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A Case for a Moral Theory of Property: How Digital Copyright Reveals the Insufficiency of Hume's Pragmatic Justification of Ownership

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I. Property Theory and Modern Copyrights: Finding Commonalities Between Locke, Hume, and U.S. Copyright Law

Defining the standards by which one becomes entitled to a given object of property can be a challenging task. Consider the legal battle over a monkey selfie between the wildlife photographer David Slater and Wikimedia (parent company to Wikipedia). The selfie was a product of Slater's several attempts not only to win the trust of a troop of crested macaques, but to also develop a contraption that, in effect, allowed the monkeys to take pictures.¹ In this dispute, Wikimedia refused to recognize Slater's copyright claim over one of the pictures taken during this project, justifying its unlicensed use of the monkey selfie. They denied Slater's argument that the time, energy, and ingenuity he employed to produce the monkey selfie constituted authorship on his part. Complicating the issue more, PETA (People for Ethical Treatment of Animals) entered the arena as a representative of the monkey in the selfie, dubbed Naruto.² PETA argued that the selfie taken by Naruto was, in fact, Naruto's and that she held a copyright claim over it. It did not take long for this argument to be rejected by the Ninth Circuit Court in California. The court determined that humans and humans alone have been in view when the law has addressed issues of authorship, eliminating Naruto as a potential owner of her selfie.³ Relative to the dispute between David Slater and Wikimedia, there is currently no litigation between the two parties and one can still find the iconic monkey selfie on the Wikipedia page about Celebes Crested Macaques.

¹Eleonora Rosati, *The Monkey Selfie Case and the Concept of Authorship: An EU Perspective*, (Journal of Intellectual Property Law & Practice 12, no. 12, 2017), 973-77. *Naruto v. David John Slater et al*, No. 3:2015cv04324 - Document 45, (N.D. Cal. 2016).

² *Ibid.*

³ *Ibid.*

This sequence of events might cause one to pause and carefully consider what truly constitutes and justifies the ownership of a thing. Here, one would be warranted in asking, “Do we have good reasons or explanations of our property laws?”

To address this question, I will consider the property theories of John Locke and David Hume. Locke’s theory is purposed for the justification of property. That is, he makes it his duty to explain why private property is morally acceptable. Moreover, he provides an explanation of how property can rightfully be acquired. He first concludes that people have a right to acquire property, because property is a necessary means for self-preservation.⁴ He then explains that people rightfully come to own something when they “mix” their labor with unowned resources. When one works to chop down an unowned tree to make it into a chair, one owns the fruits of one’s labor, the chair.⁵

On the other hand, Hume provides a psychological explanation of property—explaining how human passion and imagination could account for customs of ownership.⁶ He argues that justice concerning property exists because people in society felt the need to be secure in their possessions—to not have their things taken by their neighbors.⁷ Hume explains that the solution to this problem presented itself in the form of self-restraint.⁸ The rest of his account is devoted to explaining how ownership as we know it has come from self-restraint.

⁴Locke, *Two Treatise*, Bk. II Ch. V Sec. 26.

⁵Jeremy Waldron, *Property and Ownership*, (Stanford Encyclopedia of Philosophy, September 06, 2004) Accessed February 01, 2019.

⁶ Annette Baier, *A Progress of Sentiments*, (Harvard University Press, 1991), 1-2.

⁷ David Hume, *A Treatise of Human Nature*, Bk. III, Pt. II, Sec. II.

⁸ Baier, *A Progress*, 220-221.

Not only will I consider Locke and Hume in the attempt to find a notion of ownership which accounts for how we think of and view property, but I shall consider modern U.S. property law as well, specifically copyright law—with a special emphasis on digital property. If we are satisfied with the view of property that is present in U.S. copyright law and can show that it has some important commonalities with the theories of Locke and Hume, then we can potentially refer to such commonalities as constituting at least part of our general philosophy of property. I argue, below, that our copyright laws are like Locke’s theory of property in that they distinguish between owned and unowned things according to labor. Hume’s theory of property bears resemblance to U.S. copyright law relative to labor not in that he specifically envisions labor to be a metric for ownership, but in that his notion of accession potentially permits the use of property as a metric for ownership. Moreover, I note that the U.S. sees the ownership of a copyright as a means to some greater end. Somewhat similarly, Locke and Hume understand ownership to be instrumental to the welfare of people within society.

II. Locke & Hume

Locke’s discussion of property begins with the express goal of showing how “men might come to have property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.”⁹ Here, he commits to providing an explanation of how people could rightfully acquire property apart from “compact”—bilateral agreements with all other inhabitants of the earth

⁹ John Locke, *Two treatise of Government*, (Digireads.com Publishing, Kindle Edition), Bk II Ch. V Sec 25.

relative to who gets to possess (own) what. He sees such an account as indispensable because the possession of property (exclusive ownership) appears to be a violation of his contention that God granted the world to mankind collectively, not selectively. By “gave to mankind in common,” Locke simply means that mankind initially shared coequal access to the earth.

Locke is committed to private property because he believes natural law tells us that we have a right to those things that would help us survive (“meat and drink”) and that we must exclusively own those things to benefit from them.¹⁰ Natural law is one of Locke’s two primary sources of law (morally binding claims), the other being revelation from God (scripture). Unlike revelation, natural law is given to humans through their capacity to reason.¹¹ Locke asserts that by consulting one’s reason, one will come to know what one should do. His view of natural law is heavily influenced and informed by Richard Hooker, a sixteenth-century Anglican theologian and philosopher. Hooker understands the capacity to reason to be earmarked by the ability to recognize different lengths of time, negations, contradictions, and agreements.¹² These are the basic principles of logic. Hooker claims that natural laws, like the principles of contradiction and agreement, are self-evident. Moreover, these laws are universally agreed upon.¹³ Universal agreement, however, doesn’t necessarily mean that all people are equally disposed to recognize and follow such laws. Hooker argues that natural law can only be attained through serious reflection about what is right and wrong. In fact, he notes that the apparent lack of universal agreement is addressed by the apostle Paul in his letter to

¹⁰ Ibid.

¹¹ Ibid. Bk II, Ch. II, Sec. 6

¹² Richard Hooker, *Of the Laws of Ecclesiastical Polity*, Ch. 6, Sec. 6.

¹³ Ibid. Ch. 8, Sec. 10.

Ephesus, where Paul discusses men whose minds have been darkened by their intentional “hardening” of their hearts to the will of God.¹⁴

Locke uses the purpose for which God gave the earth to mankind to resolve the apparent conflict between his beliefs that God gave the earth to mankind collectively and his belief that natural law tells us that we have a right to those things that would help us survive: “God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being.”¹⁵ The earth was given to mankind *for* their benefit. Yet, it’s Locke’s view that common ownership, alone, fails to fulfil the earth’s purpose. It’s his understanding that only exclusive, individual ownership permits us to truly benefit from our world. The venison that an “Indian” acquires must belong to him for him to be nourished by it. For if anyone has the right to come and take that venison, it is little good to the Indian.¹⁶ Locke sees the inability to own things as a violation of the purpose for which God gave mankind the earth. Thus, Locke thinks ownership is necessary and not a violation of what he knows from revelation.

If we must be able to own things to benefit from them, what constitutes this ownership? How can I know that venison or a bushel of apples belongs to a particular person? Locke’s answer is that ownership of things like apples and venison starts first and foremost with self-ownership. By self-ownership he means that, unlike the rest of our world, our bodies and the work we do with them are our exclusive right (something

¹⁴ Ibid. Sec. 11. Bible Ephesians 4:17-18

¹⁵ Locke, Two Treatise, Bk. II Ch. V Sec. 26.

¹⁶ Ibid.

that belongs to us); no one has access to another person as they might to the oceans or a field of wild wheat (which are unowned).¹⁷ Self-ownership produces property (exclusive ownership of a thing) when we mix our labor with things that are unowned. Finally, unowned objects are objects in nature that have not been appropriated for some benefit to an owner (e.g. a wild field of wheat).¹⁸

Hugh Breakey explains that what Locke is ultimately after with the idea of self-ownership is a way of explaining how one can be justified in appropriating something from nature to make use of it for one's nourishment.¹⁹ Locke's labor-mixing standard is a derivative of this larger goal. Ownership, as far as Locke sees, is justifiable because it ensures that one may benefit from his/her labor: "Locke's arguments directly justify doing, and only derivatively having."²⁰ Breakey offers the language of his "property in activity" theory of property to recapitulate the heart of Locke's theory: one must have rights that guarantee access to resources, so that one is able to make use of those resources for one's own nourishment.²¹ Moreover, access to the specific resources that one has appropriated should be exclusive so that one can continue to properly benefit from one's labor.²² Finally, one should be entitled to the fruits of one's labor for those fruits are the very purpose and end of laboring in the first place.²³

Locke presents two provisos to his theory of property. The first is that one should only come to own property insofar as one has left enough resources for other people to

¹⁷ Ibid. Sec 27.

¹⁸ Ibid.

¹⁹ Breakey, *Two Concepts*, 257.

²⁰ Ibid.

²¹ Ibid. 258.

²² Ibid.

²³ Ibid.

use.²⁴ Once one has acquired the resources needed for one's survival, one should let others make use of the world as they need to.²⁵ This limitation follows plainly from Locke's purpose for property. Locke sets out to provide a theory of property that explains how people can ultimately support themselves. Given this goal, his theory of property can't allow one to harm another's wellbeing by taking all the available resources.²⁶ If self-preservation rests at the bottom of the justification of ownership, it seems improbable to say that self-preservation (for anyone) can suffer collateral damage at the hand of ownership. The second proviso is that one should only take possession of those things that one can make use of.²⁷ If one harvests a field of wheat and is only able to make use of only part of one's harvest, then one has acquired too much land, planted too much seed, or harvested too much wheat (unless they trade or give away the unusable parts of their harvest). Locke provides this proviso because his justification of property hinges on the point that property is necessary for people to properly benefit from the resources they collect and make. If one has acquired something and not made use of it, that acquisition is unjustified because that property is not being used for the nourishment/survival of its owner.²⁸ The second proviso becomes obsolete once currency is developed, however. Locke's account of the development of property states that once people agree to assign value to gold coins, for example, they can then collect monetary wealth without worrying about its spoilage.²⁹

²⁴ Locke, Two Treatise, Bk. II Ch. V Sec. 27

²⁵ Ibid. Sec. 33

²⁶ Ibid. Sec. 25

²⁷ Ibid. Sec. 31.

²⁸ Ibid.

²⁹ Ibid. 50.

Hume

Hume is less concerned with justifying property (as Locke attempts) and is primarily focused on explaining how property serves as a solution to the problems that come from people's love of material gain, or "avidity."³⁰ It's additionally important to note that Hume's understanding of those who originally initiated justice does not entertain the idea that people have always known justice.³¹ That is, Hume does not hold that justice and its rules are natural to human nature. Hume does think, though, that some virtues and vices are natural to human nature. However, his understanding of "natural" is quite different from Locke's. Hume does not hold that we are predisposed to think of something as right or wrong through the operation of our reason.³² Rather, he argues that it is by pleasure and pain that we immediately perceive something as right or wrong. In this sense, a Humean moral actor would deem generosity to be good because he or she experiences pleasure or ease when he/she is generous.³³ Hume's explanation of how a virtue like generosity is pleasurable is that virtues, by mere observation/contemplation, immediately produce pleasure in observers/ thinkers.³⁴ Justice is an artificial virtue because our apprehension of it as pleasurable is less direct than a virtue like generosity. Unlike generosity, one does not immediately feel pleasure in observing/contemplating acts of justice, say, acknowledging someone else's property. Rather, Hume asserts that we perceive that acts of justice tend to have utility for the good of mankind. Thus, justice is an artificial virtue because we do not immediately

³⁰ Baier, *A Progress*, 221.

³¹ *Ibid.*

³² Hume, *A Treatise*, Bk. III Pt. I Sec. I

³³ *Ibid.*

³⁴ *Ibid.* Sec II

perceive justice as pleasurable, but merely recognize justice as pleasurable through its indirect effect on us.³⁵

His account of the origins of property assumes that mankind has much to gain from being in a society with other people.³⁶ This is because he believes that individuals may indeed possess the strength and skill to care for some of their needs, but they will inevitably fail to provide for all of their needs. Though a cook may be rather skilled and efficient, his/her energy and efforts are likely limited to that domain—leaving the cook's other basic needs unaccounted for. However, in a community, a cook may offer up the fruits of his/her work in exchange for shelter that can be provided by a carpenter.³⁷ Jeremy Waldron likens this rudimentary exchange to what would now be considered simple market transfer—the exchange of things we have (be them goods, labor or money) for things we want.³⁸

Hume does not think, though, that the benefits of society are what initially motivated people to enter into community with each other. People must be made aware of such benefits before pursuing them.³⁹ Instead, he hypothesizes that the natural affection between sexes is what makes people willfully enter each other's midst. Once this is done, people come to recognize how much better off they are when cooperating with another person.⁴⁰ Moreover, Hume holds that when parents have children, they are prone to having natural affection for those children, thus motivating parents to care for their children. Children, being raised in community, are exposed to the benefits of

³⁵ Ibid. Sec I

³⁶ Ibid. Bk. III, Pt. II, Sec. II.

³⁷ Ibid.

³⁸ Waldron, *The Advantages*, 94.

³⁹ Hume, *A Treatise*, Bk. III, Pt. II, Sec. II.

⁴⁰ Ibid.

combining efforts for the sake of their individual welfare.⁴¹ Thus, it is by the erotic affection of parents and the concern they have for their offspring that people, in general, are given opportunities to recognize the benefits of living in society.

Yet, Hume asserts that once people are disposed to enter society, to cooperate with each other, they became aware of a serious impediment to their wellbeing, instability of possession due to theft.⁴² The solution to this problem, Hume asserts, has been addressed by the evolution of tacit customs in which people agreed to not dispossess each other of their goods insofar as others upheld their end of the agreement. This agreement was not a promise, but a generally regarded custom. He provides how one might reason in such a situation: “I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct.”⁴³ This sentiment, as Hume calls it, becomes more and more common as it’s embedded in the customs of a society. Moreover, as a society has developed, it has come to recognize certain modes by which property can be acquired. These modes are occupation, prescription, accession, and succession.⁴⁴

Occupation is simply first acquisition, or “first possession.”⁴⁵ Hume thinks people acknowledge occupation as a means of determining ownership because it’s a quick way to remedy the uncertainty of who owns what. People are predisposed to want such quick solutions to their property questions because the security of possessions is what enables

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid. Sec. III

⁴⁵ Ibid.

people to best benefit from living in society.⁴⁶ But Hume notes that first possession has not always been enough to establish ownership that is acknowledged by other people. As an example, he posits a case of two Grecian colonies, colonies (1) and (2), that sent emissaries to an abandoned city, seeking to take possession of that city.⁴⁷ As the two emissaries, (1e) and (2e), raced to the city to take possession of it, (1e) threw his spear at the gate of the abandoned city— knowing that he would not be able to race and reach the city before his competitor. In this case, it's rather difficult to see what exactly constitutes first possession. Moreover, would being present in the city first grant one of the emissaries assent regarding ownership from his competitor (including the competing city)? Hume is not convinced it would.⁴⁸

Enter prescription, or long possession. Prescription makes one more apt to acknowledge the possessions of others. Consider Hume's Grecian city example with this additional mode of property acquisition. What if (1e) had arrived at the abandoned city two months before his competitor? During that month, (1e) has sent word back to his country and has set up camp. Moreover, (1) has sent some colonizers along with a few military units to the abandoned city to solidify its claim to that city. Though it might be the case that (2) would lay siege to the (1) colony, Hume thinks that (2) would at least be more apt to recognize (1)'s claim.⁴⁹ Increase the length of (1)'s presence in the abandoned city by a year to five years and this effect appears to be stronger.

What exactly ensures that a property claim remains settled long enough to become ratified? Returning to the Grecian city thought experiment, how long must (1)

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

have possession of its new colony in order for (2) to consider it established? Won't people just take each other's things before the custom of prescription can settle in? Waldron attempts to address this problem by arguing that, after people in a society have realized they have maximized their potential to take advantage of each other, a pattern of who owns what begins to emerge.⁵⁰ This is the sort of pattern that becomes the object of stability.

The third mode through which people tacitly acknowledge possession is accession.⁵¹ Hume understands accession to be the custom or tendency to designate something as someone's property if that thing is intimately related to that person or to something that we already acknowledge as that person's property. For example, we are prone to acknowledge that we should not take the fruit of a person's garden. Hume's explanation of this phenomenon is not that there is any true relationship between a garden and its fruit, but that we appear to be prone to making such connections and that this propensity has affected the way we acknowledge each other's possessions.⁵² As I will somewhat demonstrate in the next section, the principle of accession is almost too general but is capable of vaguely explaining many customs of ownership.

Finally, Hume states that succession of property from parents to their children is one of the customs that has come from our gradual agreement as to who owns what.⁵³ He thinks this can be explained via accession and the affection parents have for their children. Relative to accession, he points out that one of the many connections we are

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

prone to make is between parents and their children.⁵⁴ He notes that when a parent dies, we recognize that something must be done with their property. Giving a parent's property to his/her children is the most natural thing for us to do with that property, because we perceive a strong connection between family members. Moreover, he notes that parents have a propensity to will that their children should gain their property because of the natural affection and concern parents have for their children, and it has become custom to respect a parent's desire to bequeath his/her property to his/her children.⁵⁵ It's by these trends that we have and still do determine ownership.

Each of these customs are extensions of the pursuit of stability of possession, which Hume argues has always been the point of property.⁵⁶ People feel the need to be assured of what is truly theirs and to be able to expect that no others may come and take those possessions.⁵⁷ These customs are artificial and are the product of hundreds of thousands of years of people attempting to live peaceably in each other's midst.⁵⁸

III. Digital Copyright Compared with Locke and Hume

Copyright, in general, is a domain of intellectual property that protects "original works of authorship."⁵⁹ Among such works of authorship are prerecorded music, motion pictures, home videos, books, periodicals, newspapers, and computer software. To have intellectual property is to have temporary, limited control over these works. Copyright, as a category of intellectual property, signifies the right to copy a particular work of

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Marshall Leaffer, *Understanding Copyright Law*, (New Providence, NJ: LexisNexis, 2014), 1.

authorship.⁶⁰ Having a copyright over a book that one has written, for example, precludes others from copying (without express consent) any element of that book that is deemed to be original.⁶¹ The U.S. Constitution grants Congress the power, “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁶² Thus, the Constitution justifies the use copyrights (as exclusive rights) on the basis that they have utility for the progress of the arts and sciences. A major expectation of copyright law is that guaranteeing authors copyrights to their creations motivates them to produce by ensuring them a “fair return” for their labors.⁶³ This fair return is supposed to be what motivates people to create new designs in the arts and sciences. The author of a work is typically the creator of that work.⁶⁴ However, it's important to note the works that are “prepared by an employee within the scope of his or her employment” belong to employers, unless a special agreement between an employee and their employer has occurred.⁶⁵

Before their official designation as being copyrightable in 1980, computer programs were originally understood to be copyrightable because of the close resemblance they had with works of literature.⁶⁶ In fact, in its definition of literature, the House Report of 1976 included computer programs as copyrightable insofar as those

⁶⁰ Leaffer, *Understanding*, 1.

⁶¹ *Ibid.*

⁶² U.S. Constitution, art. I, sec. 8, cl. 8. Leaffer, *Understanding*, 6.

⁶³ *Twentieth century Music v. Aiken*, 422 U.S. 151 (1975).

⁶⁴ Leaffer, *Understanding*, 191.

⁶⁵ 17 U.S.C. S 101. *Ibid.* 192

⁶⁶ H.R. Rep No. 94-1476, at 54 (1976). CONTU, *Final Report on the National Commission on New Technological Uses of Copyrighted Works*, (Computer L.J. 53, 1981). 17 U.S.C. S 101 (computer programs). House Reports are publications by which special congressional committees can make legislative recommendations to the whole House and or Senate.

programs demonstrated “authorship in the programmer’s expression of original ideas.”⁶⁷ This understanding of digital copyright remained after the passage of the 1980 amendment of the Copyright Act, which formally defined copyrightable digital works as “a set of statements or instructions to be used directly or indirectly in computer programs in order to bring about a certain result.”⁶⁸ An example of copyright law fulfilling its purpose, to encourage the progress of the arts and sciences by granting authors a fair return for their labors, can be seen in the protection of semiconductor chip designs. Semiconductors were deemed copyrightable in 1984 in the Semiconductor Chip Protection Act (SCPA) to ensure creators a financial interest in their investments of time and money.⁶⁹ Due to the fact that semiconductors are not entirely like other digital works, semiconductors were given their own chapter in the Copyright Act.⁷⁰ Rather than protecting an original set of statements as is the case with computer code, the SCPA protects the mask or imprint of semiconductors (which are used for mass production).⁷¹

Semiconductors are small, incredibly complex, chips of electronic circuitry that can either be used to store or process information.⁷² The building block of a semiconductor is a switch. Switches are used to control or amplify electronic signals.⁷³ Hundreds of thousands of switches can be housed on a single semiconductor. Prior to the use of semiconductors, electronics depended on vacuum tubes. In fact, the first digital computer, ENIAC, used vacuum tubes as switches.⁷⁴ The problem with

⁶⁷ Leaffer, *Understanding*, 106.

⁶⁸ *Ibid.*

⁶⁹ Leaffer, *Understanding*, 119.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Leaffer, *Understanding*, 118.

⁷³ *Ibid.*

⁷⁴ Saswato R. Das, *The Chip That Changed the World*, (The New York Times, Sep. 19, 2008).

electronics like ENIAC was that they were massive and consumed large amounts of energy. ENIAC weighed over 30 tons and consumed around 200 kilowatts of electrical power.⁷⁵ For reference, a standard laptop of today expends about 15-30 watts. Moreover, ENIAC only had about 18,000 vacuum tubes—a mere fraction of the switches on a semiconductor chip.⁷⁶ Essentially, semiconductor chips have enabled us to carry modern equivalents to ENIAC (and so much more) in our backpacks and shoulder bags.

Though semiconductors represent a key aspect of technological advancement in the twentieth-century, they are remarkably time consuming and expensive to design. It takes thousands of hours and millions of dollars to design a single semiconductor.⁷⁷ Naturally, it is only by mass-production of the electronics that use these semiconductors that creators can gain a return on their investment. However, pirates can illegally copy semiconductor designs and mass produce them with relative ease—enabling them to undersell the original designers of chips.⁷⁸ Piracy constitutes an obvious barrier for the general development of technology. If semiconductor designs are not protected, electronics companies are considerably disincentivized from developing new digital technology—for much of their business can be lost to pirates. The 1984 amendment to the Copyright Act preserved the interest designers have in developing new electronics by giving them exclusive rights to produce semiconductors according to their designs.⁷⁹ By granting such protection, U.S. copyright law increases the motive companies have to make new and innovative digital technology.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Leaffer, *Understanding*, 119.

⁷⁸ Leaffer, *Understanding*, 119

⁷⁹ Ibid.

Copyright law is also sensitive to the problem of monopolies. Built within copyright law is the idea vs. expression dichotomy. This distinction limits the sorts of things people can have copyrights over. Expression is copyrightable, whereas ideas are not.⁸⁰ Expressions are understood to be specific manifestations of general ideas by specific persons. For example, Thomas More's *Utopia* is an expression of the genre (idea) of a utopia. More could only copyright *Utopia* (his particular expression), not the idea of utopia itself. In digital copyright, the analogue to an idea is a function.⁸¹ For example, one could have a copyright to the code that is used to accomplish the function of a calculator (e.g. addition, multiplication). However, it is legal for those who don't have a copyright to that calculator program to write their own code to achieve the same function. The distinction between idea and expression is efficacious to the utilitarian purpose of copyrights in that the monopolization of an idea (e.g. utopia, electronic addition) could have a devastating effect on the progress of the arts and sciences. If it were the case that only one company could make calculators, for example, access to calculators would be limited to the production of calculators by that company—giving them the power to create scarcity to drive up their revenues—thus inhibiting general access to calculators and thereby stymieing the progress of science.

One of the primary questions to ask when considering the distinction between idea and expression in digital copyright is whether there is just one or very few ways of achieving a particular function (idea). In cases where there are not many ways in which one could write code to achieve a function, courts will have concluded that the idea and

⁸⁰ 17 U.S.C. S 102. Leaffer, *Understanding*, 82.

⁸¹ *Ibid.* 111

its expression have merged and the code in question is uncopyrightable.⁸² In *Apple Computer Inc. v. Franklin Computer corp.* (3d Cir. 1983), defendant Franklin partly argued that computer operating systems are digital works that merge idea and expression.⁸³ Franklin, a former Apple employee, had copied the Apple II operating system identically and used it to make his ACE computers compatible with Apple II applications.⁸⁴ He claimed that the operating system for the Apple computer was one among very few ways of achieving compatibility with Apple programs, arguing that the Apple operating system was an idea that had merged with its expression and therefore could not be protected under U.S. copyright law. Implicit within Franklin's claim is the additional claim that compatibility with Apple programs is a function rather than an expression. Ultimately, the Third Circuit court rejected Franklin's argument because the lower courts did not find that the Apple II operating system was the only means of expression by which Apple's applications could be used—rendering the Apple II operating system copyrightable.⁸⁵ In fact, Franklin admitted that some of the Apple II applications could have been rewritten to work with other operating systems.⁸⁶ That is, Franklin admitted that it was possible to achieve the function of the Apple II applications without the Apple II operating system.

Here, the purpose of copyright laws helps us to see how to treat operating systems in view of the public good. If it's the case that there is a prohibitively small number of ways one could write an operating system to run a certain program, say a

⁸² Leaffer, *Understanding*, 91.

⁸³ Leaffer 109 The purpose of an operating system is to translate commands into object code (computers only respond to object code).

⁸⁴ *Apple Computer Inc. v. Franklin Computer corp.*, 1983 Apple, App., Westlaw 714 F.2d 1240.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

video-editing application, then exclusive ownership of that operating system would necessarily preclude others from accessing that program—making it uncopyrightable as far as U.S. copyright law is concerned. In this case, Apple was permitted to have a copyright to their Apple II operating system because their copyright did not severely limit production of other expressions that function (idea) and by extension did not seriously stymie the development of new technology.

The preeminent goal of copyright law in the U.S. is to promote public welfare (progress in the sciences and arts) by incentivizing individual, creative effort. It does this by granting authors exclusive power to copy and reproduce their works so that they can get a fair return for their labor. Moreover, copyright law limits the monopolization of the right to copy and reproduce by reserving copyrightability to expressions of ideas and not ideas themselves. Congress and the courts have determined that digital works represent a domain of property that, if not distributed according to a theory of property that is sympathetic to the goal of copyrights, would have its progress and propagation significantly stunted—negatively affecting public welfare.

Locke and Copyright Law

Locke's theory of property is partly consistent with U.S. copyright law in that he uses labor to serve as a barometer for ownership. Understood through the lens of Breakey's "property in activity," Locke justifies the fruits of one's labors because those fruits are the purpose for which one engaged in labor in the first place.⁸⁷ Locke's theory justifies the connection between labor and the fruits of that labor because individuals

⁸⁷ Hugh Breakey, *Two Concepts*, 257.

own their labor and the fruits of their labor are ultimately what enables them to support themselves.⁸⁸ Similarly, Congress granted the authors of semiconductor designs copyrights to their designs because doing so helps ensure those authors the fruits of their labor—ultimately encouraging or at least maintaining further creation of semiconductor designs. It must be noted that the motivations of Locke and Congress are not the same. Locke justifies ownership because ownership is necessary to one's welfare. Congress, on the other hand, sees copyrights as the means to a collective interest—the progress of arts and sciences.

Additionally, Locke's theory of property, like U.S. copyright law, is self-limiting. In *Apple Computer Inc. v. Franklin Computer Corp.*, defendant Franklin failed to prove that there was just one way to achieve compatibility with programs that were on the Apple II computer.⁸⁹ As a result, Apple could have a copyright to the operating system that enabled their computers to run Apple II programs. Similarly, Locke provides limitations to the number of resources individuals can procure for themselves in his two provisos. His first proviso, that one should leave enough resources for others, bears particular resemblance to the motivation behind the idea vs. expression distinction.⁹⁰ Both Locke's theory of property and copyright law address the problems of potential scarcity. This similarity breaks down, however, relative to the respective goals of Locke's theory and copyright law. Locke's theory is about justifying property insofar as individuals use it to support their lives.⁹¹ Copyright law, once again, is about the promotion of the arts and sciences and, consequently, the general welfare of a society.

⁸⁸ Ibid.

⁸⁹ *Apple Computer Inc. v. Franklin Computer Corp.*

⁹⁰ Locke, *Two Treatises*, Bk. II Ch. V Sec. 27.

⁹¹ Ibid. Sec 25.

Nonetheless, Locke's theory of property justifies ownership in ways that would likely ensure somewhat similar results as those wrought from copyright law, but it is also partly calibrated to anticipate the problem of monopolization.

Hume and Copyright Law

Hume's explanation of the custom of accession potentially anticipates assigning copyrights based on labor and limiting copyrights by distinguishing between ideas and expressions. Accession, as you will recall, is to Hume the custom or tendency that we have to designate something as someone's property if that thing is intimately related to that person or to something that we already acknowledge as that person's property. Granting copyrights of authored works to their authors is consistent with the custom of accession in that the phrase "authored work" inherently implies a relationship between a copyrightable work and the one who labored to create it.

Relative to the idea vs. expression distinction, the custom of accession could possibly be used to explain why we might hesitate to grant someone a copyright over an idea because, in comparison to a specific expression of an idea, an idea isn't intimately connected to individual persons. Recall the example of the uncopyrightability of the function of a calculator (e.g. addition, multiplication). The purpose or function of a calculator is akin to an idea and the particular code/design of a calculator is the particular expression of an author. There is a more intimate connection between an author and the specific code that author writes than there is between that author and the general idea/function he/she is attempting to achieve. The former is the direct product of an author's labors (i.e., it is unique to their creativity and ingenuity), whereas the latter is more likely to be something that is known in common to many people at once (it

is also much more difficult to observe who is originator of the idea of a digital computational device). Thus, the custom of accession is potentially consistent with U.S. copyright jurisprudence.

Despite the fact that U.S. copyright potentially fits within the explanatory framework of Hume's theory of property, it's important to note that Hume's story of the development of property customs appears to be inconsistent with the justification for copyrights found in the U.S. Constitution. Article I, section 8, clause 8 states that the Congress may grant copyrights to promote the progress of art and science.⁹² Hume, however, argues that the assignment of property was not originally based on the particular utility/advantage of certain property distributions.⁹³ That is, he does not hold that the original initiators of justice assigned so and so this or that property because that assignment produced a certain economic/social utility. His account asserts that property exists as a product of our pursuit of the removal of discord and contention regarding possession. Hume argues that property assignments relative to utility/advantage are inconsistent with this pursuit because people are prone to disagree about what assignments work best for the good of society.⁹⁴ Thus Hume's account is potentially capable of explaining the customs found in U.S. copyright law, but his explanation is inconsistent with the utilitarian explanation that U.S. law is predicated upon.

⁹² U.S. Constitution, art. I, sec. 8, cl. 8.

⁹³ Hume, A Treatise, Bk. III Pt. II Sec. III

⁹⁴ Ibid.

Locke v. Hume or Locke & Hume?

Relative to U.S. copyright, it's not immediately apparent which theorist provides an account that is more consistent with modern notions of property. The resemblances/consistencies they respectively have with copyright law are different in nature. Locke's theory of property is consistent with copyright law in that he uses labor as the barometer for determining ownership and moreover recognizes property as necessary due to the fact that it serves some greater end. Hume, on the other hand, potentially anticipates copyright law with his analysis of the custom of accession. Locke uses a justification of ownership that resembles the justification of property in copyright whereas Hume's psychological explanation of property appears to be able account for the kinds of property represented in copyright.

Nonetheless, we are not left without compelling explanations of what justifies or constitutes property. First, Locke and Hume are sympathetic to U.S. copyright's use of labor to determine ownership. With Locke, we get the idea that labor should be a factor in ownership because it is by labor that we come to acquire resources for our preservation. With Hume, we are told that via the custom of accession we are prone to assign property based on the relative intimate connection an object has with a person. Labor, functioning as a conceptual bridge between people and objects, induces us to assign the products of labor to laborers. Similarly, the U.S. constitution acknowledges that copyrights should be granted to authors (laborers) so that those authors will be motivated to labor.

Moreover, both Locke and Hume acknowledge that property exists due to propensity to improve the welfare of property owners. Somewhat similarly, U.S.

copyright law is ultimately purposed for the welfare of U.S. citizens. Locke, Hume, and U.S. copyright provide overlapping reasons to believe that labor should be used as a constitutive factor in assigning property. Additionally, all three approaches to property, although for different reasons, that property/ownership is necessary in that it serves the good of people within society.

IV. Concluding Remarks

In the introduction, I stated that property disputes like those between David Slater, Wikimedia, and PETA should give us pause relative to what truly constitutes and justifies property. The avenue I have taken to address this question has been by comparing the theories of John Locke, David Hume and modern U.S. copyright jurisprudence. Such an analysis allows us to see if the theories of Locke and Hume, as old as they are, are consistent with or different from modern property law. If there are commonalities that exist between these three, then I think such commonalities potentially earmark an accurate justification/explanation of property in the U.S.

The commonalities that have survived this comparison are the fact that Locke and Hume are sympathetic to the use of labor as a barometer for ownership and the role of property as a means to the welfare of people within society. Though these principles, as products of comparison, are very general, we might nonetheless use them to approach an issue like the monkey selfie problem with some degree of clarity and direction. Relative to the dispute between Wikimedia and David Slater, one of these principles are instructive. If it's the case that the monkey selfie is mostly the product of Slater's labor, then it seems plausible to grant he should have a copyright to his work.

The justification/explanation for this is going to be somewhat varied between Locke, Hume, and U.S. copyright law but the results are likely to be nonetheless the same.

It's less clear how we might go about assessing the claim that a copyright should be granted to a monkey. Using labor as constitutive factor would not seem to call for a rejection of such protections. Many animals might be granted ownership of their burrows, dams, and nests if we were to solely rely labor to determine ownership. Moreover, it seems that protected property could possibly benefit animals and therefore justify granting them property rights if we were as committed to their welfare as we are to the welfare of humans. If one were to acknowledge that a dam belonged to a beaver, then that beaver would not become endangered by one's use of its wood for lumber. That is, it appears that restraining oneself from taking an animal's possessions appears to benefit that animal and therefore satisfies the second commonality between Locke, Hume, and U.S. copyright law. Alas, it may be replied that implicit within Locke, Hume and U.S. copyright is the idea that property exists as a distinctly human protection. Though that seems rather self-evident, I'm afraid that rabbit hole belongs to someone else and must be addressed by another person in another paper.

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17 U.S.C. Sec 101, Computer Programs.

