

# 1. Indelicate Imbalancing in Copyright and Patent Law

*Tom W. Bell*

When we were kids, my brother and I quarreled at length about the color of the world. Our intractable dispute arose because my brother, David, favored blue, whereas I favored green. As proof that he had chosen the superior of the two colors, my brother claimed that the world had more blue in it. Being some four years younger and correspondingly smaller, I could not resort to David's favorite rhetorical device (the argument from pummeling). I instead had to rely on my half-pint wits. To his claim on behalf of the color blue, I thus replied: "Does not!"

"Does too!" came David's retort. "The sky is blue and so is the ocean."

"The sky isn't blue when it rains or at night," I parried, "and the ocean isn't blue—it's green. And the grass is green. And the trees are green, too."

You can well imagine where our colloquium on the world's color went from there: whether the sky was blue, black, or even (as I averred) deep purple at night; how to reckon the color of the sky *above* the clouds and, relatedly, how many airline passengers get window seats; which of us had better claim to the Red and Yellow Seas; whether the "Sea of Green" the Beatles sang of really existed; "does not"; "does too"; and so forth.

I relate this tale for two reasons. First, I want to publicly concede that my brother almost certainly had the better of our factual dispute. As a five-year-old in rural Virginia, I perhaps had good reason to think that the world sports predominately green hues. I've since learned, however, that we call Earth "the Blue Planet" for good reason. (It bears noting, though, that scientists recently discovered that "the current color of the *universe* is a sprightly green.")<sup>1</sup>

Secondly, and more important, that childhood argument over color illustrates an important aspect of contemporary arguments

over the proper scope of copyright and patent protection. Neither sort of argument could ever end by dint of quantitative measures. The necessary numbers do not exist and, even if they did, they could not alone suffice to settle the dispute in question. These types of arguments ultimately turn on questions of values—aesthetic in one case, ethical in the other—not on questions of facts.

Our ignorance about the relative amounts of blueness and greenness hardly mattered to me and my brother because we implicitly understood that our fight over facts served as a mere proxy for the ultimate, and ultimately irresolvable, issue: aesthetics. Ignorance of the relevant quantitative data *does* matter, however, to arguments over the proper scope of copyright and patent law. By all accounts, copyright and patent law aim to strike a “delicate balance” between public and private interests. By most accounts, moreover, and by the only convincing ones, the justifiability of copyright and patent protection relies on a showing that lawmakers have managed to at least approximate that balance.

But due to knowledge problems,<sup>2</sup> copyright and patent law has not and indeed cannot strike a delicate balance between public and private interests. Due to public choice problems,<sup>3</sup> lawmakers can at best achieve only a rather *indelicate imbalance* between various private interests—namely, those private interests with sufficient clout to sway legislative deliberations.

Can the legislative process at least approximate *the real goal* of copyright and patent law, that of balancing public and private interests? That remains a difficult—and hotly contested—question. Merely to ask the question demonstrates the need to reevaluate the justifiability of state action protecting copyrights and patents. Copyrights and patents represent federal welfare programs for creators. As with other sorts of welfare programs, we may never know if copyright and patent work very well or even if they produce net benefits. But, as with other sorts of welfare programs, we should recognize copyrights and patents as evils—evils necessary at the best and susceptible to reform at the least.

Admittedly, some intellectual property theoreticians might object to the characterization of copyrights and patents as purely utilitarian devices for maximizing social utility. Such theoreticians characterize copyrights and patents as natural rights that vest in the creators of original expressions or novel inventions, respectively. To clear the

way for the main topic—the indelicate imbalances struck by copyright and patent law—the next section offers a brief rejoinder to the natural rights argument for copyrights and patents. Then the paper discusses why copyright and patent law cannot demonstrably satisfy their utilitarian aims, and suggests what we should do about that problem.

Before turning to those arguments, allow me to clarify that I do not intend to analyze every sort of intellectual property. I focus here solely on copyrights and patents, which alone out of all intellectual property protections tout express authorization under the U.S. Constitution,<sup>4</sup> which thus arise almost solely under U.S. federal law rather than the laws of the several states, and which have little or no plausible claim to natural or common law foundations. Trademarks and trade secrets, the two other main types of intellectual property, present issues different from those covered by this paper and, thus, beyond its scope.

### **The Unnaturalness of Copyright and Patent Rights**

The instrumentalism that pervades cases, legislation, and commentary on copyright and patent law leaves scant room for natural rights.<sup>5</sup> The Supreme Court has, for instance, described copyright as “the creature of the Federal statute”<sup>6</sup> and observed, “Congress did not sanction an existing right but created a new one.”<sup>7</sup> In another case, the Court observed: “The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather it was a reward, an inducement, to bring forth new knowledge.”<sup>8</sup> Nonetheless, a few commentators have argued that the propriety of copyrights and patents could and should rely on a Lockean labor-desert justification. That form of justification would run, in very brief, thus: 1) Because a creator owns himself, 2) he owns his labor and, thus, 3) those intellectual properties with which, by dint of his creative acts, he mixes his labor.<sup>9</sup>

That facially plausible extension of Locke’s theory does not, however, withstand close scrutiny. The labor-desert justification of property gives a creator clear title only to the particular tangible item in which he fixes his creativity—not to some intangible wisp of the metaphysical realm.<sup>10</sup> It speaks only to the ownership of atoms, not to the ownership of bits. Locke himself did not try to justify intangible property.<sup>11</sup> Modern commentators who would venture so far beyond

the boundaries of Locke's thought, into the abstractions of intellectual property, thus ought to leave his name behind.

More pointedly, copyright and patent protection contradicts Locke's justification of property. By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of their tangible property.<sup>12</sup> Because it thus gags our voices, ties our hands, and demolishes our presses, the law of copyrights and patents violates the very rights that Locke defended.<sup>13</sup>

At any rate, Locke's justification of the natural right to property runs little risk of convincing contemporary legislators or courts to forsake the prevailing utilitarian justification of copyright and patent. The Lockean labor-desert theory has only one realistic hope of influencing intellectual property law: via originalist interpretation of the U.S. Constitution.<sup>14</sup> Many judges find appeals to the original meaning of constitutional language, such as that embodied in the copyright and patent clause, quite persuasive.<sup>15</sup> We thus need to ask whether the Founders understood copyrights and patents to secure authors' and inventors' natural rights against unauthorized duplication. A careful review of the historical record indicates that the Founders almost certainly did not.<sup>16</sup>

Consider first the plain language of the Constitution's copyright and patent clause, which authorizes Congress to "promote the Progress of Science and the useful Arts"<sup>17</sup> The clause makes no reference to natural rights, instead offering only a utilitarian justification of copyrights and patents.<sup>18</sup> Consider second the available evidence of substantial discussion about the clause during the Philadelphia Convention or the state ratification debates: no such evidence exists.<sup>19</sup> Reconstructing the Founders' views on copyright and patent law thus calls, third and last, for us to consider their extra-legislative comments.

In *The Federalist Papers*, James Madison defended the power granted by the copyright and patent clause to Congress on grounds that,

The utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.<sup>20</sup>

Note first that Madison's defense of the copyright and power sounds more in utility than natural rights. Note next that, intentionally or not, Madison misrepresented copyright's standing at common law, which had some years prior to his comments lost what little nonstatutory protection it ever enjoyed.<sup>21</sup>

Most importantly, however, note that notwithstanding Madison's reference to the "claims of individuals," he appears not to have held a natural rights view of copyrights and patents. The telling evidence appears in what he said—or rather what he did not say—in his correspondence with Thomas Jefferson about the copyright and patent clause. Jefferson wrote from Paris critiquing the proposed Constitution for failing to include a bill of rights, advocating in particular that it "abolish . . . Monopolies, in all cases. . . ."<sup>22</sup> Jefferson explained that "saying there will be no monopolies lessens the incitements [sic] to ingenuity . . . but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."<sup>23</sup>

Madison's reply gave ample credit to Jefferson's concerns and, more pointedly, nowhere defended the clause as a measure necessary to protect the natural rights of authors and inventors.<sup>24</sup> Madison's silence on that point would prove remarkable in any context.<sup>25</sup> In this case, though, writing to one of the foremost advocates of natural rights, in reply to his call for a bill of rights, and in defense of the copyright and patent clause, Madison's silence speaks tomes. Madison regarded copyrights and patents not as natural rights but as admittedly dangerous tools for advancing industrial policy, and ones of dubious efficacy at that.

As his comments to Madison indicated, Thomas Jefferson likewise regarded copyrights and patents as unnatural—and presumptively unwise—rights. His view of patents carries particular weight, as Jefferson served, in effect, as the first Commissioner of Patents.<sup>26</sup> Jefferson quite plainly regarded patents as utilitarian and statutory devices, describing "the exclusive right to invention as given not of natural right, but for the benefit of society. . . ."<sup>27</sup>

In sum, then, the argument for natural rights in copyrights and patents cannot claim the support of the plain language of the Constitution, judicial interpretation of that language, Locke's theory of property, or the Founders' views of copyrights and patents. On that evidence I conclude that copyrights and patents represent notable

exceptions to the default rule that a free people, respecting common law rights and engaging in market transactions, can copy original expressions and novel inventions at will.<sup>28</sup> In that, I think I follow the Founders, who viewed copyrights and patents as exceptions to natural rights so extraordinary as to require explicit constitutional authorization.

### The Statutory Failure of Copyright and Patent Law

Courts and commentators agree that copyright and patent represent statutory responses to a looming market failure—namely, the market's failure to provide adequate supplies of original expressions and novel inventions.<sup>29</sup> Why create copyright and patent rights? "To promote the Progress of Science and useful Arts,"<sup>30</sup> the Constitution explains. How do copyright and patent promote that end? By "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," the Constitution's text continues.<sup>31</sup> The Supreme Court summed it up in *Mazer v. Stein*: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."<sup>32</sup>

In other words, copyright and patent law provide emergency shelter to creations that, but for such special statutory protection, would have fallen between the common law's cracks and been left wandering unprotected through the market economy. Just as commentators call the special treatment that lawmakers afford to influential commercial interests "corporate welfare," we might thus call copyright and patent law "creators' welfare." Or, to draw a parallel with a type of welfare that, in contrast to corporate welfare, has seen bracing reform—the Aid to Families with Dependent Children (AFDC) program<sup>33</sup>—we might call copyright and patent protection "ACPE," for "Aid for Creators with Positive Externalities."

As that analogy suggests, we ought to withdraw copyright and patent protections when and if they prove redundant. Understand that by analogizing them to welfare I do not mean to dismiss copyrights and patents as utterly illegitimate. For one thing, copyright and patent law can lay just claim to using a fairly efficient means of incentivizing creators: the creation of fungible and divisible rights. For another thing, copyright and patent law tackles a very difficult

problem—one the Founders thought salient and important enough to expressly address in the Constitution. But the analogy with welfare does serve to remind us that the legitimacy of copyrights and patents remains a contingent question of fact.

But here we face a problem: Notwithstanding ubiquitous claims that copyright and patent policy strikes a delicate balance between public and private rights,<sup>34</sup> thus maximizing social utility, it almost certainly does not strike such a balance. Indeed, it cannot. Political authorities cannot measure even the *economic* factors that would have to go into a calculation of the optimal level of copyright and patent protection.<sup>35</sup> Still less can they measure the myriad fluctuating and intangible ones, such as the Internet's effect on the production of new music or the social impact of parody.<sup>36</sup> Regardless of whether they could *measure* all the relevant economic, legal, technological, and cultural factors, moreover, politicians could not *balance* such incommensurable values.<sup>37</sup> The subject matter of copyright and patent law reaches so deeply into our lives that it has become not simply a matter of industrial policy, or even of information policy, but of social policy. Copyright law limits criticism of the Church of Scientology, for instance, while patent law raises the price of life-saving drugs. The intractable nature of those and related controversies ensures that no amount of open, sincere, and disinterested discourse will put copyright and patent law into delicate balance.

Does that sound discouraging? It gets worse. Public choice theory teaches that even if lawmakers could obtain the data necessary for delicately balancing all the public and private interests affected by copyright and patent law, it wouldn't matter.<sup>38</sup> Lawmakers would not use those data—or, more precisely, those data would not control the laws they make. Instead, lobbying by special interests would invariably ensure that copyright and patent law favors private interests over public ones. That is not to say that politicians are always corrupt or that democracies always fail; it means simply that politicians respond to the same incentives as the rest of us and that, consequently, democracies tend toward predictably biased outcomes.

Does "delicate balancing" rhetoric merit any place in copyright and patent jurisprudence? Copyright and patent legislation does reflect careful compromises struck between the various private parties that lobby for changes to federal law. As noted, however, any

such truce among special interests does not and cannot delicately balance all the interests affected by copyright law. The influence of such rough-and-tumble politics merely ensures that copyright and patent law put public and private interests into an *indelicate imbalance*.

### **Toward Market Success in Protecting Original Expressions and Novel Inventions**

What can we do about the apparently inexorable influence that ignorance and politics wield over copyright and patent law? We can, for a start, learn to recognize and resist how copyright and patent owners co-opt the rhetoric of property.<sup>39</sup> Such rhetoric proves especially attractive to those who have for so long courageously defended rights to tangible property.

True, copyrights and patents bear some of the attributes of real and chattel property. That they have nonnatural origins (arising solely by statute) and remain nonrivalrous in consumption (even if statutory protections render them somewhat excludable), means that copyrights and patents remain quite different from tangible property, however. The thief of your apple, house, or other tangible property violates your natural rights because you can no longer enjoy—or “consume”—those purloined goods. His consumption rivals yours. The copier of your copyright or patent, in contrast, leaves you at complete liberty to continue expressing your authorship or using your invention. He infringes only your statutory right to exclude others from those same benefits of consumption. Those who respect property rights should never forget that distinction, lest debates about the proper scope of copyrights and patents overextend and fatally dilute the very concept of property.

In addition, even though no one can tell whether copyright and patent have achieved that mythical “delicate balance” of public and private interests, we *can* tell when lawmakers have plainly put matters out of whack. Sentencing copyright infringers to death would, for instance, clearly go beyond the pale. Perhaps some current laws do too. The point here is not to settle such questions but rather simply to observe that imprecise knowledge should not preclude rough justice. Regardless of the merits of our childish debate over blue versus green, after all, my brother and I would have agreed that either of our favorites colored the world far more than, say, fuchsia.



Recalling the utilitarian foundations of copyright and patent law should encourage us to continually question its proper scope. At the very least, we should challenge the absurd argument that copyright and patent rights have become so important to the national economy that they must reach farther still.<sup>40</sup> To the contrary, the efficacy of copyright and patent protections demonstrates that market failure no longer looms and, thus, that they have reached the limits of their justification. Far from trumpeting the prodigious revenues, jobs, and exports that their clients generate, in other words, lobbyists for increased intellectual property protections should have to relate their clients' threadbare survival and imminent woe.

Still further, we should regard even extant copyright and patent protections skeptically. Perhaps creators would do just as well without such legal fripperies. We appear to suffer no shortage of creative perfumes,<sup>41</sup> recipes,<sup>42</sup> clothes designs,<sup>43</sup> furniture,<sup>44</sup> car bodies,<sup>45</sup> or uninhabited architectural structures,<sup>46</sup> even though U.S. law affords no effective protection to them *qua* original expressions or novel inventions.<sup>47</sup> Perhaps the same would hold true of subject matter now covered by copyrights or patents were their protections removed.

As set forth above, we cannot count on lawmakers to resolve such questions—or even to have much resolve in asking them. The problem of encouraging the creation and distribution of original expressions and novel inventions thus mirrors other difficult problems of social coordination; in no such case can we expect a central political authority to have the information and incentives necessary to identify and implement an efficient public policy. Here, as generally, we should insofar as possible rely on the decentralized enforcement of common law rights and remedies.<sup>48</sup> Although the common law cannot replicate copyrights and patents, those unnatural and purely statutory creations, it might nonetheless supplant them.

Whether and how the resultant “packet switched society,” as I have elsewhere termed it,<sup>49</sup> will give rise to practices and institutions capable of supplanting copyrights and patents poses an interesting and difficult question. It seems reasonable to suppose that common law contract, tort, and property rules, buttressed by innovative institutions and technologies, could go some distance toward that goal. In place of copyrights, for instance, automated rights management systems could help protect an expressive work from unauthorized access and condition use of it on agreement to a “clickwrap” license.<sup>50</sup>

In place of patents, so-called "idea futures" or "decision markets" could reward research and invention by allowing people to "bet" for or against claims about future events.<sup>51</sup> Someone who had created a new cure for AIDS, for instance, could profit by shorting the market in claims about the disease's spread.

So go some plausible forecasts of how the market might respond had it greater incentives to protect expressive works and novel inventions. But we cannot really know what such a spontaneous order will achieve unless and until we free it to function. We thus face a preliminary problem: How do we get from here to there? In other words, how can we encourage the development of nonstatutory alternatives to copyright and patent law? Even if I had a complete answer to that question—which I do not—to relate it would surely exceed the bounds of this essay. I can, however, offer a few brief suggestions.

For reasons set forth above, public choice pressures make direct legislative attacks on the scope of copyright and patent law highly unlikely to succeed. That does not mean that statutory reforms offer no hope; it means simply that any such reform would have to pass muster with the various parties that lobby for more powerful intellectual property protections. I've elsewhere specified a very modest amendment to the Copyright Act, for instance, that might both win the support of such lobbyists and help encourage extra statutory protections of expressive works.<sup>52</sup>

It might also help drive the development of alternatives to copyright and patent were we to encourage practices more clearly demarcating the line between protected and unprotected creations. This would prove especially helpful in copyright law, where U.S. law by default grants protection to every fixed expression of authorship. I've thus argued for applying notices such as "Uncopyright," "Uncopr.," or even just "(c)" to works that have been removed from, fallen out of, or never qualified for the Copyright Act's protections.<sup>53</sup> Such notices would encourage the growth of an "open" copyright system, one that respects and encourages movement across the Act's porous border.<sup>54</sup>

Beyond those measures, the best options for effectuating reform of copyright and patent law remain the standbys of reformers everywhere: long-shot legal claims, the diffuse effects of popular opinion, and long-term academic debates. Although that may sound dispiriting, I assure you from personal experience that it can prove a very

engaging project. At the very least, the hard job of privatizing copyright and patent law promises to keep liberty-loving policy wonks motivated and busy for years to come.

## Conclusion

Arguments over the proper scope of copyright and patent law resemble the argument between my brother and me in that both arguments wrongly assume knowledge of things unknown and unknowable. We can excuse such meta-ignorance in the case of two kids squabbling over the merits of their favorite colors. We cannot excuse it in the case of those who shape copyright and patent policy, however. The risks of simple ignorance, already too evident in copyright and patent policy, pale beside the risks of not knowing the limits of our knowledge.

## Notes

1. Paul Recer, "Scientists Say Universe Is a Pale Green," Associated Press, January 10, 2002 (emphasis added). They arrived at this color by averaging all the colors from the light of 200,000 galaxies.

2. See, for example, Friedrich A. Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press: 1948), pp. 77–78. Hayek explains that the knowledge essential for central planning does not exist in concentrated form.

3. Public choice theory holds, in very brief, that because political actors respond to incentives in the same way that other humans do, we should not assume that political acts aim at promoting the public good. See, for example, James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press: 1962); Mancur Olson, Jr., *The Logic of Collective Action* (Cambridge, Mass., Harvard University Press: 1965).

4. U.S. Const. Art. I, § 8, cl. 8.

5. See Mark A. Lemley, "Romantic Authorship and the Rhetoric of Property," *Texas Law Review* 75 (1997): 873, 879–95, reviewing James Boyle, *Shamans, Software, and Spleens* (Cambridge, Mass.: Harvard University Press, 1996). Boyle's collected cases, statutes, and commentary describe the instrumentalist philosophy underlying copyright and patent law.

6. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

7. *Ibid.*

8. *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966).

9. See, for example, Ayn Rand, "Patents and Copyrights," in *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), p. 26; Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," *Yale Law Journal* 102 (1993): 1533; Alfred C. Yen, "Restoring the Natural Law: Copyright as Labor and Possession," *Ohio State Law Journal* 51 (1990): 517. See also Justin Hughes, "The Philosophy of Intellectual Property," *Georgia Law Journal* 77 (1988): 287, 296–331, exploring the uses and limits of the Lockean justification of intellectual property.

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10. See Tom G. Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," *Harvard Journal of Law and Public Policy* 13 (1990): 851–55, distinguishing rights to tangible property from claims to intangibles.

11. For an argument from irony, consider this: The text that allegedly inspired a natural rights view of copyright among the Founders, John Locke, *The Second Treatise of Government*, in John Locke, *Two Treatises of Government*, ed. Laslett (1690, New York: Cambridge University Press: 1963), p. 299, appears not to have enjoyed copyright protection itself.

12. See Copyright Act of 1976, as amended, 17 U.S.C.A. §§ 502–11 (West Supp. 2001), for a description of remedies for copyright infringement; Patent Act of 1952, as amended, 35 U.S.C.A. §§ 283–88 (West Supp. 2001) (describing remedies for patent infringement). Note, however, that these two statutes do not afford equivalent remedies; the former generally offers more powerful ones. Most notably, U.S. patent law imposes criminal sanctions not for infringement per se but rather only for false patent marking, 35 U.S.C.A. § 292 (West Supp. 2001), and counterfeiting of letters patent, 18 U.S.C.A. § 497 (West Supp. 2001), and allows for seizure and forfeiture of infringing goods only with regard to imports, 19 U.S.C.A. 1337(a)(1)(B) (West Supp. 2001).

13. Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline Law Review* 12 (1989): 261, 281. See also Palmer, "Are Patents and Copyrights Morally Justified?" p. 827 (critiquing the Lockean argument for intellectual property rights on grounds that they "restrict others' uses of their own bodies in conjunction with resources to which they have full moral and legal rights."). But see Gordon, "A Property Right in Self-Expression," p. 1423, for a response to Palmer's argument with the Hohfeldian and positivist argument that "all entitlements limit each other."

14. Though originalists do not always take care to do so, one ought to distinguish between original meaning and original intent. Justice Antonin Scalia explains, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." Antonin Scalia, *A Matter of Interpretation* (Princeton, N.J.: Princeton University Press, 1997), p. 38. Justice Scalia does well to favor original meaning over original intent. Our untrustworthy records of what transpired in the Constitutional Convention and in the states' ratifying conventions, not to mention the incoherence of ascribing intentions to deliberative bodies, should discourage attempts to divine the Founders' intentions.

15. See, for example, *ibid.*, at 37–41.

16. I undertook a fairly comprehensive review of the evidence relating to copyrights in Bell, "Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works," *University of Cincinnati Law Review* 69 (2001): 762–74. Others have done much the same for patents. See, for example, Adam Mossoff, "Rethinking the Development of Patents: An Intellectual History," *Hastings Law Journal* 52 (2001) ("Regardless of the theoretical schema scholars have used to explain the history of patents, everyone agrees that natural rights theories played no part whatsoever in this story").

17. U.S. Const. Art I, § 8, cl. 8.

18. See H.R. Rep. No. 1494, 52d Cong., 1st sess. 2 (1892) ("There is nothing said [in the Constitution's Copyright and Patent clause] about any desire or purpose to secure to the author or inventor his 'natural right to his property'").

19. See Karl Fenning, "The Origin of the Patent and Copyright Clause of the Constitution," *Law Journal* 17 (1929): 109, 114 (reviewing the evidence and concluding

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that the clause "apparently roused substantially no controversy either in the Convention or among the States adopting the Constitution").

20. James Madison, *The Federalist* No. 43.

21. Madison presumably relied on *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769), in which the King's Bench read the Statute of Anne not to abrogate common law's protection of copyrights. But the House of Lords overruled that case five years later, in *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774)—some thirteen years before Madison published *Federalist* No. 43. Madison's claim that copyright "has been solemnly adjudged, in Great Britain, to be a right of common law" therefore had as much truth as the modern claim that "slavery has been solemnly adjudged constitutional." In neither case would old bad law justify new bad law.

22. "Letter from Thomas Jefferson to James Madison," Paris, July 31, 1788, James Morton Smith ed., reprinted in *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826* ed., (New York: W.W. Norton, 1995), pp. 543, 545.

23. *Ibid.*

24. "Letter from James Madison to Thomas Jefferson," New York, October 17, 1788, *ibid.* at 562, 566.

25. That Jefferson did not raise a natural rights argument bears noting, too.

26. Jefferson, as secretary of state, effectively directed the three-member board that reviewed applications under the 1790 Patent Act. Edward C. Walterscheid, "Patents and the Jeffersonian Mythology," *John Marshall Law Review* 29 (1995): 269, 279-80. Some authorities also credit Jefferson as having authored the 1793 Patent Act. See for example, *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980). Recent scholarship has somewhat mitigated that claim, however, making it appear more likely that Jefferson merely influenced that Act. See Edward C. Walterscheid, "The Use and Abuse of History: The Supreme Court's Interpretation of Thomas Jefferson's Influence on the Patent Law," *Journal of Law and Technology* 39 (1999): 195, 211-12.

27. "Letter from Jefferson to Isaac McPherson," Aug. 13, 1813, in XII Writings of Jefferson, *supra* note 5, p. 335.

28. As Justice Holmes explained of copyright law, and as he would no doubt have rightly said of patent law, too, 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." *White-Smith Music Publishing Co. v. Apollo*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

29. See, for example, *Mazer v. Stein*, 347 U.S. 201, 219 (1954), describing copyright and patents as a response to market failure and analyzing them in cost/benefit terms; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (same with regard to copyrights); John R. Thomas, "Collusion and Collective Action in the Patent System: A Proposal for Patent Bounties," (2001) *University of Illinois Law Review* 2001 (2001): 305, 308-09 (describing patents as a response to market failure). Also see Brett Frischmann, "Innovation and Institutions: Rethinking the Economics of U.S. Science and Technology Policy," *Vermont Law Review* 24 (2000): 377-82; Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors," *Columbia Law Review* 82 (1982): 1610-14; Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review* 84 (1970): 281; William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18 (1989).

30. U.S. Const. Art I, § 8, cl. 8.

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31. *Ibid.*

32. 347 U.S. 201, 219 (1954).

33. The Personal Responsibility and Work Opportunity Act, Pub. L. No. 104-193 (1996) codified as amended at 42 U.S.C.A. § 600 *et seq.* (West Supp. 2001), replaced AFDC with the Temporary Assistance for Needy Families (TANF) program.

34. With regard to copyrights, see, for example, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (claiming that Copyright Act "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2d Cir. 1994) (referring to "delicate balances established by the Copyright Act"); *Recording Industry Association v. Copyright Royalty Tribunal*, 662 F.2d 1, 17 (D.C. Cir. 1981) ("'delicate balance' that Congress decreed in the Copyright Act"); *Morseburg v. Baylon*, 621 F.2d 972, 977 (9th Cir. 1980) ("careful balance struck by Congress between those matters deserving of protection and those things that should remain free"); David Nimmer *et al.*, "The Metamorphosis of Contract into Expand," *California Law Review* 87 (1999): 17,19 ("'delicate balance' between the rights of copyright owners and copyright users"); Dennis S. Karjala, "Federal Preemption of Shrinkwrap and On-Line Licenses," *University of Dayton Law Review* 22 (1997): 511, 518.

With regard to patents, see, for example, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years."); *Saf-Gard Products, Inc. v. Service Parts, Inc.*, 532 F.2d 1266, 1270 n. 8 (9th Cir. 1976) (describing the "delicate balance between granting exclusive rights to developers of meritorious inventions and allowing general use of designs properly within the public domain."); John M. Golden, "Biotechnology, Technology Policy, and Patentability: Natural Products and Invention in the American System," *Emory Law Journal* 50 (2001): 101, 104 (claiming that patent law aims to strike a "delicate balance between two prongs of social desire: the desire to encourage initial invention and the desire to ensure the availability of that invention both for its initially intended use and for its use as a basis for further invention.").

35. See Jessica Litman, "The Public Domain," *Emory Law Journal* 39 (1990): 965, 997-98 (characterizing as an "unruly brawl" debate among economists about copyright's effects and concluding that in general "empirical data are not only unavailable, but are also literally uncollectible."); Yen, pp. 542-43 ("[T]he empirical information necessary to calculate the effect of copyright law on the actions of authors, potential defendants, and consumers is simply unavailable, and is probably uncollectible."). See generally Hayek.

36. See Trotter Hardy, "Property (and Copyright) in Cyberspace," *University of Chicago Legal Foundation* 1996 (1996): 257 (arguing that in the face of rapid technological change, "the high costs of group decision making ensure that the Copyright Act will be long out of date before it can be revised appropriately").

37. See George Priest, "What Economists Can Tell Lawyers about Intellectual Property," in *Research in Law and Economics: The Economics of Patents and Copyrights* 8 (1985): 19, 21 ("[E]conomists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."). See also Ludwig

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Von Mises, *Liberalism in the Classical Tradition*, 3rd ed. (1962, 1985), pp. 70–75 (economic calculation cannot proceed absent price signals).

38. See generally James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962); Mancur Olson, Jr., *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1965).

39. See Lemley, pp. 895–904 (describing in cautionary terms a trend toward “propertization” of copyright, patent, and other types of intellectual property).

40. See, for example, Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2000 Report* (Washington: International Intellectual Property Alliance, 2000) (reporting on behalf of the International Intellectual Property Association that for the ninth straight year U.S. copyright industries ranked among the fastest-growing segments of the U.S. economy), [www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

41. See Pierre Breese, “Olfactory Measurement Methods Linked to Sensory Analysis, Designation and Comparison Tools for Use by the Legal Expert,” [www.breese.fr/guide/htm/parfum/cannes.htm](http://www.breese.fr/guide/htm/parfum/cannes.htm) (asserting that currently there is no intellectual property protection for olfactory creations apart from trademark law) (visited November 12, 2001).

42. See U.S. Copyright Office, Form Letter 122: Copyright Registration in Recipes 1 (June 1999) (“Mere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection.”), [www.loc.gov/copyright/fls/fl122.pdf](http://www.loc.gov/copyright/fls/fl122.pdf) (visited November 12, 2001). Interestingly, recipes apparently represent the oldest known subject matter of intellectual property protection. See Steven L. Nichols, “Comment: Hippocrates, the Patent-Holder: The Unenforceability of Medical Procedure Patents,” *George Mason Law Review* 5 (1997): 233–34 (reporting that c. 500 B.C. the Greek colony of Sybaris, in Southern Italy, afforded patent-like protection to recipes).

43. See Jennifer Mencken, *A Design for the Copyright of Fashion*, B.C. *Intellectual Property and Technology* 121201, ¶¶ 3–5 (December 12, 1997), [www.bc.edu/bc\\_org/avp/law/st\\_org/ip/tf/articles/content/1997121201.html](http://www.bc.edu/bc_org/avp/law/st_org/ip/tf/articles/content/1997121201.html), visited November 12, 2001 (detailing scope and reasons for noncopyrightability of fashion designs). Incredibly, the author argues for creating copyright protection in clothes designs even though she admits, “It is clear that the lack of copyright protection in the U.S., as well as the existence of protection in Europe, has not changed the ability of designers to create new garments each season. Nor has there been any adverse effect on the power of the public to purchase garments made by quality designers at reasonable prices.”

44. See Craig Joyce et al., eds., *Copyright Law*, 5th ed. (Newark, N.J., and San Francisco, Calif., 2001), p. 200 (describing furniture as “largely untouched by the scheme of the copyright law, thanks to the ‘useful articles’ doctrine”).

45. See Michael Peters, “Note, When Patent and Trademark Law Hit the Fan: Potential Effects of *Vornado Air Circulation Systems, Inc., v. Duracraft Corp.* on Legal Protection for Industrial Design,” *Environmental Law and Technology Journal* 15 (1996): 126 (“[T]he relatively low level of outright invention in a new car design generally fails to meet the rigorous ‘uniqueness’ requirement of the design patent. Even when a design meets the technical requirements: . . . The process frequently takes longer than the typical market life of most products, rendering the patent useless.”).

46. U.S. copyright protection of architectural works apparently extends only to habitable structures “such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions.” H.R. Rep. No. 735, 101st Cong., 2d sess. 20 (1990). It apparently

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does not cover structures not intended for human occupancy, such as bridges, highway cloverleaves, and dams. Although in theory such structures could win patent protection, that appears in practice to have no influence on the creativity evinced in their design.

47. Although some of the works listed here could in theory win design patent protection under U.S. law, "the patent process has proved too rigid, slow, and costly for the fast-moving, short-lived products of mass consumption, and too strict in excluding the bulk of all commercial designs on grounds of obviousness." J. H. Reichman, "Legal Hybrids between the Patent and Copyright Paradigms," *Columbia Law Review* 94 (1994): 2432, 2460.

48. See generally Richard A. Epstein, *Simple Rules for a Complex World* (Cambridge, Mass.: Harvard University Press, 1995).

49. Bell, "Escape from Copyright," pp. 804-5.

50. See, for example, Tom W. Bell, "Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine," *North Carolina Law Review* 76 (1998): 557 (describing the functional features and legal impact of automated rights management systems), [www.tomwbell.com/writings.html](http://www.tomwbell.com/writings.html).

51. See, for example, Tom W. Bell, "Gambling for the Good, Trading for the Future: The Legality of Markets in Science Claims," *Chapman Law Review* 5 (2002) (forthcoming) (describing the functional features and legality of such markets), [www.tomwbell.com/writings.html](http://www.tomwbell.com/writings.html).

52. The proposed amendment would add the following subsection to § 301 of the Act: "(g) Nothing in this title annuls or limits any person's legal or equitable right to a work under the common law of any state if that party permanently abandons with respect to that work all rights and remedies under this title." For an explanation of why that might both appeal to the copyright lobby and promote the development of extra statutory protections of expressive works, see Bell, "Escape from Copyright," pp. 793-98.

53. *Ibid.*, p. 802.

54. *Ibid.*, pp. 801-03.