable works.[151] Abolishing authorial rights in derivative works would

148 *Id.* Breyer also notes that less than four percent of book writers ever realize motion picture subsidiary-rights income. *Id.*

149 JOHN STUART MILL, ON LIBERTY: WITH THE SUBJECTION OF WOMEN; AND CHAPTERS ON SOCIALISM (Stefan Collini ed., 1989).

150 *Id.* at 47.

151 In the seminal essay on law, economics and copyrights, Landes and Posner inform us

likely mean that fewer people would cease creating than would be encouraged to create by their freer access to existing works.

Landes and Posner's economic analysis supports this argument. They write that "[t]he less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work."[152] Conversely, they continue, the effect of increased protection is to raise the cost of creation and "thus, paradoxically, perhaps lower the number of works created."[153] Common sense tells us that the lower the costs, the greater the quantity produced.[154] Mill suggests that because we are fallible beings we ought never suppress another's speech for we cannot ensure that there is no truth (or, one might suggest, other desirable attributes, such as beauty) in that speech.[155] Increasing copyright protections beyond the minimum level required by the incentive system surely results in just such a suppression.

There are numerous ways of creating a derivative work, some requiring more creativity than others. A derivative can be as creative as *West Side Story,* or as completely appropriative as a Sherrie Levine photograph.[156] It is the right to market and prepare deriva-

that removing from the original author the right to sell property in adaptations of her work will not result in original works not being created; it would, at most, provide an incentive to primary authors to withhold their work from the market until they have a chance to prepare derivatives themselves. Landes & Posner, *supra* note 143, at 355. Thus, a novelist hoping to make money by adapting her work for the screen, could either switch to writing screenplays, or not release her novel until she has written and is ready to market a screenplay as well.

152 *Id.* at 332.

153 *Id.*

154 It has been argued that removing preexisting works from the cultural palette would result in the creation of greater quality works because secondary authors would be forced to be more innovative and more original. *See* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works,* 42 J. COPYRIGHT SOC'Y (forthcoming 1994). The argument that it will result in greater originality, however, is subject to the same criticism offered against Hegel. It assumes that originality is good in itself, and is to that extent monological. It seems to assert that cultural movement that is unconnected to what has come before is better than movement that is so connected.

The argument that it may result in greater innovation can be defended on consequentialist grounds to the extent that greater innovation may lead to greater truth or beauty. However, it seems that at least in academic scholarship those capable of innovating will be unlikely to settle for merely copying another's work; and in the world of art, the argument unjustifiably presupposes that radical innovation is better than derivative innovation.

155 MILL, *supra* note 149, at 29 ("No Christian more firmly believes that Atheism is false, and tends to the dissolution of society, than Marcus Aurelius believed the same things of Christianity; he who of all men then living, might have been the most capable of appreciating it. Unless any one who approves of punishment for the promulgation of opinions, flatters himself that he is a wiser and better man than Marcus Aurelius . . . let him abstain from that assumption of the joint infallibility of himself and the multitude, which the great Antoninus made with so fortunate a result.").

156 Levine is one of the more blatant appropriation artists. Her work involves reproducing photographs by other photographers such as Edward Weston and Walker Evans,

tives that allows a novelist to demand payment for the film rights to her novel, an author to create an anthology that collects previously published works into a new edition,[157] and a writer to prevent an unauthorized biographer from quoting from his unpublished letters.[158] What all derivative works have in common, however, is that they are by definition "based upon one or more preexisting works."[159]

Under current law, a derivative work is a per se infringement of a protected expression since it is based upon a preexisting copyrightable work. This is so unless the underlying work is in the public domain or permission has been granted,[160] or unless its use is protected under the fair use doctrine, which provides an affirmative defense against an infringement claim.[161] While all derivatives incorporate protected expression, some copy the expression of another author only as a building block in creating a new work. Examples of this sort of derivative work would include use of a novel's plot and characters to create a movie, or Andy Warhol's use of trademarked products in his paintings. In *Kalem Co. v. Harper Brothers,*[162] the Supreme Court concluded that the preparation of a silent movie based on the appellee's book, *Ben Hur,* infringed the author's right to dramatize his work. The court found that it was not necessary to take the author's written expression; infringement could be found even when the secondary author had merely pantomimed the original author's story. The Court tersely dis-

mounting them, and displaying them as her own with titles such as "After Walker Evans." Other examples of appropriation art include Andy Warhol's paintings of Campbell's soup cans and Brillo pads and Duchamp's mustached Mona Lisa. For a fuller discussion of appropriation art, see John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law,* 13 COLUM.-VLA J.L. & ARTS 103 (1988); *Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion,* 13 CARDOZO ARTS & ENT. L.J. 91 (1994).

157 Since *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* an anthology of previously published material would only be entitled to copyright protection if the arrangement itself were sufficiently original. 499 U.S. 340 (1991).

158 *See* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd,* 811 F.2d 90 (2d Cir.), *cert. denied,* 484 U.S. 890 (1987); New Era Publications Int'l, ApS v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds,* 873 F.2d 576 (2d Cir. 1989).

159 17 U.S.C. § 101. The definitional section of the 1976 Copyright Act lists as examples of derivative works:

> a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

Id.

160 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.09[A] (1993).

161 17 U.S.C § 107.

162 222 U.S. 55 (1911).

missed Kalem's contention that it had merely taken the author's ideas, which are not protected.[163]

Kalem is a paradigmatic case for the kind of secondary work that this Note argues should be permitted. The film was a highly transformative work—it took not a word of protected expression, did not serve as a substitute for the original book, involved great creativity on the part of the film company,[164] and provided a valuable addition to culture.

A similar case, and one which could also be considered paradigmatic, is *Sheldon v. Metro-Goldwyn Pictures Corp.*[165] In *Sheldon*, the authors of a play entitled *Dishonored Lady* claimed that MGM's movie *Letty Lynton* had infringed their play.[166] Both play and movie were based on a Scottish murder trial (a public domain source) and the movie had copied no dialogue from the play.[167] Nevertheless, Judge Learned Hand held that the movie had copied some plot elements and characterizations and had, therefore, infringed the play's copyright.[168]

"Transformation" is a term of art popularized by Judge Pierre Leval to describe any highly creative use of copyrighted material.[169] According to Leval, in order to qualify for fair use protection, the secondary user must "add[ ] value to the original," thus transforming the original into a new creation with "new aesthetics, new insights and understandings."[170] For example, Leval explains, "a quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test. . . . If, on the other hand, the secondary use adds value to the original . . . this is the very type of activity that the fair use doctrine intends to protect

163 *Id.* at 56. Wendy Gordon makes the argument that sometimes expression itself can be a fact (or more accurately, a cultural artifact), which, like an idea, is not copyrightable, and in those cases the secondary user ought to be able to use a fair use defense. Gordon writes, "when the fact that the first work exists is an essential prerequisite for the second author's point to be made, then the special policies in favor of allowing free use of facts should come into play." Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992). Examples of such uses would include most parodies, virtually all copying done by teachers for classroom use, and most quotations taken in the preparation of scholarly, including biographical, works, and any creative use of a work which, despite being copyrighted, has become so much a part of the common culture that to be prevented from using or commenting on it would make the secondary artist worse off in the sense of causing some part of herself to be stifled. *Id.*

164 This is not meant to imply that creative labor is good per se, only that it may serve as a useful way of determining whether the secondary work usurps the market for the original.

165 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

166 *Id.*

167 *Id.*

168 *Id.*

169 Leval, *supra* note 9, at 1111.

170 *Id.*

for the enrichment of society."[171] Transforming another's work thus provides a powerful justification for the secondary user to receive the benefits of fair use.[172] As indicated by his emphasis on the "new" and on adding "value," however, Leval seems to accept the deontological view that leads to apotheosizing originality. But the creativity emphasized by the transformation standard need not be justified in this way. Instead, it can serve simply as a convenient demarcation between works that require copyright protection and those that do not, if the goal of maximizing cultural output is to be achieved. Thus, such derivative works as compilations,[173] condensations, elaborations, and modifications generally require very little creativity on the part of the secondary author, so it can be assumed that, when prepared without authorization, their only function is to usurp the market for the primary work. If the general public were allowed to market such easy-to-prepare substitutes, it might serve as a disincentive to the creation of the works they copy. For this reason, this type of derivative work neither is, nor should be, allowed without the permission of the original author, not because it is inherently less valuable because less original, but because allowing the preparation of these sorts of derivatives would result in a severe diminution of cultural output, and thus disserve the quantitative goal.

The transformation standard has recently been adopted by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*[174] Although both Leval and the Court have only applied the transformation standard to fairly limited takings,[175] there is no principled reason

171 *Id.* The doctrine of fair use has been described as "a common law standard that permits use under circumstances in which the benefit to the public, or another artist, outweighs the interest of the copyright holder." Lacey, *supra* note 3, at 1545. The doctrine is an explicitly consequentialist one.

172 Leval, *supra* note 9, at 1111.

173 Nimmer defines a compilation as a work which consists "merely of the selection and arrangement of preexisting material without any internal changes in such material." NIMMER & NIMMER, *supra* note 160, § 3.02, at 3-5. It is thus, by definition, nontransformative.

174 114 S. Ct. 1164 (1994). Until *Acuff-Rose*, the test for infringement was the levels of abstraction test articulated by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). Under this test, literal duplication constitutes infringement, but using only vague and abstract features from the plaintiff's work does not. *Id.* It is too soon to tell what effect the *Acuff-Rose* decision will have on the future use of Hand's test.

175 *Acuff-Rose* involved a taking for parodic purposes, which has traditionally been given more leniency by the courts since taking a sufficient amount is necessary to evoke the original in the mind of the audience. 114 S. Ct. at 1176. Parody is also given favored status since its critical purpose is one which the original author is unlikely to endorse. *Id.* at 1178. Additionally, the taking that was permitted by the Court amounted to only the first line of the original song; the case was remanded to determine whether repeated use of the plaintiff's guitar riff was permissible. *Id.*

why it could not be extended to apply to all derivative works.[176]

From at least Newton's day to the present, it has been noted there are no entirely new ideas; all authors and artists are dwarfs standing on the shoulders of giants.[177] Or, in modern copyright terms, "all intellectual creative activity is in part derivative."[178] Leval has argued this point quite forcefully. He notes that:

> Not since Athena sprung from the head of Zeus has an artist emerged fully formed. There is no such thing as a wholly original thought. Every idea takes a substantial part from what has gone before. Intellectual man, like biological man, displays the genes of his forbears. Titian's Venus and Goya's Maja are both present in Manet's Olympia. Cezanne's geometric reductions are found in Picasso's cubism. T.S. Elliot tells us that while lesser writers borrow, great writers steal.[179]

One must draw a distinction, therefore, between derivative uses that serve as mere substitutes for the "original" and those that transform what has come before.[180] The law should continue to prevent nontransformative derivatives, while encouraging transformative derivatives, in the hope that encouraging the maximum quantity of both derivative and original works will encourage more high-quality output than otherwise.

V. Conclusion

Against current justifications of copyright on deontological grounds, this Note shows that Locke actually subordinated his theory of property to consequentialist determinations of the sort that

176 In a recent symposium at the New York City Bar Association, however, Leval indicated that he would not be not willing to go this far. Leval ridiculed the idea that a secondary author could simply make a movie of their own, using a character that belonged to Walt Disney, without permission. Judge Pierre Leval, Remarks at the New York City Bar Association, Appropriation Art & Copyright (March 7, 1994). *See also* Leval, *supra* note 9, at 1111-12. Leval, like this author, draws the line at the point where the secondary author has taken so much as to remove the incentive for primary authors to create; however, he believes that point is at some point below what will be borrowed in preparing most derivatives. *Id.*

A further distinction must be made between Leval's position and that of this Note. For Leval transformation is a necessary condition to a finding of fair use, but alone it is not sufficient. This Note suggests it is both necessary and sufficient.

177 *See* Lacey, *supra* note 3, at 1533 n.8. This famous aphorism, used by creative minds from Sir Isaac Newton to Albert Einstein, served as the title of a book, R. Merton, On the Shoulders of Giants (1965). *Id.*

178 Leval, *supra* note 9, at 1109.

179 Leval, *supra* note 8, at 169.

180 This is not to say, however, that a consequentialist argument cannot be made to allow limited nontransformative copying when the public benefit clearly outweighs the cost to the copyright owner.

provide an alternative to the monological view of culture implicit in Hegel's deontology.

While the consequentialist approach could be seen as supporting the abolition of all copyright protection, this Note has assumed that incentive-based arguments have established the need for minimal protection. However, this Note has concluded that it is much harder to justify authorial rights to preclude transformative derivatives.