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NATURAL RIGHTS, SCARCITY & INTELLECTUAL PROPERTY

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INTRODUCTION

Property rights are a fundamental aspect of all classical liberal and libertarian philosophies. Within these ideological paradigms, there is little disagreement over the concept of self-ownership and property rights in tangible goods. But when looking to property rights in non-tangible or ideal objects—like those granted by copyright, patent, and trademark law—a considerable disagreement can be seen within the classical liberal approach.[1]

If we look to positions of various libertarian and classical liberal writers, we see a range of conclusions concerning how ideas and their applications should be protected under a system of law. This paper takes a natural rights approach to the consideration of property in general, and investigates the reasons why the consensus on rights to tangible property exists and why it breaks down when applied to ideal or intangible property. Beginning with the Lockean foundation of the natural right to self-ownership and personal

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1 Ideal objects are the intangible objects that constitute ideas and knowledge.

property, and continuing into the application of these ideas to intangible and ideal objects, this paper concludes that scarcity is the fundamental difference between these two types of resources. The lack of scarcity in ideal objects destroys any perceived natural rights foundation to intellectual property.

I. LOCKEAN THEORY FOR NATURAL RIGHTS TO REAL/TANGIBLE PROPERTY

To assess the Lockean basis of classical liberal arguments for the existence of and rights to intellectual property, we must first examine the Lockean position on tangible property. This approach is necessary because the Lockean theory of intellectual property among libertarian writers often stems from this original argument for tangible property in natural rights theory.[2] John Locke's theory of property is a good starting point for theories on natural rights to tangible property. Locke begins with the axiom that "every man has a *property* in his own *person*."[3] Liberty and self-ownership principles create a framework for Locke's natural rights theories; holding that men have the right to be free from coercion and to live life freely to the extent that their living does not interfere with others doing the same.[4] This is said to be a "natural" right because *in nature* a human must be "master of himself, and *proprietor of his own person, and the*

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[2] See generally LYSANDER SPOONER, The Law of Intellectual Property: Or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas, in THE COLLECTED WORKS OF LYSANDER SPOONER § 3 (C. Shively ed., 1971); HERBERT SPENCER, 2 THE PRINCIPLES OF ETHICS 121 (1978) (1893); AYN RAND, Patents and Copyrights, in CAPITALISM: THE UNKNOWN IDEAL 130 (1967); Israel Kirzner, Producer, Entrepreneur, and the Right to Property, 1 REASON PAPERS 1 (1974).

[3] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C.B. Macpherson ed., 1980) (1690).

[4] *Id.* at 9.

actions or labour of it."[5] This right is not given or imposed in the sense that a third party allows or instructs individuals to hold property in themselves. Rather it is a creation of reality and *nature* that—if left to his own devices—man must act in a way that he considers fit to live.[6] This liberty cannot be taken away, and at all times man is free to act or think in a manner that suits his purpose. This is the first principle of property: only the individual has dominion over himself and therefore the *right* to do what he sees fit with himself.[7]

Now it is beyond argument that the rights man holds in himself can be abrogated by others through force and restraint.[8] Arguing with an aggressor over whether the right to liberty really exists will do no good if the aggressor is determined to coerce action. But as Locke explains, even though the "right" of liberty as he defines it may be invaded or destroyed by another it does not follow that the "right" itself is a fiction.[9]

The possibility that individual liberty could be destroyed by others demands resolution through the social construct known as "justice."[10] Locke's concept of justice is closely tied to self-ownership. Restricting the rights of men, according to Locke, is a violation of natural law and of justice.[11] In this case, the violated law is the natural right to property in one's self. So, following Locke's first argument of property, all humans have dominion over themselves and justice requires this to be respected if men are to

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5 *Id.* at 27.

6 Id.

7 *See generally* John A. Simmons, The Lockean Theory of Rights (1992); Serena Olsaretti, Liberty, Desert and the Market 19 (2004).

8 Locke, *supra* note 3, at 11.

9 *See id*. at 8–14.

10 David Hume, *A Treatise of Human Nature, in* MORAL PHILOSOPHY 88–90 (Geoffrey Sayre-McCord ed., 2006) (1739–40).

11 LOCKE, *supra* note 3, at 9–11.

live peaceably.[12] Locke uses this starting point to help us understand how a right in tangible property (e.g. land and chattel) is created. Possession of tangible objects first occurs with the "mixed labor" foundation of real property.[13] In its simplest form, "mixed labor" theory claims a person should own the fruits of his labor. It is this approach that creates many divisions among natural right theorists concerning intellectual property and what rights, if any, are found therewith.[14]

Locke's mixed-labor theory considers objects in nature to be held in common among individuals therein. Locke then asks: when do these individuals gain a property interest in what was given in common?[15] He answers that, "labor put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right."[16] When men are in the company of other men in a state of nature common to all, there must be some convention that can govern when and how they may gain the right over some division of the commons so that they can use it in order to live.[17] Preservation of self requires appropriating things useful to sustain life.[18] As Locke explains:

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12 *See* Edward Younkins, *Justice in a Free Society*, LIBERTY FREE PRESS, http://www.quebecoislibre.org/younkins27.htm (last visited June 13, 2013).

13 LOCKE, *supra* note 3, at 19.

14 *See generally supra* note 2 (includes many "classical liberal" writers and their views on intellectual property's natural origin). *See generally* Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y. 817 (1990); N. STEPHAN KINSELLA, AGAINST INTELLECTUAL PROPERTY (2008); JAN NARVESON, THE LIBERTARIAN IDEA (1988) (previous three arguing against the natural rights view to intellectual property).

15 LOCKE, *supra* note 3, at 19.

16 *Id*.

17 *Id*.

18 *Id*.

> And will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in *commons* … that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which *begins the property*; without which the common is of no use.[19]

Individuals, it seems, have a natural right to appropriate—without harming others—what is needed or useful to sustain their life. This is done through creation or first possession.[20] If what is taken out of the commons is destroyed or stolen by another, the right would be abrogated and it would be an injustice toward the individual.[21] The victim would then have the right to treat the invader as if he were trying to take his very life.[22] Property, like justice, becomes a social convention among men to demarcate the rights found in nature. It is natural for someone to be free because no other person can substitute their will for another. It is a natural right for man to own property because without the ability to use what is found in nature to sustain his life he will cease to exist. If one was prevented from owning property in natural things by another through whatever means, it would be comparable to being prevented from living by another through the means of a sword.[23]

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19 *Id*.

20 *Id*.

21 *Id*. at 9–11.

22 *Id*. at 11.

23 *See* H.R.J. Res. 94, 110th Cong. (2008) (quoting John Adams) ("Property must be secured or liberty cannot exist."; quoting John Dickinson: "Let these truths be indelibly impressed on our minds: (1) that we cannot be happy without being free; (2) that we cannot be free, without being secure in our property; (3) that we cannot be secure in our property, if , without our consent, others may, as by right, take it away."); LOCKE, *supra* note 3, at 9–11.

A person can claim ownership in real property when he obtains it from nature with the intent to use it.

II. MIXED LABOR AND MORAL THEORIES OF INTELLECTUAL PROPERTY

It is from this mixed labor concept of property that many arguments for intellectual property rights come about.[24] Mixed labor theory is a foundational argument for acquiring tangible property. Libertarians and classical liberals reform this argument to justify the existence of intellectual property rights.[25] However, as will be discussed, the translation of property rights in tangible objects to intangible objects only holds when scarcity is disregarded. In short, the argument for intellectual property typically is: since mixing labor with the natural world creates property rights, mixing labor with thought similarly gives rise to a property interest in what is created thereby. For instance, if I plow and seed my land, I should own what I can reap from that work. Similarly, if I work to write a novel or build a new machine, it is only through my work that these items come into existence and, therefore, I should own the rights to them.

Ayn Rand was a strong proponent of this position.[26] She claims that intellectual property rights are not "grants … in the sense of a gift, privilege or favor" from the laws established by governments, but rather an acknowledgment of "the role of mental effort in the production of material values" and, therefore, a right that

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[24] *See generally supra* note 2.

[25] *See* Roderick T. Long, *The Libertarian Case Against Intellectual Property Rights*, 3 FORMULATIONS (1995), *available at* http://www.freenation.org/a/f31l1.html.

[26] *See* RAND, *supra* note 2, at 130.

exists in the creator.[27] While she ultimately believed that the laws governments pass to protect intellectual property must center on the real and physical objects the ideas produced, she nevertheless maintained that the idea itself is the object of the right.[28] Even if the idea never manifests itself in tangible form, it is the idea that was *created* and as such is owned by the individual who labored in thought to produce it.[29]

Similarly, Lysander Spooner, the nineteenth-century abolitionist and anarchist, advocated that, since ideas, objects, and even emotions are all products of an individual's life, they are rightfully viewed as property owned by the creating individual.[30] Tom G. Palmer's paper, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, provides an excellent summary of Spooner's philosophy on the subject of property.[31] Palmer highlights Spooner's use of natural rights theory in advocating natural rights to intellectual property and explaining how such rights come about:

> The foundations of property, according to Spooner, are the acts of possession and of creation. Property is necessary to secure the "natural right of each man to provide for his own subsistence; and, secondly … his right to provide for his general happiness and well-being, in addition to a mere subsistence." Thus, while Spooner's account of the natural right to property, and especially of intellectual property, falls among the moral-desert arguments for property, it contains a consequential element: property is justified be-

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27 *Id*. at 130–31.
28 *Id*.
29 *Id.*
30 SPOONER, *supra* note 2.
31 Palmer, *supra* note 14, at 821–35.

> cause it is a necessary means to the attainment of man's natural end.[32]

Interestingly, it is evident from this passage that Spooner would agree with Locke with respect to how property rights are found in nature. Locke points out that *both* taking from the commons as well as creation produce a claim to property.[33] Property rights come from the necessity humans have in obtaining property for survival—preserving their rights in themselves.[34] Spooner analogizes the position presented by Locke for tangible property to intellectual property. Quoting again from Palmer:

> If ideas preexist in nature and are merely discovered then "he who does discover, or first takes possession of, an idea, thereby becomes its lawful and rightful proprietor; on the same principle that he, who first takes possession of any material production of nature, thereby makes himself its rightful owner." On the other hand, if ideas are not preexisting in nature, but are the products of an active intellect, then "the right of property in them belongs to him whose labor created them."[35]

Classical liberals and libertarians often apply these Lockean arguments in the context of intellectual property to defend state-imposed laws forbidding the use of ideas without the consent of the creator.[36] On its face, it seems plausible that intellectual property

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32 Palmer, *supra* note 14, at 822.
33 LOCKE, *supra* note 3, at 19, 26.
34 *Id*.
35 *Id*.
36 *See generally* note 2.

arises through the same natural law as tangible property After all, it is only by creation or possession that natural right theorists believe tangible property becomes useful in promoting the life of individuals who have the natural right to be sustained. Combine this with a system of just possession or a Nozickian theory of just acquisition and the parallels with intellectual property would appear to be evident.[37] However, upon closer inspection of the differences between intellectual property and tangible property, it is clear that the analogy is unsound.

III. SCARCITY AND THE CREATION OF NATURAL RIGHTS TO REAL PROPERTY

The very basis and conception of the convention of property rights arises when it is impossible for two or more individuals to simultaneously derive the benefit of an object in nature.[38] Conflicts in claim or use of property only arise with the existence and interaction of multiple individuals—making property an inherently a social construct.[39] In the physical world, every object's use has a beginning and an end, and in most cases, requires possession by someone. This is the economic phenomenon known as scarcity.[40]

Undoubtedly, certain objects (tools, food, etc.) that are useful to human beings cannot simultaneously be used by two actors. For instance—taking an example from Locke—if an individual who labored to separate a cup of water from the common well wanted to allow another to receive the same benefit from that same cup of wa-

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37 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–67 (1974).

38 HUME, *supra* note 10, 88–90.

39 *Id.*

40 *See generally* LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 16 (2nd ed. 1935).

ter, he would be sure to discover that it is impossible.[41] The use of such scarce items requires possession to resolve the inherent fact that no two individuals can make use of the object at the same time. If two individuals want to use a single hammer to drive nails for some purpose, there must be a set of rules determining who gets to use the hammer at what time, as it is quite impossible for them both to use it in unison.

Scarcity in the real world forces us to deal with the difficulties of ownership. This is how individual rights to property, as outlined by Locke, naturally arise.[42] It is also the point at which Locke ties property inextricably with liberty. Liberty must begin with exclusive ownership over oneself.[43] Every individual exists once, remains scarce, and is only possessed—or in use—by himself. If an individual finds himself under the rule of another and being put to some use against his own will, he has lost liberty and his most important possession—himself.

Possession of self is the fundamental liberty interest at the heart of property. As explained by Locke, the idea that man has property in his own person extends to other tangible items because of a natural "right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence."[44] People are thus entitled to restrict others who would attempt to destroy that natural right to self-preservation and possession of the physical objects required for subsistence. An object in nature can either be owned by one or another and, when no clear rule exists, conflicts occur over who will get to use it. It may be impossible for two individuals to avoid conflict if each is hoping to gain the full benefit of the object. The rules of first possession and

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41 *See* LOCKE, *supra* note 3, at 20.
42 KINSELLA, *supra* note 14, at 39–42.
43 LOCKE, *supra* note 3, at 8.
44 *Id*. at 18.

creation determine who justly should gain the benefit.[45] Once possession is established, the possessor is harmed by removal of the beneficial use of the scarce object. The benefit created by the acts of first possession or creation is scarce. The scarcity of the object's benefit necessitates a natural *right* to ownership and the subsequent right to resist anyone at anytime attempting to destroy ownership and its benefit.

If an object had a characteristic that enabled numerous individuals to enjoy its benefit without lessening the capacity for others to do the same, the natural right to exclusively own the object would cease to exist. Because one person's use and benefit would not inhibit that of another, there is no interference with liberty and no conflict or competing claim to ownership. For example, were a stereo broadcasting classical music from a ledge near a busy street, it would seem rather absurd to claim that anyone in earshot could claim any sort of right to prevent another from hearing the music also. The musical sound waves are infinitely accessible and no person's use of them restrains anyone else. If the stereo was replaced by a man playing a guitar, we would not say that the creator of the music should have the right to use force to prevent another from hearing his strumming. And if we were to say such a right should exist, it would not be a property right in the emanating sound, but rather a privilege to control the actions of others. This is because no natural conflict exists over the use of the sound waves and no invasion of liberty is created by any one person listening to the music.

In sum, scarcity exists in nature and is a characteristic of both individuals and tangible objects. The axiom that one has the right to oneself[46] is in part created by the impossibility that any other can use the individual in unison with his own will. If one's will is

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45 KINSELLA, *supra* note 14, at n.76.

46 *See* LOCKE, *supra* note 3, at 9.

abrogated by force, there is a right to resist and reinstate liberty. This extends to the realm of real objects that can only produce a benefit when possessed. Abrogation of the use or benefit of any object by force creates a right to resist and this right is that of property. Because the right to property hinges on the existence of scarcity, individuals do not have a natural right to exclusively possess objects that are not scarce.

IV. INTELLECTUAL PROPERTY'S LACK OF SCARCITY

The objects protected by copyright and patent law have no real form and are not limited in space and time.[47] Modern intellectual property law protects ideas and the physical manifestation of those ideas.[48] Property based solely on the principles of first possession or creation may superficially appear to justify the possession of ideas—a position Rand and Spooner advocate.[49] But as we have seen, the rights that are created in physical property are a result of physical property's inherent scarcity. In the world of ideas and knowledge, such scarcity is lacking.[50] Because of this lack of scarcity, the arguments in favor of natural rights to possession and ownership should not arise.

To demonstrate the lack of scarcity, it is only necessary to think of an example of an ideal or intangible object and look to see what restrictions, if any, there are on its ability to be possessed and used by many at one time. Comparing this to scarce and tangible objects, we find the use of ideal objects lack the need for sole pos-

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47 Boudewijn Bouckaert, *What Is Property*, 13 HARV. J.L. & PUB. POL'Y 775, 793, 797–99 (1990).

48 ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 38–57 (7th ed. 2006).

49 *See generally* note 2.

50 KINSELLA, *supra* note 14, at 32.

session. If we take a story, such as the *Iliad*, and look at its characteristics as an ideal object we can find that the story in itself is not something that, when used by many at the same time, has any effect whatsoever on the object's use by any other. Once Homer wrote the story and presented it to others, the story became possessed—that is, known—by those who read it.[51] It is obvious that the use of the object by a person who reads it does not divest its use from another or prevent him from the enjoyment of his knowledge; e.g., the activity of mulling over the details of the Trojan War.[52] The object is not affected by scarcity.

If we look at something that might be protected under a system of patent, we also find that in fact the ideal object, a concept or knowledge that allows the creation of the physical invention, is not affected by scarcity. Take for instance the hypothetical inventor of the wheel. Consider a primitive society, or something akin to Locke's state of nature, where loosely affiliated individuals act as their own legislator and executor.[53] Imagine that in this society, an individual discovers how to create an object that is round and rolls when pushed.[54] Next, assume that a few others, who are intelligent enough to understand the concept of the wheel by looking at the device, see what the first inventor created and then attempt to create their own. Some might be successful and become the proud owners of their own wheels. When in this hypothetical is there any

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[51] Letter from Thomas Jefferson to Isaac McPherson, Monticello (Aug. 13, 1813) ("If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it."). When used in this paper "possession" means actually knowing the idea and "use" means putting the idea into physical form or activity.

[52] *Id*.

[53] *See* LOCKE, *supra* note 3, at 9–10.

[54] Gorman, *supra* note 48, at 49–56.

harm to the first inventor? Is his idea less useful to him? Is the physical object that he first made less able to perform its function when the knowledge and ideas upon which it is based is used by more than one individual? The answer is clearly no. Once an intangible ideal object has been placed into an accessible form that others can understand, it is available for infinite use. Therefore, the first creator cannot be divested of, harmed by, or in any way damaged from the object's wide-ranging use.

If we look to the ideas of first possession and creation as the delineation of property rights, we can see how such rules work with real property but fail with ideal property. To begin with, in the case of ideal property, the first possessor is always the creator and the creator is almost always the first possessor.[55] It is true in both above hypotheticals that the first possessor is clearly the individual who created the idea. Homer first possessed the story of the *Illiad* and the intelligent savage was first to possess the knowledge of the wheel. But once put on display by the very individuals who first possessed and created the objects, *possession* became a matter of exposure to the idea. Those individuals who heard the story, and those who saw and understood the invention, all without interfering with the possession of the creator, took possession as well.[56] Since there is no interference with the right to possess, it is not possible to claim that the first possessor has some sort of liberty interest in refusing the use of the idea commonly held. The benefit of an ideal object—unlike those in the tangible world—requires no "removal from the

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[55] Unless there is the rare case of independent creation, or instantaneous display of an idea upon creation, the creator will be the first possessor for at least a limited time.

[56] Jefferson, *supra* note 51 ("He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.").

commons." The object can remain both common and retain its use at the same time.

There still remains the argument that, since the author or inventor is the *creator*, a recognizable moral claim of ownership exists.[57] This claim rests on the premise that individuals should have the right to what they themselves created. Superficially this makes sense. After all, in the tangible world, what is produced is always the product of the interaction of will (labor) and owned resources (property). If a person takes owned land and owned seed and creates a row of corn he should be able to own the harvest. The moral claim is not only that you *shall* reap what you sow, but that you *should.* But this theory fails in the realm of ideal-object creation because there is no explanation for why objects that do not require exclusive possession to gain a benefit create such a moral right. As previously pointed out, it is only because the use of objects extends to individuals through possession that creators/first possessors of such objects should retain some natural right to maintain possession of them. In the tangible world the use of scarce objects *requires* sole possession and this is clearly not the case with ideal objects. The moral claim rests on much shakier ground due to a lack of harm to the creator/first possessor.

In addition, the distinction between creator and first possessor holds little weight in the first instance both for real and ideal objects. In the Lockean paradigm, it is curious that such a distinction should be made if we are concerned with limiting the interference with the liberty of the individual and his natural self-interest. If we look at the hypothetical of taking a draft from a well, we see both an act of creation and first possession. So it is not necessary in the natural rights understanding of property to make such a distinction in the first place. The act of drawing water from a well pro-

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[57] Palmer, *supra* note 14, at 827.

duced what was useful: a draft of water. But it is all the same to say that taking the draft was in fact an act of first possession. The distinction is meaningless and any moral claim—at least under a system of natural rights—cannot rest on the subtle dissimilarity between first possession and creation.

In his paper *Against Intellectual Property*, Stephen Kinsella outlined this curiosity in the moral theory of property: "No one creates *matter*; they just manipulate and grapple with it according to physical laws. In this sense, no one really creates *anything*. They merely rearrange matter into new arrangements and patterns."[58] Taking a ball of clay that is possessed and creating a statue does not necessarily "create" anything new. The clay is still the tangible object that is owned or possessed according to the necessity of scarcity. What *is* introduced however is the idea represented in the statue itself. It remains to be seen how the creation of the idea in any way creates a parallel right to exclusively possess it as well. There is no grounding in nature that justifies restriction of possession and use of ideas simply because of the act of creation.

While natural law theories on real property protect an individual's liberty interests, the opposite occurs in the context of intellectual property law. In any situation in which two individuals possess the same ideal object—that is, have knowledge of the same idea—it would seem that, from a natural rights perspective, one could not justly restrict the other from acting on his knowledge. Because utilizing knowledge, or ideal objects, does not cause harm to another, there is no ground for restricting its use. If we take the example of the savage who invented the wheel, and claim a moral right running to him from creation, we would need to also allow the right to use force to restrict all others from using the same idea—even though the idea was appropriated without any force and with

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58 KINSELLA, *supra* note 14, at 36–42.

no harm or obstruction to the first possessor's interest in the object. He would need the remedy of force in order to secure this "moral" right.[59] But it is clear that this claim is wholly divorced from the original understanding of what rights are and where they come from under a Lockean position. There has been no force used to appropriate what is rightly under the dominion of the ideal object's first possessor, and its use and possession by others require no harm to be done. The usual justifications for the executor of rights are not present. This asks the question: where does this moral right come from? It is clear that there is no good answer.

What *is* clear is that the observance of such "rights" *does* interrupt and infringe on others' natural right to self-ownership.[60] The ability of the creator of an idea to prevent another through force from using the idea is a destruction of the second person's liberty interest. For a second party to be physically restrained from using what is held in common *without harm* is to restrain him from the freedom to do as he sees fit in order to carry out his life.[61] This is a fundamental attack on the sovereignty of the individual without any justification found in nature.[62] What claim can the creator of the ideal object have that would satisfy a natural rights theorist on the question of whether there is a right to use force to prevent that which invaded no right itself? It is difficult to imagine an answer that would be satisfactory. Palmer highlights this tension between moral rights over ideal objects and liberty:

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[59] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[The United States] will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

[60] Palmer, *supra* note 14, at 834, 862.

[61] LOCKE, *supra* note 3, at 14.

[62] *Id.*

> Liberty and intellectual property seem to be at odds, for while property in tangible objects limits actions only with respect to particular goods, property in ideal objects restricts an entire range of action unlimited by place or time, involving legitimately owned property (VCRs, tape recorder, typewriters, the human voice, and more) by all but those privileged to receive monopoly grants from the state. To those who might argue that any form of property limits liberty in some way, Jan Narveson responds: "this is to talk as though the "restrictions" involved in ownership were nothing but that. But that's absurd! The essence of my having an Apple Macintosh is that I have one, at my disposal when and as I wish, which latter of course requires that you not be able simply to use it any time you like; it's not that you can't have one unless I say so."[63]

The liberty interest in the possession of real objects is determined by the fact that use requires ownership.[64] A divestment of ownership by force is harm.[65] In contrast, there is no harm running from the use of an ideal object because sole possession is not required to maintain its beneficial use.

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[63] Palmer, *supra* note 14, at 830–31 (quoting NARVESON, *supra* note 14, at 77).

[64] LOCKE, *supra* note 3, at 19.

[65] *Id.* at 15 ("This makes it lawful for a man to *kill a thief*, who has not in the least hurt him, nor declared any design upon his life, any farther than, by the use of force, so to get him in his power, as to take away his money, or what he pleases, from him; because using force, where he has no right, to get me into his power, let his pretence be what it will, I have no reason to suppose, that he, who would *take away my liberty*, would not, when he had me in his power, take away every thing else.").

V. MARKETABILITY AS "USE"

A reoccurring objection to the argument that common possession and use of ideal objects does not create a harm to the creator or first possessor is the claim that the ideal object is a marketable instrument that loses value once commonly held and commonly used.[66] Using the already mentioned hypotheticals, we can see that both Homer and the inventor of the wheel may very well create the ideal object simply for its direct use—the story's enjoyment or the invention's utility. However, there may be additional use in holding the idea and then displaying it only to those who would pay for the privilege of possessing and using the idea as well. The concept being: because the creator has first possession, the object is at his disposal to distribute to others for consideration.[67] Using the moral argument that a creator should have the right to the fruits of his labor, and that the possible payment for divulging the idea is "fruit," we can see how some would consider free use of ideal objects by those who are not the author to be an invasion of a right in property.

There is a very large presumption in the notion that ideal objects should be secured by force against those who would use them without payment to the author because of the harm that would result in not having a market in which to sell. There is a presumption that an exclusive market exists in the first instance. In a state of nature, there is no such market for the ability to use an idea.[68] Modern intellectual property law is the vehicle that creates the ability for the creator of an idea to restrict its use for financial

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66 *See generally* note 2.
67 KINSELLA, *supra* note 14, at 45.
68 *Id*. at 54.

gain.[69] Prior to this power to restrict—created by positive law—there is no natural monopolistic market for an ideal object's use. In contrast, the only true natural market for ideal objects—one that exists before positive law creates it— is the market to know.[70] The creator is the sole possessor for some amount of time after the object's creation.[71] This fact naturally creates a market of individuals ignorant of the idea and willing to give consideration to the creator for the ability to know it. This is important if we look at the moralist's claims on the rights of creators of ideal objects. No moral theory could hold that an individual gaining knowledge of an idea freely and publicly expressed would constitute a harm running to the creator.[72] In other words, being able to recite a work of fiction from knowledge received by having heard it read is not harmful to the author. Possession of the idea creates no problems in a state of nature. Understandably then, it is the use of the idea by others that intellectual property law attempts to forbid and not its possession.

The prohibition on use of commonly held ideal objects is justified by intellectual property moralists on the ground that if commonly held objects could be used by all who possess them, the creator would lose the ability to exploit the object's market.[73] The

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69 *See* 17 U.S.C. §§ 501–13 (2012).

70 KINSELLA, *supra* note 14, at 45.

71 Unless there is the rare case of independent creation of an identical ideas or instantaneous display of an idea upon creation, the creator will be a sole possessor for some amount of time.

72 Being able to recite a poem after having heard it read aloud by the author would create no harm. Possession of the poem is both with the author and the listener after such a display of the idea. Possession cannot be said to be harming the creator.

73 Moralists also often believe in preservation of image, which is best stated in Article 6 of the Bern Convention: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation."

argument that an ideal object's marketability is a benefit that can be protected by right cannot be maintained inside of a natural rights paradigm.[74] If the moral rule creates the nature it derives its origin from, the moral rule is circular. An author can only claim that the privileged marketing of an ideal object is a use that should be protected on the understanding of natural rights if the market in fact exists naturally.[75] Because the use of commonly held knowledge can only be controlled by force, a natural entitlement to an ideal object's market is impossible.

If we look at history, we see that the desire for an exclusive market—not its natural existence—for ideal objects heralded the creation of the first intellectual property laws in the Anglo-Saxon world.[76] Looking back at the hypothetical about the invention of the wheel, it would seem quite odd to think that the inventor of a technology would presume that he could extract consideration from the copier once the idea had been exposed to the copier's mind. In fact it seems quite odd, in view of natural rights theory, that in any society before the rise of positive intellectual property law there would be

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[74] For the idea that natural rights are to be found in nature see: Tibor R. Machan, *What are Natural Rights? A New Account*, 9 Reason Papers 61, 61–62 (1983) ("(1)Natural rights are those rights (if any) a person has in the state of nature; (2) they are held prior to and independently of institutional arrangements (e.g., legal systems), conventions, or agreements; (3) they derive from or have their basis in human nature or activity, they flow from some attribute(s) of the person rather than the situation; (4) they are basic and indefeasible, and they provide the framework within which teleological moral considerations (if any) may operate; (5) they are self evident; and (6) they include rights against coercion.").

[75] *Id*.

[76] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 86–89 (2004) ("The Statute of Monopolies and the Statute of Anne dealing with patents and copyrights respectively were passed by parliament in the late 17th early 18th centuries. The Statute of Anne was largely seen as a way to secure to *publishers* the rights to print and sell those works that they had been publishing already to protect them from Scottish publishers who began to compete in the publishing market").

any notion that, without secrecy, an ideal object could be kept for the sole use of the author.

There is a presumption in the claim that there is harm to an author by those who "pirate" the work: that the market being diluted would exist in the first place. As history shows us, this was not the case until late in human history and only after the "rights" of authors were established by law.[77] The use of ideal objects, once divulged to the common, as marketable possessions is not something that is a natural characteristic of the object itself.[78]

VI. CONTRACT THEORY & INTELLECTUAL PROPERTY

As discussed previously, the distinction between the first possessor and creator of an ideal object are inseparable.[79] The creator is always the first possessor; given certain conditions, he is the sole possessor.[80] Intellectual property laws do not protect the creator's right to *possess* like laws concerning real property do.[81] They instead attempt to give the right to *use* the object in order to create a

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77 *Id*. (established either by common law or statute).

78 Palmer, *supra* note 14, at 839.

79 KINSELLA, *supra* note 14, at 37.

80 The conditions being that the object was not created by another individual at the same time and that display of the object is not performed by the creator. Also that the creator has not died leaving some hidden manuscript to the finding of another – but this is of no significance to the argument.

81 White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J.) ("The notion of property starts, I suppose, from confirmed possession of a tangible object, and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now *in vacuo*, so to speak. It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right.").

market that the author can exploit.[82] But in the nature of ideal objects, the only true market that exists after the creation of the ideal object is that of *knowing* and not *use*. This is clear if we take as a first principle the natural rights concept of the liberty interest in oneself and apply it to a situation involving the creation of ideal objects and the ability for the creator to maintain sole possession at will.

Not only is the creator of an ideal object a first possessor, he is the *sole* possessor—barring another coming up with the same idea. As ideal objects are inherently first "created" in the mind of the author, it is a characteristic of ideal objects that—at least in the first instance—the author is the only individual who knows of its existence. This creates a prerogative on the part of the author to decide whether this sole possession should remain or whether the expression of the object should take form and thereby provide the possibility that others will also possess the object. Unlike the market for monopolistic control of ideal objects that can only be provided through law, there *does* exist in nature a market to possess, or know, ideal objects. Accordingly, the ability to exploit this market creates a use of an ideal object that is scarce.[83] Because the principle of scarcity attaches to ideal objects in this way, we can apply the natural right principles concerning real property and the rights thereto and see that the so called "first sale" principle does indeed create a right flowing to the creator of an ideal object.[84] This right is not the ability

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[82] COPYRIGHT OFFICE, REG REPORT ON GENERAL REVISION OF U.S. COPYRIGHT LAW 3 (1961) ("In essence, copyright is the right of an author to control the reproduction of his intellectual creation. As long as he keeps his work in his sole possession, the author's absolute control is a physical fact. When he discloses the work to others, however, he makes it possible for them to reproduce it. Copyright is a legal device to give him the right to control its reproduction after it has been disclosed.").

[83] Because the author is the sole possessor at will, there is a group of individuals who may pay to learn about the ideal object in his possession.

[84] *See* Harper & Row Publ'ers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (Holding that the otherwise fair use of publishing excerpts from a public figure's

to forbid possession, but instead the ability to hold an ideal object once created without being forced, induced, or obliged to divulge the idea. Creators of ideal objects therefore possess a natural right to first sale.

This may seem like a useless right in the sense that concealing an ideal object in order to maintain the sole ownership of it may not provide a benefit to the author. The author of an ideal object often gains the most by giving the idea physical form and publicly using it for whatever purpose it was created for. But as modern examples make clear, the market to private knowledge is real and exploitable by sole possessors of ideal objects. One only has to look at such things as trade secrets, client lists, and non-patentable industrial practices to see that a useful market to know can exist naturally and independently of any coercive action by the state or other parties. Trade secrets are ideal objects possessed by individuals or groups that are not necessarily protected by modern intellectual property law. The information is kept secret so that the use of the information becomes valuable for those who have knowledge of it.[85] The desire for secrecy can stem from the unavailable or less adequate remedies for restricting use of such information once widely possessed. Here we see value in ideal objects arising naturally out of sole possession.

Companies and individuals who attempt to use trade secrets will obviously find it necessary in many cases to disclose the ideal objects to others in order to exploit whatever use the object has. In this way they are destroying the sole possession of the "property" in that they are creating the ability for others to possess

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manuscript violated the individuals right of "first sale"); GORMAN, *supra* note 48, at 43 (stating that U.S. copyright law recognizes a right in the author to control the first sale of a work even if the use would normally be considered fair use).

[85] The secrecy creates the value by giving the company an advantage over competition that does not have access to such information.

it also. But through the use of contract, the sole possessor—when divesting himself of such a title—can limit the extent to which possession of the object extends in the adjacent population.[86] He does this to maintain value in the object, as he knows that if it becomes widely possessed, there will be no recourse to the restriction of use in order to maintain an exploitable value. The market must be maintained by another mean, and contract law is the mean.[87]

If an author or an inventor wants to make use of the ideal object in the aforementioned manner, he needs only to enter into contracts with others who are willing to give consideration for the privilege of learning what he knows. A duty of non-disclosure or non-use beyond a specified limit would surely be a recognizable form of consideration along with any other payment offer.[88] Once bound by such a promise, the promisee enjoys the benefits of possession, which he can use in accordance with the promise exchanged.

We see then, through the natural rights theories of property and contract, the potential for exploitation of certain markets that are naturally created by the characteristics of ideal objects. But when looking to modern intellectual property laws and comparing them to theories of intellectual property as contract, stark differences arise that further bolster the conclusion that such laws are not seeking the protection of any natural right; but rather are conferring benefits and monopolies to some while invading the natural rights of others.[89] Contract theory for intellectual property is based on the

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[86] *See* KINSELLA, *supra* note 14, at 45–46.

[87] For the proposition that natural rights support contract restrictions on liberty, see Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267 (2008).

[88] *Id.* at 323–25.

[89] N. Stephan Kinsella, *Against Intellectual Property*, 15 J. OF LIBERTARIAN STUDIES 44 (2001).

premise that an author can restrict use through consideration, but only against those who consent.[90] Intellectual property laws, on the other hand, aim to restrict use against all third parties and not simply those who consent. Kinsella explains the limits of contract for intellectual property:

> Suppose, for example, that *A* writes a book and sells physical copies of it to numerous purchasers *B(1)*, *B(2)* … *(B)(N)*, with a contractual condition that each buyer *B* is obligated not to make or sell a copy of the text. Under all theories of contract, any of the buyers *B* becomes liable to *A*, at least for damages, if he violates these provisions … It does not bind third parties, i.e., those not in "privity" with the original parties. Thus, if the book purchaser *B* relates to third parties *T* the plot of the purchased novel, these third parties *T* are not bound, in general, by the original contractual obligation between *A* and *B*.[91]

Natural law theories of contract reveal the extent to which an author has the right to restrict others in possession and use without violating their liberty interests. This contrast between positive intellectual property law and contract highlights the different presumptions on what ideal objects are. Through contract, an author can gain the ability to market certain ideas without violating another's natural rights. This is done through limiting the just use of force against others to only those situations where an initial force has been used to divest the author's own liberty. Because ideal objects are solely possessed upon creation and may remain so at the will of the author, individuals wanting to gain possession of the

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90 *See* KINSELLA, *supra* note 14, at 45–46.

91 *Id.*

object may do so, but only by consent of the author. Conversely, once commonly possessed, the author can no longer claim any right to restrict others through force in order to extract a profit from the use of an object that has no effect on his liberty interest.[92]

VII. THE CONSTITUTION AND INTELLECTUAL PROPERTY

One might read these arguments and not see a benefit in the distinction between practical matters of law in the current modern legal scheme. After all, the Constitution of the United States gives Congress the power to "[p]romote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."[93] Whether the founders viewed such "writings and discoveries" as a natural law right to property, or took the more utilitarian approach concerning "promotion" for the benefit of society, is immaterial to the question of authority.[94] The right to create restrictions on the use of intellectual property is clearly stated and present in the enabling provisions of the Articles.

The reason why the distinction holds importance concerns not only the implementation of congressional acts creating intellectual property, but also the treatment by judges and commentators of the benefits being conferred by law to authors and what interest the public at large holds as well. Since natural law cannot account for the presence of intellectual property law, it is only through the positive law of the Articles that authors can have any claim on their

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92 *Id*.
93 U.S. CONST. art. I, § 8, cl. 8.
94 *Id*.

works.[95] It is telling that the founders saw a need to write the Copyright Clause into the articles when the protection of property, as a negative right endowed in the individual, was adopted in the amendments.[96] If ideal objects were indeed considered property in parity with real objects, it would seem to make the Copyright Clause a redundancy—unless one was to make the tenuous argument that the enabling clause was an effort to limit what the founders otherwise thought would be an indefinite ownership interest in ideal objects through the common or natural law of property.

Claiming that intellectual property is in fact no property at all should have obvious implications concerning the rights owners of patents and copyrights have. If the founders were not interested in recognizing intellectual property as a natural right to the same degree as real property, the analogous legal fields applying to real property, such as constitutional takings and torts, do not stand up when applied to ideal objects—at least when understood to flow from a natural rights foundation. Richard Epstein takes the view that the Takings Clause, as well as the whole field of law concerning real property, should be used in the intellectual property sphere wherever possible.[97] In general, resolving issues that arise between conflicting parties over intellectual property can be successfully resolved through traditional approaches to property law.[98] But the argument that the Takings Clause should be applied to intellectual property presents serious problems for such "carry over" doctrines when the acceptance of parity between the word "property" in the

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95 *See id*.

96 For the argument that the amendments should be understood as negative rights, see Tibor Machan, *Rights versus "Rights*," 45 THE FREEMAN 309 (1995).

97 *See* Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 480–90 (2010).

98 *Id.*

Fifth Amendment, and what is created by Congress through the power of Article I, Section 8 is called into question.[99]

If intellectual property is not to be understood as the type of property that the Constitution protects in the amendments, then it becomes difficult to justify any hyper-protection through the takings doctrine of such ideal objects. Since the "property" in question is really just a legal conferral by Congress, then the only protections we would expect to have available for securing the benefits granted would arise under due process.[100] Some have claimed that patent and copyright holders should be able to use the takings doctrine that has evolved in the courts to protect their respective holdings.[101] Epstein goes so far as to say that intellectual property holders should be able to seek analogous protection of the *per se* rules governing regulatory takings of real property in the intellectual property field.[102] If we divorce what is created by the Copyright Clause and subsequent acts of Congress from the type of property the founders meant to protect under the takings provision of the Fifth Amendment, Epstein's proposal should be viewed skeptically.

As a matter of policy and judicial conflict resolution, many of the doctrines concerning real property could very easily be used to deal with intellectual property conflicts. In principle however, because there is no "right" to writings and inventions beyond the dictates of Congress and due process, courts should guard against any attempt by intellectual property holders to bootstrap their holdings into the constitutionally protected field of real property and

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[99] *Compare* U.S. CONST. amend. V *with* U.S. CONST. art. I, § 8, cl. 8.

[100] *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that statutorily created welfare benefits cannot be terminated outside the protections of due process). *See generally* U.S. CONST. amend. XIV, § 1.

[101] *See, e.g.*, Epstein, *supra* note 97, at 514.

[102] *Id.* For a background on *per se* regulatory takings doctrine, see generally THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1258–1323 (2007).

use the takings doctrine as a shield against legislation that would diminish the value of their legally created monopoly.

Another important consequence of the distinction between the source of intellectual property and real property is the heightened importance of the public's interest, which should be taken into account when questioning the purpose of the Copyright Clause itself. If the inclusion of the Copyright Clause in the Articles is understood not as a decision by the founders to protect a natural right of authors, but rather as a provision adopted by the people to secure the benefits that a market for ideas would create, we can question the validity of acts passed without the view of "progress" as the purpose of the law.

The rights to natural liberty that are protected by the Constitution were also in many ways abridged by consent at the founding.[103] The ability to use ideas commonly possessed may be restricted by Congress; this much is clear. However, the only rational purpose of this abandonment of liberty is that of a utilitarian concept concerning the efficient creation and distribution of ideas and an attempt to secure "progress" for the whole nation.[104] If we consider the difficulty of using natural law concepts of contract to protect the usefulness of ideal objects, we can see the reason why both consumers and creators of ideal objects may agree to a legally constructed market.[105] The public gains the benefit of an abundance of ideal objects because authors have incentives to produce them and gain marketable items. The purpose of the Copyright Clause is the advancement of the "useful sciences and arts," and the means is the securing of works to authors for a "limited time."[106] Calls for the

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103 *See generally* LOCKE, *supra* note 3, at 47–48.

104 For a discussion on the utilitarian concept of property rights *see* Palmer, *supra* note 14, at 849–51.

105 *See* KINSELLA, *supra* note 14, at 45–47.

106 U.S. CONST. art. I, § 8, cl. 8.

recognition of a moral right to one's intellectual property, if adopted, would destroy this compromise by enlarging the consideration given by the public by changing the "limited" restriction of natural liberty to use commonly held ideas to an indefinite prohibition.

While no such calls have seriously been made in the United States, there is a disturbing trend at the moment toward enlarging the duration period of copyrights through legislation.[107] The recognized purposes of the Copyright Clause should at least inform the goals of such legislation. Lawrence Lessig, in his brief submitted to the Supreme Court in *Eldred v. Ashcroft*, argued that Congress's ability to perpetually enlarge the duration of copyrights amounted to an abandonment of the "limited time" restriction.[108] His argument was rejected, but it raised some interesting points concerning the limitations on Congress's ability to create legislation in this field. If we look specifically at Congress's ability to enlarge the duration of copyrights that are scheduled to move into the public domain, we see a problem with the claim that there exists any ability to promote the creation of such a work since it already exists. In addition, the judicial doctrine of impermissible analysis, used in other areas of constitutional law, may have a place in reviewing acts of Congress under the Copyright Clause to find if "progress" is indeed the ultimate purpose.[109]

Finally, judicial interpretation of the "fair use" doctrine may be better understood by removing moral rights as a criterion or

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[107] *See* Sonny Bono Copyright Term Extension Act, Pub. L. 105-298 (codified as amended in scattered sections of 17 U.S.C.); *See* Digital Millennium Copyright Act, 17 U.S.C. §§ 512, 1201–05, 1301–32 (2012).

[108] LESSIG, *supra* note 108, at 234–39; Eldred v. Ashcroft, 537 U.S. 186 (2003).

[109] For an interesting discussion of such a proposal, see Dan T. Coenen & Paul J. Heald, *Means/Ends Analysis in Copyright Law:* Eldred v. Ashcroft *in One Act*, 36 LOY. L.A. L. REV. 99 (2002). As with other areas of congressional power the courts could use a means/ends analysis to determine whether the goals of certain legislation enabled by Article I provisions are allowed. *Id.* at 102–03.

motivation in intellectual property law.[110] Lydia Loren argues that the judicially created balancing test used to determine whether a derivative work is permissible fair use can best be understood as an attempt to use the doctrine to fix a "market failure" in copyright law.[111] Understanding that the purpose of the monopoly granted to certain authors is to induce the production of works, judges use a balancing test to determine if such an author would be willing or likely to produce a derivative work that is being challenged.[112] For example, in the case of *Suntrust Bank v. Houghton Mifflin Co.*, the Eleventh Circuit determined that the fair-use doctrine was appropriately applied to the lampooning and satirical derivative work of *Gone With the Wind*, titled *The Wind Done Gone*, in large part because the estate of Margaret Mitchell would never have created such a work that meant to deride the novel that made Mitchell famous.[113] Quite correctly, Loren views these types of decisions as an unstated understanding by the courts concerning the purposes of the Copyright Clause and a correct understanding of what intellectual prop-

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110 *See* GORMAN, *supra* note 48, at 715 ("... the 'fair use' exception to copyright protection constitutes perhaps the most significant, and the most venerable, limitation on an author's or copyright holder's prerogatives. Originally a judge-made doctrine, the exception is now codified at § 107 of the 1976 Act. In essence, the traditional concept of fair use excused reasonable unauthorized appropriations from a first work, when the use to which the second author put the appropriated material in some way advanced the public benefit, without substantially impairing the present or potential economic value of the first work.").

111 *See* 17 U.S.C. § 107 (2006) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use … (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work)"; Lydia Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

112 *Id.*

113 Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001). *The Wind Done Gone* was a story of the same events and characters in Gone With the Wind but with a narrator that was a slave of the O'Hara family.

erty laws are trying to do.[114] If a monopolist created by the state uses the monopoly to *prevent* the "progress" of the useful arts, the purpose of conferring the monopoly has failed, and the courts should step in to remedy this failure.

IX. CONCLUSION

Many of the arguments in favor of the extention of strict property rights to intellectual property and ideal objects stem from a misapplication of Locke's mixed labor theory of property. These arguments may pull at the heartstrings of those libertarian and classical liberal writers who rightly see property as fundamental to liberty. But when we look closely at why property rights are so important to a worldview that holds liberty sacrosanct, we can see that the staunch defense of property stems from the harm that runs to owners of scarce objects when they are divested of sole possession. In contrast, because scarcity does not attach to ideal and intangible objects, a "no harm" principle is implicated by the lack of sole possession. This distinction between scarce and non-scarce objects drives a wedge between what should be considered a natural right in property found in tangible and scarce resources justly acquired, and those resources that can be held in common without harm to any possessor. The distinction between these two types of resources is not without consequence. "Property" in the Constitution is distinct from Congress's grant to authors of monopolies over their work. This has implications for the rights both authors and the public hold in regards to intellectual property law.

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[114] Loren, *supra* note 111.