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I. INTRODUCTION

Copyright law in the United States is more than the letter "C" in a circle. The visual impression of someone clutching a book prevails in many minds. The use of the phrase "it's copyrighted" has become common. Many people consider a "copyright" to be "property." The true story of copyright law is so steeped in history—a great deal from England—that it makes even Betty White seem middle aged. This Article examines some of that history and compares mistaken connotations about "property" within the realm of contract law—a better association.

The Copyright Act grants statutory rights to authors[1] for "original works of authorship fixed in any tangible medium of expression . . . ."[2] Take note that statutory rights are provided at the moment an expression is *fixed*—not registered. (So even a grocery list could have copyright protection.)

This Article purports that protecting original expressions at the moment of fixation decreases society's bargaining power and blurs authors' entitlements in the copyright system. The Constitution's purpose of having copyright laws in the United States is to *promote progress*, and the law paves a two-way street for society and copyright holders. The system provides *monopoly privileges* under statutory copyright laws for an incentive to authors to continue creating literary expressions. This system promotes more works of creativity and expression for society to use and advance as a cultured citizenry.

So, from the start, there is a quid pro quo for authors and users in the copyright system: In exchange for communicating new works with society, the copyright holders (authors or publishers) get certain exclusive rights to copy the expressions. Further, the law does not protect traditional private-property rights *in* the work but protects intellectual property rights *to* certain uses of the creative expressions.

Part II of this Article discusses the problems that the fixation standard poses for society during this digital age and argues that the copyright system's users lose bargaining power when the law begins protection at the moment of fixation. Then this section explores the confusion that the copyright holder faces in

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[*] B.S., J.D., Mississippi College. I am privileged to be an alumnus of Mississippi College, our Law School, and our Law Review. I am forever thankful for the instruction I received from Professor Alina Ng, who never ceased to challenge my perceptions about property law and encourage new ideas, as well as Professor Mary Purvis, who pushed me to confront and scrutinize issues in contract law as an academic. They both embody the definition of a scholar and teacher. I dedicate this Article to Judge M. Casey Rodgers. I am so grateful for her continued dedication to our justice system, her unmatched insight, and her appointment of me to serve as her law clerk—and of course, her kindness.

1. 17 U.S.C. § 201(a) (2012).
2. 17 U.S.C. § 102(a) (2012).

detangling the notion of "property" in the copyright system and argues that fixation only adds to the misunderstanding that copyright is about appropriation.

Part III proposes a couple of solutions that might alleviate society's decreased bargaining power and the copyright holder's cloudy entitlements. This section pushes for lawmakers to grant copyright protection at the moment of communication instead of maintaining a fixation standard. Although the fixation requirement would still be relevant (and indeed Constitutionally mandated), a communication standard would help refocus copyright holders and users on the connection between the authors and their audiences. Further, this section urges lawmakers to clarify the right of first publication to fill the gap between the moment of fixation and communication that would develop if Congress adopted this Article's proposal. Last, Part IV concludes the Article and reiterates the problems with fixation and the unbargained-for-exchange that results.

II. PROBLEMS WITH THE FIXATION STANDARD

Again, the Copyright Act grants statutory rights to authors[3] for "original works of authorship fixed in any tangible medium of expression . . . ."[4] The fixation requirement itself is not the problem; in fact, as Professor Nimmer suggests, the concept that a creative work must be "fixed" to receive copyright protection rests on the Constitutional language that secures exclusive rights to "writings."[5] Instead, the problems rest in the fixation *standard* that people use to justify and understand the copyright system.

The United States has not always used fixation as a starting point for statutory protection. Before 1976, authors received federal protection for the rights to their creative works at the moment of *publication*, which in turn divested the author of any state common-law rights in the work.[6] But, new technologies in the twentieth century strained the copyright system to adapt to new types of media.[7] In 1976, Congressional representatives explained, "[T]he concept of publication has become increasingly artificial and obscure" with "radically different" definitions among the courts, which created "unpredictable and often unfair" effects.[8] Further, perpetual rights at common law for unpublished (but widely disseminated) works were causing conflicts with the "limited times" language in the Constitution.[9] Put very simply, this "dual-system" was not promoting efficiency within the United States or in the

3. 17 U.S.C. § 201(a) (2012).

4. 17 U.S.C. § 102(a) (2012).

5. 1 Mellville Nimmer and David Nimmer, Nimmer on Copyright § 2.03(B) (LEXIS 2010). The Seventh Circuit recently reiterated the fixation's rudimentary importance to the copyright system when it held that an artist's living garden was not copyrightable because it failed the fixation requirement. Kelley v. Chi. Park Dist., 2011 U.S. App. LEXIS 2915 at *36–38, Nos. 08-3701 & 08-3712 (7th Cir. Feb. 15, 2011).

6. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (March 4, 1909) (repealed 1976).

7. House Report 94-1476 at 130 (1976).

8. House Report 94-1476 at 130. Representatives expressly criticized White-Smith Publ'g Co. v. Apollo Co., 209 U.S. 1, 17–18 (1908) (holding that perforated music rolls were not copies because they were not in a form in which people could see and read the musical composition). House Report 94-1476 at 52 (1976).

9. House Report 94-1476 at 130.

international arena because technology could disseminate works instantly.[10]

So the 1976 Congress abolished the artificial definitions of publication and removed the distinction between published and unpublished works when it adopted the Berne Convention's concept of providing protection at the moment of fixation.[11] Again, this Article does not suggest that the fixation requirement itself is a problem for the copyright system. Instead, the two problems addressed in this Article arise because people confuse the concept of communication in the copyright system with the standard of fixation.

A. Society's Decreased Bargaining Power

Society's bargaining power decreases so long as fixation remains the standard for copyright protection, and the theoretical problems turn into realistic setbacks when that standard is coupled with copyright holders using technology for exclusionary purposes.

This section discusses two separate concepts of contractarian thought: The first portion briefly discusses the social contract theory behind civil governments to illustrate the natural rights that society gave up in exchange for progress.[12] The second portion explores the contractual nature of copyright legislation and identifies a loophole in using fixation as a point of protection for creative works. While the first portion serves as a stepping-stone, the latter proves the argument that protecting original expressions at the moment of fixation decreases society's bargaining power.

1. The Social Contract

Before governments, individuals existed in a state of nature with the right to take what they could get and protect it by brute force.[13] After developing standards of conduct and moral principles of justice,[14] it became apparent through either reason,[15] fear,[16] or distaste for chaos[17] that society should give up

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10. House Report 94-1476 at 130.

11. 17 U.S.C. § 102; House Report 94-1476 at 52 (1976); Berne Convention for the Protection of Literary and Artistic Works art. 2, Jul. 24 1971 (*available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P85_10661). Perhaps the reason the Berne Convention adopted the fixation concept was due to its goal of removing formality barriers between the author and the user. Paul Goldstein, *Copyright and Legislation: The Kastenmeier Years*, Law & Contemp. Probs. 79, 89–90 (1992).

12. The United States Constitution provides, "The Congress shall have the Power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

13. John Locke, *Two Treatises of Government*, *in* GREAT POLITICAL THINKERS 389, 389–90 (William Ebenstein & Alan Ebenstein eds., 6th ed., Wadsworth 2000) (1690). Locke explains that when God's people are in a state of nature, they have "title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of nature," and each person has a co-equal power to punish transgressors of that law in the absence of civil authority. *Id.* at 389–90.

14. John Rawls, *A Theory of Justice*, *in* GREAT POLITICAL THINKERS 863, 863–68 (William Ebenstein & Alan Ebenstein eds., 6th ed., Wadsworth 2000) (1971).

15. People, out of their God-given ability to reason, consensually quit the state of nature to avoid an ever-looming state of war. LOCKE, *supra* note 11, at 392–94 (stating "Men living together according to reason without a common superior on earth, with authority to judge between them, are properly in the state of nature. But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war.")

some of its natural rights in exchange for the rule of law to govern the body politic.[18]

In the late eighteenth-century copyright setting, this theory illustrates how society gave up its natural right to reproduce creative works in order to achieve progress through civil government.[19] Society's natural right existed, after all, because creative works were inherently non-rivalrous[20] and non-excludable public goods.[21] Thus, the social contract, as applied to the intellectual property clause in the Constitution,[22] meant that society would give up some of its natural rights to use creative works in exchange for adhering to Congressional laws that granted temporary monopolies to authors to promote the progress of science.

2. The Law's Bargain for Authors

Society was not the only party with natural rights in creative works: Authors had a natural property right[23] in their works before they were expressed to society. Consider Thomas Jefferson's explanation:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his

16. Thomas Hobbes, *Leviathan*, *in* GREAT POLITICAL THINKERS 364, 365–67 (William Ebenstein & Alan Ebenstein eds., 6th ed., Wadsworth 2000) (1651).

17. Jean Jacques Rousseau, *The Social Contract and Discourses*, *in* GREAT POLITICAL THINKERS 452, 452–57 (William Ebenstein & Alan Ebenstein eds., 6th ed., Wadsworth 2000) (1762).

18. The people give up the natural right to punish trespassers by developing a political society with "standing rules" for civil government. LOCKE, *supra* note 11, at 397–98.

19. Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 413, 472–73 (2008).

20. Creative works are inherently non-rival because one person's use of the expression does not deplete the next person's share, which "means that each customer becomes a potential competing supplier." Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 267–68 (1996). Professor Lawrence Lessig goes further to call the non-rival aspect an "unavoidable feature of intellectual property." LAWRENCE LESSIG, CODE 2.0, 181 (Basic Books 2006).

21. Creative works are non-excludable because the author "cannot systematically refuse to supply the [expression] to nonpayers while supplying it to payers." Perritt, *supra* note 20, at 268.

22. U.S. CONST. art. I, § 8, cl. 8.

23. A person's natural right to property rests upon the Lockean thought that everyone "has a *property* in his own *person*," so the "work of his hands" are rightly that person's property as well. LOCKE, *supra* note 13, at 394. It then follows that whatever "he removes out of the state that nature hath provided and left in it, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property." *Id.* In other words, when a person plants a bulb in the ground and picks the bundle of flowers that grow, that *thing* becomes that person's property, which the law today would recognize as a possessory right to exclude the world from that bouquet. Likewise, a person who draws on experiences in nature and mentally labors to produce a creative work in his mind has an absolute property right to exclude the world from those creative thoughts until he expresses them.

taper at mine, receives light without darkening me.[24]

To promote progress, though, Congress, with its permission from the Constitution, sought to give authors an incentive to communicate their expressions to society.[25] The premise was that authors would not create new works because the costs greatly outweighed the benefits—the cost of creation was high, and the reproduction cost for free-riders was low.[26] Lawmakers ultimately turned to an economic rationale for the copyright system[27] and made a promise: The law will grant exclusive—but temporary—statutory monopoly privileges to copyright holders *in exchange for* authors creating expressions for society.

This promise is not an ordinary one; it is a contractual arrangement among the users in society, authors, and publishers. Like all contracts,[28] the consideration for this mutual agreement may be examined using a bargained-for-exchange test: (1) The promisee must suffer a legal detriment, (2) the legal detriment must induce the promise, and (3) the promise must induce the legal detriment.[29] In other words, the promisee must "do or promise to do" something she has no duty to do or "refrain from doing what [she] is legally privileged to do."[30] Then, that act or forbearance has to be such that the other party, the promisor, "wishes to exchange" the detriment for his own promise.[31] Last, "the promisee must know of the offer and intend to accept" it by taking on the legal detriment.[32]

In the copyright setting, the bargained for exchange test looks something like this: (1) The promisee (the author) must suffer a legal detriment (the gift of an expression to society). (2) The legal detriment (the gift of the expression to society) must induce the promise (to grant monopoly rights). (3) The promise (to grant monopoly rights) must induce the legal detriment (the gift of the

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24. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), 6 THE WRITINGS OF THOMAS JEFFERSON at 180 (H. A. Washington, ed., Taylor & Maury 1854).

25. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

26. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989).

27. Mazer v. Stein, 347 U.S. 201 (1954) ("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 through the talents of authors and inventors in "Science and useful Arts."); *see* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291–94 (1970) (discussing the publisher's push for exclusive printing rights for payment purposes).

28. Along with mutual assent, all valid and legally enforceable contracts require consideration. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS CONSIDERATION § 4.1 at 172 (5th ed. West Group 2003) (1970) (citing In Re Owen, 303 S.E.2d 351 (N.C. App. 1983)).

29. PERILLO, *supra* note 28, at 174–77.

30. *Id.* at 174 (citing Ragland v. Sheehan, 846 P.2d 1000 (Mont. 1993); Habeck v. MacDonald, 520 N.W.2d 808, 811 (N.D. 1994); RESTATEMENT (SECOND) OF CONTRACTS § 71) (AM. LAW INST., 1981).

31. *Id.* at 175 (citing Zip Lube v. Coastal Sav. Bank, 709 A.2d 733 (Me. 1998)).

32. *Id.*

expression to society).[33] This theory seems to fit quite nicely for published works. Society, through its legislative branch, creates a law that it can shine before authors across the country and say, "Look authors! If you will communicate all of your beautiful artwork and telling stories to us, our law will give you a temporary monopoly over those works' copies as a reward."

But the theory does not fit very well for works that receive copyright protection at the moment of fixation but have not yet been disseminated or published. If society's law grants that temporary monopoly at the moment of fixation without requiring any level of communication to the citizenry, the author is free to put the work back in her desk drawer for the rest of her days. Society's ability to bargain with authors and publishers decreases because there is little left to induce the copyright holder to communicate the work post-fixation.

Then again the whole point of granting monopoly rights to authors was to give them an incentive to create and express new works; the system is about *expression*, not exclusion,[34] and it seems unrealistic to say that an author would write a song or a book just to put it away.[35]

So what is the big deal? Well, fast-forward to an age when internet encryptions and digital transmission passwords prevail over CDs and books, and copyright holders may begin excluding these creative works from time to time for market purposes.[36] Why, then, should society have to put up with the exclusion *and* the monopoly?

Technology's advancements directly challenge the fundamental thought that creative works are non-excludable public goods because encryption software permits copyright holders to use self-help methods in distinguishing between payers and non-payers.[37] Coupled with the non-rivalrous aspect,[38] creative

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33. It seems unlikely that society could act as the promisee in this context because a legal detriment must either be an act or a forbearance of a legal privilege. *See id.* at 174; RESTATEMENT (SECOND) OF CONTRACTS § 72(3)(a)–(b). Although society may have a realistic ability to endlessly copy non-rival and non-excludable creations, it stretches the term "legal privilege" too far to call society's ability such. Even if the argument is made, contractual promises must be made in good faith. RESTATEMENT (SECOND) OF CONTRACTS § 205. Society cannot, in good faith, ensure to the author that the entire citizenry will forbear from copying expressive works.

34. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 17 (Cassell & Co. 1899) ("The essence of Property is an unwillingness to share it, but the literary art lives by *communication*; its essence is the telling of a tale with the object of creating an impression and of causing repetition.").

35. *See* Wheaton v. Peters, 33 U.S. 591, 657 (1834) ("The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works, when first published.").

36. *See* McRibs and the Art of Artificial Scarcity (Nov. 21, 2016), http://www.foxnews.com/leisure/2010/11/29/mcribs-art-artificial-scarcity/ (last visited Apr. 17, 2011). ("In announcing that the animated film "Beauty and the Beast" would be available on DVD beginning in October, a Disney website uses the phrase "Finally Releasing from the Disney Vault for a Limited Time." Fans know the drill: When a movie emerges from the "vault," they whip out their credit cards to grab a copy before the company pulls it again from store shelves. It's received as an opportunity, rather than a marketing gimmick. "There is an element of appealing to scarcity that always works in every human being," says Jayanthi Rajan, who teaches economics and business at Albright College in Reading, Pa.").

37. Christopher Yoo, *Copyright and Public Goods Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 659 (2007) ("As an empirical matter, the emergence of copy protection and DRM has greatly increased authors' ability to employ self-help in preventing nonpaying customers from obtaining access to their

works may fall into a different economic category as virtual fences become more prevalent.[39]

Professor Lawrence Lessig warns, "[C]yberspace is about to give holders of copyrighted property the biggest gift of protection they have ever known."[40] He presents a telling scenario:

> Today when you buy a book, you may do any number of things with it. You can read it once or a hundred times. You can lend it to a friend. You can photocopy pages in it or scan it into your computer. You can burn it, use it as a paperweight, or sell it. You can store it on your shelf and never once open it. Some of these things you can do because the law gives you the right to do them . . . . Other things you can do because there is no effective way to stop you . . . . But what if each of these rights could be controlled, and each unbundled and sold separately? What if, that is, the software itself could regulate whether you read the book once or one hundred times; whether you could cut and paste from it or simply read it without copying . . . ?[41]

Thus, it may be time to reconsider protecting creative works at the moment of fixation and turn the focus toward a communication standard to keep society from having to deal with both a lengthy monopoly and the copyright owner's potential exclusion tactics.

One might argue that the fair use doctrine[42] could serve as adequate protection for accessing creative works that copyright holders subsequently exclude. But Professor Wendy Gordon explains that "intermediate cases of market failure," where some people pay for the use and others later obtain it without payment, may turn fair use into a substitute for purchase, which tends not to accommodate the balance between incentive and access that the law aims to secure.[43] Furthermore, Professor Christopher Yoo points out that even if the

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works . . . . [T]he problem is not that the exclusion of nonpaying [users] is impossible, but rather that excluding them would be prohibitively costly."); Perritt, *supra* note 20, at 268.

38. Yoo, *supra* note 37, at 667 ("The intangible aspects of the creative expression that is the copyrightable work are nondepletable, in that one can make an infinite number of copies of it without reducing the supply available for consumption by others. Recognizing that copyright protects only the intangible aspects of a creative work also makes it easier to characterize copyrighted works as indivisible, since nothing prevents the same intangible property from appearing as an argument in more than one consumer's consumption function. In addition, the resources that went into producing that intangible component are necessarily the same for all consumers of the creative work.").

39. *See id.* at 678–79.

40. LESSIG, *supra* note 20, at 175.

41. LESSIG, *supra* note 20, at 177.

42. 17 U.S.C. § 107 (2012) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

43. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax*

"access/incentive tradeoff" narrows as creative works become excludable, the practical concerns of using an affirmative defense such as fair use as a sword may present untamable caseloads to determine this substitution and excess entry.[44]

Again, protecting original expressions at the moment of fixation decreases society's bargaining power because there is little left to induce copyright holders to disseminate the creative work after it is fixed in a tangible medium of expression, and there is less encouragement to induce copyright holders to maintain that communication if partial exclusion proves more attractive.

In sum, the bargain between users and copyright holders lacks a bit of quid pro quo for society while fixation remains the standard but exclusion becomes today's practice.

B. The Author's Blurred Entitlements[45]

Moving to the second argument, protecting original expressions at the moment of fixation further blurs the author's entitlements in the copyright system if people confuse the statutory rights to mean rights *in the thing*.[46] To argue that the fixation standard *further blurs* entitlements suggests that the copyright system already exists with a certain confusion about property rights. This section points out a few foggy misunderstandings to illustrate how the fixation standard might contribute to the "property" rhetoric. Professor Benjamin Kaplan puts the heart of this argument in a nutshell, "To say that copyright is 'property' . . . would not be baldly misdescriptive if one were prepared to acknowledge that there is property and property . . . ."[47]

Property law tends to grab the average citizen's attention more so than other areas of the law[48] because there is an intuitive human disposition about possession.[49] As jurists and scholars have increasingly used the term

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Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1618 (1982).

44. Yoo, *supra* note 37, at 708.

45. Copyright initially vests in the author(s), 17 U.S.C. § 201(a) (2012), but this section also applies to any transferee copyright holders.

46. Professors William Stoebuck and Dale Whitman suggest, "When a layman is asked to define 'property,' she or he is likely to say that 'property' is something tangible owned by a natural person . . . ."Roger A. Cunningham et. al., The Law of Property 1 (West Group 2000) (1984). For an example of that same confusion within the copyright system, outspoken artist Ted Nugent equated intellectual and tangible property when he compared Napster's file sharing system to someone "stand[ing] outside the local grocery store and offer[ing] its food free to the public." Ted Nugent, *Cat Scratch Thiever* (Mar. 13, 2001), http:/www.tednugent.com/news/music/newsDetails.aspx?PostID=917643 or https://www.webpages.uidaho.edu/eng207-td/Sources,%20Links/Cat%20Scratch%20Thiever.htm.

47. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74 (1967). Professor David Fagundes suggests that the concern about confusing intellectual property with private property is really a concern about "privatization rather than propertization." David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 669 (2010).

48. David Fagundes, *supra* note 47, at 652 ("Most legal terms mean little to laypeople. Ask an average person about an adhesory contract, the doctrine of equivalents, or even a plain old tort, and you're nearly certain to get no more than a blank stare. But property is different. People care about property - a lot. Consider, for example, how the Supreme Court's 2005 decision in Kelo v. City of New London moved an often apathetic public into apoplexy.").

49. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037 n.15 (2005). Professor Peter Jaszi suggests that the concept of "authorship" found "its roots in notions of

"intellectual property,"[50] it is easy to see the analogies that people might draw to private property, particularly the possessory right to exclude.[51] Professor Mark Lemley suggests that the term not only unifies a legal discipline and boosts a practitioner's prestige, it also "promises a connection to the rich and venerable legal and academic tradition of property law."[52] It becomes increasingly troublesome for the copyright system if people expect the same types of rights in creative works that they expect in real property because the two are fundamentally different.

Classical liberalism provides the rudimentary premise for protecting private property rights: Property rights protect an individual's natural liberty.[53] But the granted monopoly privileges in the Copyright Act have a different foundation: Copyright law serves a *function*; it must promote progress according to the Constitution.[54] Statutory law promotes that progress through incentives by creating certain rights enforceable against copyright infringers; these monopoly rights do not include a possessory right to exclude the work (as a *thing*) from society.[55] As Justice Holmes once stated, "The right to exclude is not directed to an object in possession or owned, but *is in vacuo*, so to speak. It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doings as they saw fit."[56] In explaining Wesley Newcomb Hohfeld's distinction between in rem and in personam rights, Professor Alina Ng clarifies that a copyright holder may have an in rem right that is broadcasted to

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individual self-proprietorship" and "provided the rationale for thinking of literary productions as personal property." Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 472 (1991).

50. Mark A. Lemley, *supra* note 49, at 1034 (showing that the term was used nine times in federal court opinions between 1944 and 1954, and it was used 3,211 times between 1994 and 2004).

51. Mark A. Lemley, *supra* note 49, at 1036 (citing Frank H. Easterbrook, Intellectual Property is Still Property, 13 HARV. J.L. & PUB. POL'Y 108, 109, 112 (1990) ("Intellectual property is intangible, but the right to exclude is no different in principle from General Motors' right to exclude Ford from using its assembly line . . . . Old rhetoric about intellectual property equating to monopoly seemed to have vanished [at the Supreme Court], replaced by a recognition that a right to exclude in intellectual property is no different in principle from the right to exclude in physical property . . . .").

52. Mark A. Lemley, *supra* note 49, at 1034. As Professor Lemley argues, the traditional property concern about internalizing positive externalities through private ownership pre-occupies copyright jurisprudence with thwarting and punishing free-riders. *Id.* at 1037–39. Professor Olufunmilayo B. Arewa discusses the problems of copyright holders considering the use of their works as "theft" and points out that people may not understand the incentives in the copyright system very well. Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 506–07 (2007). Even Justice Breyer has used this language. MGM Studios, Inc. v. Grokster, 545 U.S. 913, 961 (2005) (Breyer, concurring) ("And deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft.").

53. Gerald Gaus, Shane D. Courtland, & David Schmidtz, *Liberalism* § 2.1 (Edward N. Zalta ed., The Stanford Encyclopedia of Philosophy 2010) (1996) (*available at*http://plato.stanford.edu/archives/spr2011/entries/liberalism/).

54. Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); U.S. CONST. art. I, § 8, cl. 8.

55. ALINA NG, COPYRIGHT LAW AND THE PROGRESS OF SCIENCE AND THE USEFUL ARTS 132 (2011) (citing WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 710, 723 (Yale University Press 1917)).

56. White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

society (e.g., the reproduction right) or an in personam right against an infringer without having rights *in* the work.[57]

Although the United States Supreme Court recognizes this distinction,[58] some people continue to try to apply common principles of private property law to intellectual property disciplines. Copyright protection's dependence on fixation helps focus the owner on the tangible *thing* instead of the communication privileges that the system provides. When people hear the word property and connect it with possession, they likely connect the word "copyright," as intellectual "property," with excludability connotations—this connection is erroneous.

All of this makes sense to general citizens when they hear that copyright protection is granted as soon as the original work is fixed in a tangible medium. Just like they have a private property right to exclude people from their tangible notebook, they feel justified in saying they have a "copyright" to exclude people from the expressions inside the notebook because they turned their thoughts into *things* on paper.[59] This scenario helps illustrate why people might think that copyright laws are about appropriation instead of creation and expression. Granted, the fixation standard alone does not create these blurred entitlements; instead, the standard contributes to the problems that the copyright system already faces in understanding the nuances of the word "property."

III. PROPOSALS FOR A SOLUTION

The previous sections examined the problems with protecting original works of expression at the moment of fixation and revealed that society loses some of its bargaining power and the author/copyright holder continues down a road of confused entitlements. This section proposes a couple of solutions that might alleviate some of the problems mentioned before. Part A urges lawmakers to consider altering the fixation standard, while keeping the fixation requirement, by granting the statutory monopoly privileges at the moment the work is *communicated* to society. Part B addresses the gap that such a change would leave between the points of fixation and communication and suggests that lawmakers or courts should clarify the right of first publication.

A. Protection at the Moment of Communication

The copyright system could give some bargaining power back to society if the law protected creative works at the moment of communication instead of using fixation as the standard. Moreover, changing the standard might help clear up the confusion about property rights so that people appreciate the expressive and sharing nature of creative works as opposed to familiar types of private

57. ALINA NG, *supra* note 55, at 132–33.

58. Dowling v. United States, 473 U.S. 207, 216 (1985) ("The Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.").

59. This conclusion is based on the author's personal discussions with people untrained in the law.

property rights that involve seclusion and appropriation.

The fundamental purpose for copyright legislation in the United States is to promote the progress of science.[60] The system creates a market (an audience)[61] for creative works so that authors can create new expressions and communicate the vibrant and living literary arts to society through publishers or direct distribution channels. Augustine Birrell described it well: "The essence of Property is an unwillingness to share it, but the literary art lives by *communication*; its essence is the telling of a tale with the object of creating an impression and of causing repetition."[62] Professor Paul Goldstein further explains that the communication—the *connection*—between authors and audiences is the "heart and essence of authorship."[63]

The World Intellectual Property Organization ("WIPO") actually provides authors with a right to communicate their creative works to the public "in such a way that members of the public may access these works from a place and at a time individually chosen by them."[64] Although WIPO is talking about an author's right and this section focuses on a societal demand for initial communication from the author, the concept is parallel; in very much the same way, the United States can promote the connection between authors and users by requiring the original work of authorship that is fixed in a tangible medium of expression be *communicated* to society before the law will grant its statutory monopoly privileges.

If the law promotes a communication standard alongside the fixation requirement, the contractual arrangement discussed in Part II(A) would once again find harmony with the test for a bargained-for-exchange. Critics may suggest that this proposal would lead the United States back into an era of formalities and dig up all of the old problems with the "publication" requirement. But this Article uses the term "communication" to reflect a conveyance of a creative work that allows the market to access the expression. In reality, a communication standard would not affect everyday practices because authors almost always communicate their work. The legal setting would serve as a reminder about the quid pro quo *that society should get* in return for the law's temporary monopoly privileges, and in rare cases the setting would prevent complete exclusion alongside that monopoly. Perhaps as more and more lawyers come to terms with the non-property (but still property) aspects of copyright laws, internet encryptions might become less of a norm and more of a challenge to the fundamental communication aspect of the system. This Article leaves that proposition for another day, but for the time being, a clear standard for communication in the copyright system would provide society with more bargaining power and would help clear up some of the confusions about copyright as a branch of "property" law.

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60. U.S. CONST. art. 1, § 8, cl. 8.

61. Paul Goldstein, *supra* note 11, at 80.

62. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 17 (Cassell & Co. 1899).

63. Paul Goldstein, *supra* note 11, at 80.

64. World Intellectual Property Organization Treaty, art. 8, Apr. 12, 1997, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 152.

B. Clarify the Residual Divulgation Right

If the law protects at the moment of communication instead of using a fixation standard, there will be a vulnerable gap that remains between the stage of fixation and communication. As most people understand, creating literary works involves a critical creation process:[65] "Copyright is as much about the pages of deleted text, the scenes . . . on the cutting room floor, as it is about the refined work, the final cut, that ultimately reaches the author's public."[66] Thus, the law needs to clearly protect the author's rights during that stage. As the following paragraph explains, the right of first publication exists in the United States, but its reality is left uncertain.

Professor Nimmer suggests that France's moral right *droit de divulgation*" has flown across the ocean, adapted to the U.S. legal climate, and now comfortably makes its nest on these shores."[67] The famous decision in *Harper & Row, Publishers Inc. v. Nation Enterprises* held that the right of first publication exists under the statutory right to distribute copies,[68] which expressly subjects the right to the fair use doctrine.[69] The Court carefully explained, "A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user."[70] Professor Wendy Gordon explains that in times of complete market failure, or a severe absence of communication, common sense suggests that the law should not provide protection for the plaintiff.[71] Although the decision in *Harper & Row* protected President Ford's distribution right to his unpublished (and incomplete) manuscript, the decision left the opportunity open for the fair use doctrine to trump the author's decisions.[72]

To put it bluntly, the law can do better. Lawmakers and courts need to spell out the divulgation right so that authors feel comfortable creating new works. Either by drafting new legislation or interpreting the current distribution right more clearly, the law should protect the author at this stage of the creation process without vaguely subjecting it to the right to fair use. It only adds to the confusion about the property entitlements in the copyright system when litigants and courts start turning to private property doctrines like trespass to chattels or conversion to protect un-communicated creative works.[73]

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65. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 554–55 (1985).

66. Paul Goldstein, *supra* note 11, at 79.

67. Nimmer on Copyright § 8D.05 (LEXIS 2010).

68. 17 U.S.C. 106(3) (2012).

69. Harper & Row, Publishers, Inc., 471 U.S. at 552.

70. *Id.* at 553–54 (quoting Senate Report at 64).

71. Gordon, *supra* note 43, at 1618.

72. *Id.* at 552–53.

73. Brief of Petitioner at 48, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (No. 83-1632) ("Under the majority holding it is clear that one may, with impunity, "steal" a manuscript and publish its contents, at least if one takes care to paraphrase less than the entire work. If the manuscript is returned, no offense has been committed. In the majority's view "[m]erely removing" the manuscript under those circumstances constitutes "far too insubstantial an interference with property rights to demonstrate conversion." (A 12–13). Nor is there any liability for trespass to chattels, for that requires "a showing of actual damage to the property interfered with." (A 13, n.5). The sanctioning of such conduct will not only require a publisher to turn his publishing house into an armed camp. It will also impair his ability to license the

IV. CONCLUSION

To restate this Article's thesis, protecting original expressions at the moment of fixation decreases society's bargaining power and blurs the author's entitlements in the copyright system. The fixation standard fails in theory to show true consideration for the copyright agreement, and the standard fails in reality as public goods becomes more and more excludable through the Internet and software. Moreover, fixation adds to people's confusion about the notion of "property" in copyright law because people tend to focus on the tangible good to satisfy their common understandings about private property, while the temporary monopoly privileges in the Copyright Act are separate from the physical works.

A communication standard appears more appropriate because it better reflects the bargained-for-exchange theory in contract law, and it would encourage future litigants or citizens to push for a continued degree of communication that would prevent some encryption-style exclusion tactics. If Congress develops this change in the copyright system, it is necessary for legislators or courts to clarify the divulgation or right of first publication so that authors feel comfortable experimenting after some of the work is fixed but before it is communicated. In sum, as the American experience moves forward on its road toward progress, the copyright system should focus on the connection between the author and the audience with fixation *and* communication as the standards for granting monopoly privileges.

publication of excepts in advance of book publication. Aware of the import of the holding, publishers will know that if they circulate a manuscript to ascertain third party interest in acquiring such rights, there is a real risk that someone will take for free that which is being offered for sale.").