

Part I, Chapter 2

The Unnaturalness of Copyright*

Introduction

Copyrights are not natural rights. If no natural rights exist, no natural copyrights exist, of course. And if natural rights do exist, copyrights do not count among them.

The instrumentalism that pervades cases, legislation, and commentary on U.S. copyright law leaves scant room for a natural right to copyright.¹ The Supreme Court has, for instance, described copyright as "the creature of the Federal statute" and observed that "Congress did not sanction an existing right but created a new one."²

Little suggests that the men who wrote and ratified the U.S. Constitution considered copyrights as natural rights. To the contrary, they evidently viewed copyright as a policy tool, one aimed at promoting the progress of science and useful arts. They begrudged copyright's interference with natural and common law rights, like the government they formed, as a necessary evil. They judged that neither civility nor copyright could survive in a state of nature, so they put both under a State.

Natural rights theory joins the Founding generation on that count. Copyrights do not fare well under Locke's influential labor-desert justification of property. Nor do they answer to a positivist description of natural rights, such as Barnett's. We cannot credibly claim copyrights without the State's backing; they cannot survive in a state of nature. Although copyright law reflects some popular moral intuitions, it is not necessary to combat any natural wrong. "Unnatural" well describes copyright.

A. Why Care About Copyright's Naturalness?

Who cares whether copyright qualifies as a natural right? Not many lawmakers,

* This chapter largely derives from material first published in *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 760-74 (2001).

¹ See generally *supra*, chapter 1. See also Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y 513, 519-20 (1999) (arguing that copyright does not protect "property" as traditionally understood); Lemley, *supra* note [[cite]], at 879-95 (criticizing the "romantic" view that intellectual property draws its justification from creators' rights to their creations). *But see* [[cite to sources used in Privilege chapter]] (describing in cautionary terms a trend toward "propertization" of copyright and other types of intellectual property).

² *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). See also Patterson, *supra* note [[cite]], at 5 ("There is . . . no reason for confusion as to either the source or the nature of copyright. The authoritative pronouncements that copyright is the grant of a limited statutory monopoly are too many and too clear.").

judges, or lawyers. They regard the question as settled. Under the conventional view, detailed in the prior chapter, copyright represents nothing more than a tool of public policy.³ Courts and commentators do not rank its protections with those of the Bill of Rights.⁴ They see it as a merely a possibly useful way to promote the general welfare and the progress of science and useful arts—not as a natural right.

That pragmatic dismissal of the question certainly saves time and effort. Even if copyright qualified as a natural right, after all, it would merely join a panoply of other natural rights. Nothing would authorize copyright to trump other natural rights, such as our rights to freedom of expression and the peaceable enjoyment of our tangible property. Historical priority alone would still suggest that copyright generally cede to common law absent the dire risk of a public policy disaster.

Original meaning would likewise argue against letting even copyrights-*qua*-natural rights trump common law protections of expressive works. State copyright laws from the Founding era did not include preemption clauses.⁵ To the contrary, those statutes often took care to constrain copyright from unduly interfering with common law rights.⁶ More importantly, the Founders regarded statutes as legislative attempts to remedy salient defects of common law and interpreted statutes against the backdrop of that general aim.⁷ It thus seems very unlikely that the Founders would have understood copyright to routinely preempt common law protections of expressive works.

Because it embraces that same canon of statutory interpretation that the Founders did, the Supreme Court would presumably regard common law rights to expressive works with similar solicitude. The Court has long held that "statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and

³ See *supra*, chapter 1.

⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (explaining that "the D. C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'" (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)).

⁵ See COPYRIGHT OFFICE, LIBRARY OF CONGRESS, BULLETIN NO. 3 (REVISED), COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1-21 (reprinting state copyright statutes) [hereinafter COPYRIGHT ENACTMENTS].

⁶ See, e.g., Connecticut Copyright Act, § 7, reprinted in Copyright Enactments, *supra* note 95, at 1, 3 (providing that "nothing in this act shall extend to affect, prejudice or confirm the rights which any person may have to the printing or publishing of any book, pamphlet, map or chart, at common law, in cases not mentioned in this act"); Georgia Copyright Act, § IV, reprinted in Copyright Enactments, *supra* note 95, at 17, 18 (same but for minor grammatical differences); New York Copyright Act, § IV, reprinted in Copyright Enactments, *supra* note 95, at 19, 21 (same but for minor grammatical differences).

⁷ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 898-99 (1985).

familiar principles, except when a statutory purpose to the contrary is evident."⁸ Congress legislates against a background of common-law principles;⁹ it "does not write upon a clean slate."¹⁰ The Supreme Court has consequently held that common law doctrines "ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."¹¹ The Copyright Act of course offers no exception to that general principle of interpretation.¹²

Elevating copyright to a natural right therefore would hardly render it inviolate. Courts and legislatures would still need a rule for settling conflicts between copyrights and other, traditional natural rights, presumably as embodied in constitutional and common law.¹³ We would have little reason to automatically favor copyrights-qua-natural rights over other natural rights, ample reason to instead favor the latter, and every reason to let the holders of expressive works choose which rights to exercise.

Admittedly, then, the question of copyright's naturalness has little bearing on much of this book's argument. Copyright would at all events need to defer to our common law rights, and we would still want equitable and efficient public policies. Some readers might thus want to presume copyright's unnaturalness and turn directly to the next chapter. Other readers might prefer to stay, joining me in this chapter's investigation of whether or not copyright qualifies as a natural right.

B. Copyright's Unnatural Origins

We cannot be absolutely sure what the founding generation thought about copyrights. They did not get much attention during public discussions about the newly proposed Constitution and, of course, interpretations of what the founders did say varies. It seems safe to say, however, that we have scant reason to think that the Founders viewed copyright as a natural right. Granted, some states under the Articles of Confederation had prefaced their copyright laws with invocations of natural rights. Set in context, however, those preambles sound more like excuses than justifications. And, at any rate, the rhetoric of those state copyright statutes makes the solely utilitarian language of the U.S. Constitution copyright clause all the more probative. The musings

⁸ *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)) (omission in original).

⁹ *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

¹⁰ *United States v. Texas*, 507 U.S. at 534.

¹¹ *Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813)).

¹² *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1996) (interpreting § 505 of the Copyright Act against the backdrop of the American rule that litigants generally bear their own attorneys fees).

¹³ *See Barnett*, [[cite]], at 20-22, 25-26 (explaining how an appreciation of natural rights illuminates and legitimizes constitutional principles); *id.* at 108-31 (describing how common law processes discover, refine, and make concrete natural rights).

of the Framers likewise fail to recognize copyrights as natural rights. To the contrary, even copyright's most prominent defender among the Framers, James Madison, described it as "among the greatest nuisances [sic] in Government."¹⁴

1. Original Meaning via State Copyright Acts

Twelve of the thirteen states governed by the Articles of Confederation passed copyright acts.¹⁵ Of those twelve acts, seven had preambles that invoked natural rights.¹⁶

¹⁴ *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), reprinted in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790, at 562, 566.

¹⁵ See COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 1-21 (reprinting state copyright statutes). Delaware was the only state to have no such statute. See *id.* at 21.

¹⁶ See An Act for the encouragement of literature and genius, passed at January session, 1783 [hereinafter Connecticut Copyright Act], Preamble, Acts and Laws of the State of Connecticut 133-34 (Sherman & Law) (repealed 1812), reprinted in COPYRIGHT ENACTMENTS, *supra* note 85, at 1, 1 (1973) (justifying act in part on grounds that "it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works."); An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years, passed March 17, 1783, [hereinafter Massachusetts Copyright Act], Preamble, Acts and laws of the Commonwealth of Massachusetts 236 (Edes & Sons), reprinted in COPYRIGHT ENACTMENTS at 4, 4 (justifying act in part on grounds that "the legal security of the fruits of . . . study and industry . . . is one of the natural rights of all men."); An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions, for twenty years, passed Nov. 7, 1783 [hereinafter New Hampshire Copyright Act], Preamble, The Perpetual Laws of the State of New-Hampshire, from July 1776, to the session in December, 1788, continued into 1789, 161-162 (Melcher) (repealed 1842), reprinted in COPYRIGHT ENACTMENTS at 8, 8 (same); An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years, passed at December session, 1783 [hereinafter Rhode Island Copyright Act], § 1, At the general assembly of the governor and company of the State of Rhode Island and Providence-Plantations, begun and holden at East-Greenwich on the 4th Monday of December, 1783, pp. 6-7 (Carter), reprinted in COPYRIGHT ENACTMENTS at 9, 9 (same); An Act for securing literary property, passed November 19, 1785 [hereinafter North Carolina Copyright Act], Preamble, Laws of the State of North-Carolina, pp. 563-64 (Edenton, Hodge & Wills), reprinted in COPYRIGHT ENACTMENTS at 15, 15 (justifying act in part on grounds that "nothing is more strictly a man's own than the fruit of his study."); An Act for the encouragement of literature and genius, passed February 3, 1786 [hereinafter Georgia Copyright Act], Preamble, A Digest of the Laws of the State of Georgia, pp. 323-25 (Watkins & Watkins), reprinted in COPYRIGHT ENACTMENTS at 17, 17 (justifying act in part on grounds of "principles of

The historical context of those statutes, however, gives their rhetoric more the air of apology than philosophy.

State legislators must have realized that they were contradicting the view, pervasive during the Founding era, that such statutory monopolies favored special interests over common liberties.¹⁷ The Maryland Declaration of Rights, for example, had decreed in 1776 "[t]hat monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered."¹⁸ State legislators almost certainly realized, furthermore, that they had indeed enacted copyright statutes to appease a special interest—a small but influential lobby.¹⁹ By invoking the

natural equity and justice"); An Act to promote literature, passed April 29, 1786 [hereinafter New York Copyright Act], Preamble, Laws of the State of New York, passed by the legislature of said State at their ninth session, pp. 99-100 (Loudon & Loudon), *reprinted in* COPYRIGHT ENACTMENTS at 19, 19 (same). *See also* An Act for the promotion and encouragement of literature, passed May 27, 1783 [hereinafter New Jersey Copyright Act], Preamble, Acts of the seventh general assembly of the State of New Jersey, at a session begun at Trenton, on the 22d day of October, 1782, and continued by adjournments, being the second sitting, ch. 21, p. 47 (Collins) (repealed 1799), *reprinted in* COPYRIGHT ENACTMENTS at 6, 6 (justifying the act in part on grounds that "it is perfectly agreeable to the principles of equity.").

¹⁷ *See generally* Mary Helen Sears & Edward S. Irons, *The Constitutional Standard of Invention-The Touchstone for Patent Reform*, 1973 UTAH L. REV. 653, 667-73 (reviewing historical evidence that the Founders had a strong aversion to monopolies). Similar concerns evoked widespread objection to the inclusion, in the Constitution, of the Copyright and Patent Clause. *See* Walterscheid, *supra* note [[cite]], at 54-56.

¹⁸ Maryland Declaration of Rights art. XXXIX (1776), *quoted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES AND BILL OF RIGHTS 346, 350 (Richard L. Perry ed., revised ed. 1978) [hereinafter SOURCES OF OUR LIBERTIES]; *see also* North Carolina Declaration of Rights art. XXII (1776), *quoted in* SOURCES OF OUR LIBERTIES, *supra*, at 355, 356 ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed").

¹⁹ Noah Webster, author of the famed speller, grammar book, and dictionary, stood foremost among these. *See* Goldstein, *supra* note [[cite]], at 51 (crediting the origins of U.S. copyright law to Webster's lobbying); HARRY R. WARFEL, NOAH WEBSTER: SCHOOLMASTER TO AMERICA, 55-58, 132-35, 184-85 (1966) (describing Webster's lobbying efforts and observing that "Webster unquestionably is the father of copyright legislation in America"); Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 115 (1929) (crediting the state statutes to "the efficient urging of Noah Webster"). Webster also played an important role in lobbying the Continental Congress to pass a resolution encouraging the states to pass copyright laws. *See* Walterscheid, *supra* note [[cite]], at 21. Though the committee that recommended the resolution cited, among other reasons, "that nothing is more properly a man's own than the fruit of his study," *id.* at 20, that justification merits even less weight than the similar language of some states' copyright statutes. It not only shared their

rhetoric of natural rights, state legislators discouraged criticism that they had, after less than a decade of independence, disinterred statutory monopolies of the sort that earlier sparked the Revolution.

That the states invoked natural rights merely as rhetoric appears on the face of their copyright statutes, none of which actually treated copyright as a natural right. A natural right would last indefinitely and cover all expressions; state copyrights lasted only a few years²⁰ and covered just a few types of expressions.²¹ A natural right would protect all authors; state copyrights generally protected only U.S. authors.²² A natural right

dubious reasoning and origins; it represented mere legislative history to a nonbinding resolution.

²⁰ See Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y 11, 21-23 (1975) (reviewing maximum state maximum copyright terms that varied between fourteen and twenty-eight years).

²¹ See *id.* at 18-21 (summarizing the types of works protected by the state copyright laws). No state copyright statute covered paintings, prints, sheet music, or sculpture. See *id.* The broadest of them covered only "literary" works. *Id.*; see Massachusetts Copyright Act, § 2, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4; New Hampshire Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8; Rhode Island Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9.

²² See Connecticut Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS *supra* note 95, at 1, 2 (limiting protection to works authored by inhabitants or residents of U.S.); New Jersey Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 6, 7 (same); Georgia Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 17 (same); New York Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 19 (same); Massachusetts Copyright Act, § 2, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4 (limiting protection to works authored by "subjects" of U.S.); New Hampshire Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8 (same); Rhode Island Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9 (limiting protection to works authored by citizens); Pennsylvania Act of 1784 for the encouragement and promotion of learning by vesting a right to the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned, passed March 15, 1784 [hereinafter Pennsylvania Copyright Act], § III, Laws enacted in the second sitting of the eighth general assembly of the Commonwealth of Pennsylvania, which commenced the 13th day of Jan., 1784, ch. 125, pp. 306-308 (Bradford), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 10, 10 (same); An Act securing to authors of literary works an exclusive property therein for a limited time, passed October 1785 [hereinafter Virginia Copyright Act], § I, Acts passed at a General Assembly of the Commonwealth of Virginia, pp. 8-9 (Dunlap & Hayes), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 14, 14 (same); North Carolina Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 15 (same). Maryland and South Carolina, the notable exceptions to this list of states limiting protection to inhabitants, residents, or citizens, made no claims to copyright's natural status. See An Act respecting literary property, passed April 21, 1783 [hereinafter Maryland Copyright Act], Laws of Maryland, made

would disregard publication dates; most states denied copyright to any pre-printed work, regardless of its originality, as a general matter.²³ A few states even discriminated against original expressive works by denying copyright protection to pre-printed books and pamphlets, while granting it to maps and charts.²⁴ A natural right would not censor; Connecticut, Georgia, and New York barred copyright protection of works "prophane [sic], treasonable, defamatory, or injurious to government, morals or religion."²⁵ A natural right would arise, well, naturally. In contrast, no state allowed copyright protection as a matter of course. New Hampshire and Rhode Island demanded that authors identify themselves²⁶ and all the other state copyright acts imposed registration requirements of one sort or another.²⁷ North Carolina demanded that copyright holders

and passed, at a session of assembly, begun and held at the city of Annapolis on Monday the 21st of April, 1783, ch. 24 (Green), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 5; An Act for the encouragement of arts and sciences, passed March 26, 1784 [hereinafter South Carolina Copyright Act], Acts, Ordinances, and Resolves of the General Assembly of the State of South Carolina, passed in the year 1784 pp. 49-51 (Miller), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 11.

²³ See Maryland Copyright Act, § II, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 5, (limiting protection to works "already composed and not printed or published, or that shall be hereafter composed"); New Jersey Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 6, 7 (limiting protection to works "not yet printed"); Pennsylvania Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 10, 10 (same); North Carolina Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 15 (limiting protection to works "not hitherto printed"); see also Massachusetts Copyright Act, § 3, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4 (limiting remedies to works "not yet printed"); New Hampshire Copyright Act, § 2, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 8, 8 (same); Rhode Island Copyright Act § 2, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9 (same).

²⁴ See Connecticut Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 1, 2 (limiting copyright protection of books and pamphlets-but not maps and charts-to those "not yet printed"); Georgia Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 17 (same).

²⁵ Connecticut Copyright Act, § 7, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 3; Georgia Copyright Act, § IV, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 19 (same but for a extra comma; to wit: "morals, or religion."); New York Copyright Act, § IV, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 21 (same as Georgia Copyright Act); see also North Carolina Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 17 (barring copyright protection of works "which may be dangerous to civil liberty, or to the peace or morals of society").

²⁶ See New Hampshire Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8; Rhode Island Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 9, 9.

²⁷ See generally Crawford, *supra* note 122, at 23-25 (reviewing registration requirements).

forfeit a copy to the secretary of state²⁸ whereas Massachusetts demanded that two copies go to "the library of the University of Cambridge."²⁹ Several states went so far as to demand that copyright holders provide works at reasonable prices and in sufficient numbers.³⁰ No natural right would admit all the many sharp, artificial, and arbitrary limitations seen in the state copyright statutes. Despite their invocation of natural rights rhetoric, the states in fact treated copyright purely as a utilitarian tool for promoting arts and sciences in general, and special interests in particular.

At any rate, every iota of faith that one invests in the view that some state legislatures embraced a natural rights view of copyright ultimately ends up weighing against the view that the Constitution embodies the same philosophy. Those taking part in the Constitutional Convention almost certainly had state copyright practices in mind as they crafted the copyright clause.³¹ The absence of any reference to natural rights in the Constitution's copyright clause thus suggests that the Framers considered and rejected the natural rights defense of copyright.³² It will not do to claim, in that regard, that the

²⁸ See North Carolina Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 16.

²⁹ Massachusetts Copyright Act, § 3, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 4, 4; New Hampshire Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8.

³⁰ See Connecticut Copyright Act, § 5, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 2 (providing penalties for neglecting "to furnish the public with sufficient editions" or selling "at a price unreasonable" a copyrighted work); South Carolina Copyright Act, § 4, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 11, 13 (same); Georgia Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 18 (same); New York Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 20 (same); see also North Carolina Copyright Act, § II, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 16 (providing penalties for setting "an unreasonable price" on a copyrighted work).

³¹ See Walterscheid, *supra* note 113, at 10, 37 (citing the practices of the various states as an influence on the Constitutional convention). Although the secretive nature of the Constitutional convention obscures his influence, *id.* at 38-41, circumstantial evidence strongly suggests that Noah Webster, primary lobbyist for then-extant copyright legislation, also successfully lobbied the Philadelphia delegates to add a copyright clause to the Constitution. See RICHARD M. ROLLINS, *THE LONG JOURNEY OF NOAH WEBSTER* 51-52 (1980) (detailing Webster's proximity to the convention, close and continuing contact with many of the delegates, and reputation as an authority on matters of public concern).

³² Much the same conclusion follows from interpreting the natural rights language that appeared in the report of the committee that the Continental Congress charged with considering "the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works." 24 JOURNALS OF THE CONTINENTAL CONGRESS 180 (1783). As mere legislative history, the claim of the committee's May 10, 1783 report that "nothing is more properly a man's own than the fruit of his study," *id.* at 326, carried even less legal weight than

Constitution's terse language precluded such justifications. The clause's command that Congress use copyright to "promote the Progress of Science and useful Arts"³³ plainly retains the utilitarian rhetoric of the state copyright statutes.³⁴ Even apart that *expressio unius* interpretation, moreover, the copyright clause's plain language supports only a utilitarian justification.³⁵

similar rhetoric appearing within the statutes passed by the states. More to the point, that James Madison and Hugh Williamson served both as members of the committee and delegates to the subsequent Constitutional Convention leaves very little doubt that those who drafted the Constitution must have considered and impliedly rejected justifying copyright on similar grounds.

³³ U.S. Const. art. I, § 8, cl. 8.

³⁴ See Connecticut Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 1, 1 (copyright protection "may encourage men of learning and genius to publish their writings"); Georgia Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 17 (same); Massachusetts Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4 ("the efforts of learned and ingenious persons in the various arts and sciences"); Maryland Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 5, 5 ("encouragement of learned men"); New Jersey Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 6, 6 ("embellishment of human nature, the honour of the nation, and the general good of mankind"); New Hampshire Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8 ("the efforts of ingenious persons in the various arts and sciences"); Rhode Island Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9 ("the efforts of learned and ingenious persons, in the various arts and sciences"); Pennsylvania Copyright Act, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 10 (entitled in part "AN ACT for the encouragement and promotion of learning"); South Carolina Copyright Act, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 11 (entitled "AN ACT for the encouragement of arts and sciences"); North Carolina Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS *supra* note 95, at 15, 15 ("to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce"); New York Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 19 ("encourage persons of learning and genius to publish their writings").

³⁵ See H.R. Rep. No. 52-1494, at 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.'"). On that reading, the Constitution's call for legislation "securing" copyrights, U.S. CONST. art. I, § 8, cl. 8, implies, if anything, that such federal legislation should render more secure the rights formerly protected, in piecemeal fashion, under the various states' laws. That reading would comport with Madison's defense of the clause: "The States cannot separately make effectual provision for" copyright protection. THE FEDERALIST NO. 43, at 272 (J. Madison) (Clinton Rossiter ed., 1961).

2. Original Meaning via Madison on Copyright

Finding no record of substantive discussions about copyright in the Philadelphia Convention or in the state ratification debates, commentators intent on reconstructing how Founders understood the Constitution's copyright and patent clause have largely relied on Madison's brief analysis of it in the Federalist Papers.³⁶ Madison's defense of the power granted to Congress in the copyright and patent clause reads, in full:

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. The States cannot separately make effectual provision for either of the cases, and most have anticipated the decision of this point, by laws passed at the instance of Congress.³⁷

Like the oratorical preambles that some states added to their copyright acts, however, Madison's defense of copyright sounds more in rhetoric than logic.³⁸

Intentionally or not, Madison misrepresented copyright's standing at common law. He presumably relied on the 1769 decision of the King's Bench in *Millar v. Taylor*, which read the Statute of Anne not to abrogate common law protection of authors' works.³⁹ But the House of Lords overruled that case five years later, in *Donaldson v. Becket*⁴⁰—thirteen years before Madison published Federalist Paper 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

³⁶ See Patry, *supra* note 3, at 912 (discussing paucity of evidence from sources other than Madison's comments); Walterscheid, *supra* note 113, at 23-54 (describing paucity of evidence from the Convention); *id.* at 56 (citing absence of debate in state ratifying conventions); 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 23-24 (1994) (commenting that we have no evidence of the Convention's deliberations about copyright and relying on the Federalist Papers); Fenning, *supra* note 121, at 114 (reviewing the evidence and concluding that the clause "apparently aroused substantially no controversy either in the Convention or among the States adopting the Constitution").

³⁷ THE FEDERALIST NO. 43, at 271-2 (J. Madison) (Clinton Rossiter ed., 1961).

³⁸ Any argument that Madison's rhetoric, regardless of its sincerity, shaped the original understanding of the Constitution must face the same *expressio unius* counterargument set forth at the end of the prior sub-section.

³⁹ 98 Eng. Rep. 201 (1769).

⁴⁰ 98 Eng. Rep. 257 (H.L. 1774). The U.S. Supreme Court later reached a similar conclusion, holding that no federal common law copyright existed and that all federal copyright protection "originated, if at all, under the acts of Congress." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834).

solemnly adjudged constitutional."⁴¹ In neither case would old bad law justify new bad law.

Notwithstanding Madison's reference to solemn adjudications at common law and the "claims of individuals" to copyrights, moreover, he appears not to have held a natural rights view of copyright. The telling evidence appears in what he said—or rather what he did *not* say—in his correspondence with Thomas Jefferson.

Jefferson had written from Paris critiquing the proposed Constitution for failing to include a Bill of Rights, advocating in particular that it "abolish . . . Monopolies, in all cases . . ."⁴² 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."⁴³ Madison's remarkable reply merits a lengthy quote:

With regard to Monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.⁴⁴

Madison said three things here that bear notice. First, contrary to his claim in Federalist No. 43 that the "utility of the power" granted to Congress in the copyright and patent clause "will scarcely be questioned," in private Madison took Jefferson's concerns quite seriously. Second, note that Madison appears never to have followed up on his suggested remedy for abuse of the copyright's privileges; namely, abolishing the privilege after paying its holder a specified price. Third, Madison's assessment of the relative power that the many, who suffer monopolies, hold over the few, who enjoy them, ignores what public choice theory would predict and what experience has amply confirmed: The

⁴¹ *Compare* *Scott v. Sanford*, 60 U.S. 393, 451 (1856) ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution."), *with* U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

⁴² *Letter from Thomas Jefferson to James Madison* (July 31, 1788), *reprinted in* 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790*, at 543, 545 (James Morton Smith ed., 1995).

⁴³ *Id.*

⁴⁴ *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), *reprinted in* 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790*, at 562, 566.

few who enjoy copyright protection have in practice more power to determine the scope of their monopoly rights than do the many who live under them.

Madison's reply to Jefferson's critique of the copyright and patent clause most bears noting, however, for what it does not say. Madison nowhere defends the clause as a measure necessary to protect the natural rights of authors and inventors (much less to protect their rights at common law). Madison's silence on that point would prove remarkable in any context.⁴⁵ Here, though, writing to one of the foremost advocates of natural rights, in reply to Jefferson's call for a bill of rights, and in defense of the copyright and patent clause, Madison's silence speaks volumes. Could any context cry out more loudly for an appeal to the supposed natural right to copyright? Madison instead treated copyright as nothing more than an admittedly dangerous tool for advancing industrial policy, and one of dubious efficacy at that.⁴⁶

Before closing this exploration of Madison's thought, it bears noting that a thorough-going originalist—one devoted to following the Founders in matters both of substance and process—might question the propriety of interpreting the Constitution's copyright clause by light of the original understanding of "copyright." The Founders generally agreed that extrinsic evidence of legislative intent ought to not shape statutory language; they demanded fidelity to the plain meaning of the text.⁴⁷ In this particular case, however, it proves imminently appropriate to observe that the Founders regarded copyright as an infringement, albeit perhaps a necessary one, on common law rights to person and property. Because the Founders viewed statutes as attempts to remedy the defects of common law, they thought it proper to construe ambiguous statutory language

⁴⁵ That Jefferson did not raise a natural rights argument bears noting, too.

⁴⁶ Madison later made more clear and public his views on the proper subject matter for property rights:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called.

James Madison, *Property*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 1761-87* (Marvin Meyers ed., rev. ed. 1981).

⁴⁷ See Powell, *supra* note [[cite]], at 888-94. For reactions to Powell's analysis, compare Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Const. Commentary* 77 (1988), reprinted in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 117 (Jack N. Rakove ed., Northwestern U. Press 1990) (faulting Powell for misusing historical evidence and for ignoring the interpretive understandings of the members of the state ratifying conventions), with Jack N. Rakove, *The Original Intention of Original Understanding*, 13 *CONST. COMMENTARY* 159 (1996) (arguing that historical evidence does not demonstrate that the Founders thought the intent of the ratifying conventions counted, either, and agreeing with Powell that the members of the Constitutional Convention gave no sign that they thought their intentions should aid in interpreting the Constitution).

against the backdrop of that general purpose.⁴⁸ Questions about the original understanding of copyright thus neatly join with questions of how to interpret the constitution's language on copyright. The Founders regarded copyright as an uncommon exception to common law rights and would have interpreted the Constitution to treat it exactly as such.

C. Copyright in Natural Rights Theory

Perhaps natural rights do not exist. Many clever people say as much, arguing that we enjoy rights thanks only to the State. On that view, all rights equate to privileges—all issue only grace of an institution that credibly claims a monopoly on initiating coercion within a particular geographic area. Even on that view, as discussed above, copyrights should defer to common law rights. And, of course, copyrights logically could not qualify as natural rights.

But what if natural rights do exist? In that event, copyrights still look unnatural. Copyrights qualify as natural rights neither under Locke's influential defense of property nor under Barnett's positivist account of natural rights. Although copyright law does reflect some popular moral intuitions, that does not suffice to make it a natural right.

1. Locke's Labor-Desert Justification of Property

Some commentators have defended copyrights as natural rights under Locke's labor-desert theory of property. On that view, copyright qualifies as a natural right for the same reason that tangible property does: Because an author mixes herself, through her creative effort, in her expressions.⁴⁹ Ayn Rand,⁵⁰ Herbert Spencer,⁵¹ and Lysander Spooner⁵² represent prominent proponents of that justification of copyright.⁵³

⁴⁸ See Powell, *supra* note [[cite]].

⁴⁹ See Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 *HAMLIN L. REV.* 65 (1997); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517 (1990). See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 296-331 (1988) (exploring the uses and limits of the Lockean justification of intellectual property).

⁵⁰ See Ayn Rand, *Patents and Copyrights*, in *AYN RAND, CAPITALISM: THE UNKNOWN IDEAL* at 130 (New York: Signet, 1967). For an argument against Rand, see Timothy Sandefur, *A Critique of Ayn Rand's Theory of Intellectual Property Rights*, 9 *J. AYN RAND STUDIES* 1 (2007).

⁵¹ See II HERBERT SPENCER, *THE PRINCIPLES OF ETHICS* 121 (F. Machan ed. 1978) (1893).

⁵² See Lysander Spooner, *A Letter to Scientists and inventors, on the Science of Justice, and Their Right of Perpetual Property in Their Discoveries and Inventions*, in 3 *THE*

That facially plausible extension of Locke's theory does not, however, withstand close scrutiny.⁵⁴ His labor-desert justification of property gives an author clear title only to the particular tangible copy in which she fixes her expression—not to some intangible plat in the noumenal realm of ideas.⁵⁵ Locke himself did not try to justify intangible property.⁵⁶ He appears, in fact, to have viewed copyright as merely a policy tool for promoting the public good.⁵⁷ Modern commentators who would venture so far beyond the boundaries of Locke's thought and into the abstractions of intellectual property thus ought to leave his name behind.

More pointedly, copyright contradicts Locke's justification of property. He described legislation authorizing the Stationers' Company monopoly on printing—the nearest thing to a Copyright Act in his day—as a "manifest . . . invasion of the trade, liberty, and property of the subject."⁵⁸ Even today, by invoking government power a copyright holder can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of physical property.⁵⁹ By thus gagging our voices, tying our hands, and demolishing our presses, copyright law

COLLECTED WORKS OF LYSANDER SPOONER 68 (C. Shively ed. 1971).

⁵³ For a review of their arguments, an explanation of why they rely on Lockean labor-based moral desert theory, and a critique, see Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J. L. & PUBLIC POLICY 817 (1990).

⁵⁴ Richard Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 20 (2005) (observing that, "It is easy to imagine how a system of property rights is natural, in the sense that it does not take any state agency to mark off the rights in question," but concluding, "That solution [] is not possible with copyright.").

⁵⁵ Epstein objects that, "We do have a system of nonwispy copyrights at the present. While one might oppose their creation, the rights in question are capable of sale or licensing, are protected against confiscation and infringement, and are capable of valuation. One might as well give the same dubious description to ordinary contract rights, for which the government cannot take an assignment unless it is prepared to compensate the assignor for the loss of his entitlement." *Id.* at 21. But to say that copyright rights, like contract rights, can be defined is not to say that they are tangible. Nor, more pointedly, does it do much to show that a Lockean justification fits copyright.

⁵⁶ 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 299 (Laslett rev. ed. 1963) (1690), appears not to have enjoyed copyright protection itself.

⁵⁷ See RONAN DREZLEY, RETHINKING COPYRIGHT 143-44 n. 32 (2006) (reading Locke's correspondence to indicate that "Locke himself did not consider that his theory of property extended to intellectual properties such as copyrights and patents.).

⁵⁸ John Locke, *Observations on the Printing Act Under Consideration in Parliament in 1694*, reprinted in 1 PETER KING, THE LIFE OF JOHN LOCKE 373, 386 (1830).

⁵⁹ See 17 U.S.C. §§ 501-511 (defining remedies for copyright infringement),

violates the very rights that Locke defended.⁶⁰

Of all the theories of natural rights reviewed here, Locke's probably has the greatest likelihood of influencing present-day law. For all that, though, it runs little risk of convincing contemporary lawmakers or courts to forsake the prevailing, instrumentalist view of copyright. The Lockean labor-desert theory has only one viable road to practical and present influence—via original meaning.⁶¹ Many judges find appeals to the original meaning of constitutional language, such as that embodied in the copyright clause,⁶² quite persuasive.⁶³ As our careful review of the historical record showed, however, the Founders almost certainly did not regard copyright as a natural right.⁶⁴

⁶⁰ See Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 *HAMLIN L. REV.* 261, 281 (1989) ("a system of intellectual property rights is not compossible with a system of property rights to tangible objects, especially one's own body, the foundation of the right to property in alienable objects."); see also Palmer, *supra* note [[cite]], at 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"); Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 *U. CHI. L. REV.* 411, 414 (1983) ("[G]ranting individuals exclusive rights to . . . information . . . conflicts with other rights in a way that granting exclusive rights to tangible property does not.").

⁶¹ 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* 38 (1997). Scalia's focus on original meaning naturally broadens the range of materials that he consults when interpreting the Constitution. He considers the writings of Founders who attended the Constitutional Convention, like Madison and Hamilton, only "because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist* and to Jefferson's writings," even though neither of them attended the Convention. *Id.* What about 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 alone discourage attempts to divine the Constitution's original intent. But with regard to copyright in particular, a near-vacuum of recorded debate utterly frustrates the search for original intent; see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 *J. INTELL. PROP. L.* 1, 23-54 (1994) (describing historical record of debates).

⁶² U.S. CONST. art. I, § 8, cl. 8.

⁶³ See, e.g., SCALIA, *supra* note [[cite]], at 37-41.

⁶⁴ See *supra*, [[cite to prior section of chapter]].

2. Barnett's Positivist Account of Natural Rights

Randy E. Barnett justifies natural rights conditionally, basing them on our appreciation of certain social goods. He emphasizes that "*if we want a society in which persons can survive and pursue happiness, peace and prosperity*, then we should respect the liberal conception of justice—as defined by natural rights—and the rule of law."⁶⁵ Not everyone values freedom, harmony, and wealth, of course.⁶⁶ Most of us do, though, and together we easily number enough enjoy the comforts and pleasures of human society.

We live together amicably because we recognize and respect certain natural rights. Which ones? Barnett names private property—including our property rights in our bodies—and freedom of contract.⁶⁷ Since property protects both the right to it and the right against trespass, it corresponds to common law's property and tort rules. Freedom of contract, which includes the right *to* contract and to *not* contract, corresponds to common law's contract rules. Barnett's description of natural rights thus matches the protections of persons, property, and promises at the heart of common law.

Barnett expressly includes "physical resources" in his description of property rights.⁶⁸ "Such property rights are 'natural' insofar as, given the nature of human beings and the world in which they live, they are essential for persons living in society with others to pursue happiness, peace, and prosperity."⁶⁹ Do copyright rights qualify as natural on that description? Probably not.

Barnett offers a positivist account of natural rights, an approach earlier developed by F.A. Hayek. Social values evolve and develop to enable human flourishing, Hayek explained. "[G]roups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order," he said.⁷⁰ That hardly means that groups with especially efficient rules conquer and crush their less developed neighbors. "It is more likely that the success of the group will attract members of others which then become incorporated in the first."⁷¹

That competition between social orders spontaneously generated natural rights long before states arose. "Long before man had developed language to the point where it enabled him to issue general commands, and individual would be accepted as a member of a group only so long as he conformed to its rules," Hayek explained.⁷² David Hume expressed the same point with characteristic grace:

⁶⁵ RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 22 (Oxford 1998) (emphasis in the original).

⁶⁶ *See id.* at 170 (describing social relations between humans and vampires).

⁶⁷ *Id.* at 64-65.

⁶⁸ *Id.* at 64, 67.

⁶⁹ *Id.* at 67.

⁷⁰ I FRIEDRICH A. HAYEK, *LAW LEGISLATION AND LIBERTY* 99 (Chicago Press 1973).

⁷¹ *Id.* at 169, fn. 7.

⁷² *Id.* at 72.

But tho' it be possible for men to maintain a small uncultivated society without government, 'tis impossible they shou'd maintain a society of any kind without justice, and the observance of those three fundamental laws concerning the stability of possession, its translation by consent, and the performance of promises. These are, therefore, antecedent to government, and are suppos'd to impose an obligation before the duty of allegiance to civil magistrates has once been thought of.⁷³

Our rights to persons, property, and promises qualify as "natural" because they have evolved to enable human social life. They long predate the State. Copyright, in contrast, arose only relatively recently, in complete reliance on a non-customary, exception, statutory privilege.

But perhaps we do copyright a disservice by defining natural rights only with regard to ancient history. Natural rights survived the establishment of the State, after all. Indeed, States draw great moral force from the claim that they protect our natural rights. And if we aspire to adopt a coolly positivist approach to natural rights, basing them on our observations of human society, it seems wholly appropriate use up-to-date data.

On that view, we can find our natural rights by looking for claims we can credibly defend even absent State aid. As arch-positivists Felix S. Cohen put it, "The state of nature is a stage of analysis rather than a stage of history. It exists today and has always existed, to a greater or lesser degree, in various realms of human affairs."⁷⁴ Our rights to tangible property certainly qualify as natural on that basis. We live in many various and overlapping customary and voluntary social organizations that recognize and respect our persons, real and chattel property, and promises. The State can help us to perfect those rights, granted. Its services come at some cost to our natural rights, too, though; so goes the social contract.

Whether or not customary or purely private institutions could credibly defend copyrights, in contrast, remains at best an open question, one that cries out for empirical proof. It seems safe to say that non-state copyrights thus far appear non-existent. It remains unclear, moreover, how they could naturally arise. We can combine our natural rights to persons, property, and promises to encourage authorship, of course, such as by contracting for a performance or buying a recording. Thus might common law satisfy copyright's policy goals. Cobbling together tort, property, and contract rights can result only in legal mechanisms that achieve copyright's ends, however; it cannot recreate its means. For that, it seems, copyright depends on State power.

3. The Morality of Unauthorized Copying

To say that copyright does not protect any natural right is not to say that it lacks any moral justification. We naturally frown on unauthorized and misattributed copying.

⁷³ DAVID HUME, A TREATISE OF HUMAN NATURE, Book III, Part I, § VIII (1739-40).

⁷⁴ Felix S. Cohen, *Transcendental Nonsense and the Function Approach*, 35 COL. L. REV. 809, 836-37 (1935).

A singer who claims authorship of a song written by another commits a sort of fraud on his listeners. Most of the time, that sort of fraud does not rise to the level of materiality, and thus does not justify litigation. We typically do not rely to any substantial detriment on the accuracy of an expressive work's description, after all. If we like a work, we like it, regardless of its source. Misdescriptions of authorship can trick us into buying the wrong expressions, however. You might, for instance, buy tickets to a Djelimady Tounkara concert only to find another, lesser guitarist on stage.⁷⁵ That would naturally rouse your indignation.

We don't need copyrights to vindicate that sort of wrong, however; common law and various state and federal statutes already afford many remedies for it. Consumers of misleadingly labeled goods or services can plead fraud under tort law⁷⁶ and breach⁷⁷ or promissory estoppel⁷⁸ under contract law. The licensee of a materially misdescribed work would enjoy a strong contract law defense, one voiding any agreement alleged by the licensor publisher.⁷⁹ An author who sees her work sold under another's name would, as a wronged competitor, have standing to sue for unfair competition under state⁸⁰ or federal law.⁸¹ The publisher of such an author might likewise enjoy legal and equitable remedies for passing off.⁸² The Federal Trade Commission and its many state counterparts can protect consumers and competitors of falsely labeled expressive works, while various federal and state executive officers can fight such wrongs with the criminal sanctions levied against the many guises of fraud.

Those legal tools give us ample ways to discourage materially harmful misdescriptions of expressive works. We don't need copyright to satisfy our moral intuitions on that front, and most people's condemnations against unauthorized copying don't go much beyond harmful lying.⁸³ If you make an unauthorized copy of a CD and

⁷⁵ I risk redundancy with "another, lesser," admittedly. *See, e.g.*, Djelimady Tounkara, *Solon Kono* (Marabi France, 2006) (making jaws drop).

⁷⁶ *See* RESTATEMENT (2ND) OF TORTS § 525 (1977).

⁷⁷ *See* RESTATEMENT (2ND) OF CONTRACTS, §§ 241-43 (1980)

⁷⁸ *See id.* § 90(1).

⁷⁹ *See id.* §§ 159-64.

⁸⁰ *See, e.g.*, Cal. Bus. & Prof. Code § 17500 (prohibiting false advertising).

⁸¹ *See* 15 U.S.C. § 1125(a) (prohibiting unfair competition).

⁸² Reverse passing off should likewise elicit legal disapproval. Selling your own expression as another's constitutes passing off. Selling another's expressive work as your own thus qualifies as *reverse* passing off. Both can harm consumers, who might end up buying unwanted goods or services. Passing off can plainly harm competitors, who might suffer having their good names wrongly besmirched. The reverse passing off of expressive works might harm a competitor, too, as it would threaten to draw away customers deceitfully and to mark the wronged author as unoriginal.

⁸³ It looks doubtful that honest copying, even when done for profit and without an author's permission, naturally rouses moral indignation. People across many cultures buy unauthorized works without evident compunction. At one time, U.S. copyright policy deliberately encouraged the practice with regard to foreign authors. *See* Thomas Bender

give it as a gift to your friend, for instance, do you feel guilty of committing a moral wrong? Probably not—even though you would probably thereby have committed copyright infringement. When you infringe a copyright, you can admit to breaking the law without also admitting to violating a natural right. Thus does a good driver on an empty road speed with a clear conscience.

So, too, might a citizen drive dangerously close to the Tax Code's limits. To misjudge, and blunder into tax evasion, could lead to loss of liberty and property. Citizens thus obey the Tax Code for good reason. Voluntary payment of excess taxes remains very rare, however; most people evidently pay their taxes under compulsion rather than out of joy. In that, the Tax Code resembles the Copyright Act. Both rely on positive legislation; both create regulatory regimes; both redistribute property (money in the one case, rights to throats, pens, and presses in the other). We grudgingly accept that the Tax Code and the Copyright Act create special beneficiaries of State power, the former by way of tax credits, the latter by way of exclusive rights.⁸⁴ We might even celebrate it, reasoning that both the poor and authors merit our generosity. But we do not speak of a natural right to welfare. Nor should we speak of a natural right to copyright.

None of that goes to show that we should infringe copyrights. Speaking only for myself, I try to respect them. I probably misjudge, sometimes, I admit. Copyright contains many subtleties, even to an avowed geek, and its application often relies on contestable facts. We often don't know what constitutes infringement unless and until a judge tells us. It doesn't matter to copyright law if I do not bow deeply enough to its commands, of course. I—like you and everyone else subject to the Copyright Act—am held strictly liable for my infringing acts.

Still, I try to respect copyright law. It does not unduly burden me, I find, and I have a profound appreciation of good authorship. I do not think that copyright's beneficiaries have any natural right to my obedience, however; nor do I think that, say, Medicare's beneficiaries have any natural right to my tax payments. But I think that authors, like the poor, merit our concern and material aid. Government programs somewhat promote that aim. They operate with dismaying inefficiency, however, and often with outrageous unfairness. Thus did the U.S. federal government recently enact welfare reform. Thus, too, should we reform authors' welfare: copyright.

You probably try to heed copyright law, too. Most people do. Why? We recognize copying limits, like speed limits and tax codes, as legislation designed to maximize social utility, created by statute for presumptively good reasons and thus, unless manifestly inefficient or inequitable, enjoying some claim to our obedience. We follow such laws out of patriotism, unreflective habit, grudging acceptance, or fear—but not because they protect natural rights.

So, to judge from actions, go the moral intuitions of most folks. We regard violations of persons, property, and promises as serious matters, dire deviations from acceptable social behavior. We regard casual copyright infringement, in contrast, as little

& David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT'L L. & POL. 255 (1997).

⁸⁴ See Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOKLYN L. REV. 229 (2003).

worse than driving 80 m.p.h. in a 65 m.p.h. zone, or exaggerating the value of a charitable donation.

Authors, admittedly, sometimes express profound outrage that unauthorized copying, even when it gives credit where due, equates to theft.⁸⁵ Their understandable pique does not, however, establish a natural copyright right. The non-rivalrousness of expressive works means that copying does not hinder the use or enjoyment of any one copy. A painter fully owns his canvas even if another photographs it without his permission, for instance. What authors care about in such instances is not the use and enjoyment of their works, but rather their lost copyright revenues.

Copyright can provide authors with revenue, a benefit that infringement threatens to reduce. Authors thus naturally feel disappointment and anger when their works suffer unauthorized use. But that hardly shows that copyright infringement violates a natural right. It only shows that authors, like almost everyone else, prefer more money to less. There can be no copyright infringement absent copyright protection. Only by circular reasoning, then, can the complaint that infringement reduces authors' revenues justify copyright.

Conclusion: Natural Rights, Here and Now

On most accounts, common law pays more deference to our natural rights than the Copyright Act does. Common law's bedrock rules protect our persons, property, and promises. Although they aim more at practical results than lofty theory, the rules of tort, property, and contract law largely respect the natural rights that we bring to the table when we form a social contract. Copyright, in contrast, conflicts with our natural and common law rights.⁸⁶

Ideally, the State helps to define and protect our natural rights. Even without its help, however, we can credibly assert rights to our persons, properties, and promises. Loners cannot defend their natural rights easily, of course, but the success of customary social organizations shows that we can band together to defend our natural rights without going so far as forming a State.⁸⁷ Social contracts need not create monopolies.

Copyrights, in contrast, exist only in States. Copyrights cannot survive in a state of nature because, by definition, they demand exclusive rights over non-excludable works. Only a monopoly can give (or at least credibly promise to give) that. In a state of nature, you find it discouragingly difficult to force your neighbor to stop singing your composition. Even with several large friends at your back, you would find it

⁸⁵ See, e.g., *The Future of Digital Music: Is There an Upside to Downloading?*, *Hearings on Copyright Issues and Digital Music on the Internet Before the Senate Judiciary Comm.*, 106th Cong. (2000) (statement of Lars Ulrich, drummer, Metallica) ("The touted "new paradigm" that the Internet gurus tell us we Luddites must adopt sounds to me like old-fashioned trafficking in stolen goods."), at http://judiciary.senate.gov/testimony.cfm?id=195&wit_id=252.

⁸⁶ See *supra*, chapter [[cite]].

⁸⁷ See BRUCE BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (1990).

extraordinarily costly, and not very beneficial, to stop the next tribe over from singing a derivative version of your song.

Copyrights thus do not number among the natural rights that we bring to the table when we enter into a social contract. Nor can we take them with us, now, if we walk away from the deal. Only rights that we can credibly assert without its help give us leverage when bargaining with Leviathan. Our natural rights thus go no farther than our rights to personal freedom, chattel and real property, and reliable promises. They do not go so far as to claim power over another's throat, pen, or press.

Authors exist in nature even though copyrights do not. Some create for the same reasons that they breathe, as a healthy habit and a way of life. But other authors trade their expressions for value, sharing them with others to earn gifts and friends in return. Common law rights likewise hold the promise of encouraging authorship. Indeed, as we will discuss later, they may well do better at it than copyrights do.⁸⁸

⁸⁸ *See infra*, Part II.