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**Labour and Intersubjectivity: Notes on the
Natural Law of Copyright**

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Draft

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I.

The vast landscape of contemporary copyright theory still reveals faint traces of a once lively and heated struggle between a view of copyright law as the vindication of the author's natural right to the products of her labour, and a view of copyright law as a statutory instrument designed to balance incentives necessary for the author's productivity with the public interest in access to and dissemination of her products.¹

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¹See, for example, Douglas Baird, "Common Law Intellectual Property and the Legacy of *International News Service v. Associated Press*," (1983) 50 University of Chicago Law Review 411; Peter Drahos, A Philosophy of Intellectual Property (Aldershot: Dartmouth, 1996); Paul Edward Geller, "Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?" in Brad Sherman and Alain Strowel, eds., Of Authors and Origins: Essays on Copyright Law (Oxford: Clarendon Press, 1994), [hereinafter Of Authors and Origins], at 159-102; Wendy Gordon, "On Owning Information: Intellectual Property and the Restitutory Impulse," (1992) 78 Virginia Law Review 149; Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," (1993) 102 Yale Law Journal 1553; Willem F. Grosheide, "Paradigms in Copyright Law," in Of Authors and Origins, at 203-234; Justin Hughes, "The Philosophy of Intellectual Property," (1988) 77 Georgetown Law Journal 287; Alain Strowel, "Droit d'auteur and Copyright: Between History and Nature," in Of Authors and Origins: Essays on Copyright Law, at 235-254; Alfred C. Yen, "Restoring the Natural Law: Copyright as Labor and Possession," (1990) 51 Ohio State Law Journal 517; and Alfred C. Yen, "The Interdisciplinary Future of Copyright Theory," in Martha Woodmansee and Peter Jaszi, eds., The Construction of Authorship: Textual Appropriation in Law and Literature (Durham: Duke University Press, 1994), [hereinafter The

Whereas the rights-based view posits that the inherent dignity of authorial right is the defining axis around which the law of copyright either does or ought to orbit, the public interest view posits that the author's legal entitlement is but a function of the public interest, a means to an end - albeit a necessary means - and not an end in itself. In the ongoing encounter between these two orientations, the latter is, at least in North America, clearly hegemonic.

Neither the struggle itself, nor the hegemony of the public interest view, are by any means new. The basic structure of the struggle already permeated the great 'literary property' debate that surrounded the interpretation of the world's first copyright statute, the Statute of Anne, in 18th century England.² Argued under its aegis, the landmark case of *Donaldson v. Beckett*³ dramatized the paradigmatic opposition between those who, on the plaintiff's side, insisted upon the author's copyright as a perpetual common law right, and those who, on the defendant's side, asserted the author's copyright as a strictly limited statutory right lasting no more than an initial fourteen year term, and a possible second term of equal duration if the author was still living at the end of the first.⁴ The House of Lords held in favour of the defendant, and the subsequent evolution of copyright law, especially in the North American context, leaves little reason to doubt the proposition that, as a statutory creation, copyright is not a vindication of authorial right but a policy instrument designed in the name of the public interest.⁵

Construction of Authorship], at 159-174.

²8 Anne, c. 19 (1710). On the 'literary property' debate, see Mark Rose, "The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship," in Of Authors and Origins, supra, note 1, at 211-230; and Brad Sherman and Lionel Bentley, The Making of Modern Intellectual Property Law: The British Experience, 1760-1911 (Cambridge: Cambridge University Press, 1999), at 11-42.

³98 Eng. Rep. 257 (1774).

⁴See Mark Rose, "The Author as Proprietor," supra, note 2; and Brad Sherman and Lionel Bentley, The Making of Modern Intellectual Property Law, supra, note 2.

⁵Thus, in Canada, the Supreme Court has stated, in *Compo Co. Ltd. v. Blue Crest Music Inc.* (1979), 105

Yet one of the great ironies of that evolution is that, in spite of the virtually unquestioned hegemony of the public interest view, the scope of the author's legal entitlement has undergone and continues to undergo significant expansion. The suspicion that such expansion is no longer consistent with the public interest has risen to the level of a commonplace in contemporary discussion of copyright law. In fact, concern with the dizzying growth of the author's entitlement has, particularly in the latter half of the 20th century, generated a venerable tradition of copyright criticism that, beginning with Benjamin Kaplan's classic, An Unhurried View of Copyright,⁶ insists upon the pressing need to re-evaluate the current state of the law of copyright so as to save it from its own expansive exaggerations.⁷ It is as if the old ghost of authorial right persists in rearing its head, like a foreign body that, by and large neglected, operates all the more effectively the more it is ignored.⁸

D.L.R. (3d) 249 (S.C.C.), that "... copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls in between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute. This creature of statute has been known to the law of England at least since the days of Queen Anne when the first copyright statute was passed. It does not assist the interpretative analysis to import tort concepts. The legislation speaks for itself and the actions of the appellant must be measured according to the terms of the statute." In the U.S., the public interest view has nothing less than constitutional lineage. U.S. Const. art I, § 8, cl. 8 states that "Congress shall be empowered ... To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries" But see Yen's suggestive discussion of the clause in "Restoring the Natural Law," supra, note 1.

⁶Benjamin Kaplan, An Unhurried View of Copyright (New York: Columbia University Press, 1967).

⁷See, for example, David Lange, "Recognizing the Public Domain," (1981) 44 Law & Contemporary Problems; Jessica Litman, "The Public Domain," (1990) 39 Emory Law Journal 965; Wendy Gordon, "On Owning Information," supra, note 1; Wendy Gordon, "Equality and Individualism," supra, note 1; Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property," (1993) 68 Chicago-Kent Law Review 841; Barbara Friedman, "From Deontology to Dialogue: The Cultural Consequences of Copyright," (1994) Cardozo Arts & Entertainment Law Journal 157; Neil Weinstock Netanel, "Copyright and a Democratic Civil Society," (1996) 106 Yale Law Journal 283. See also Margaret Jane Radin and R. Polk Wagner, "The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace," (1998) 73 Chicago-Kent Law Review 1295.

⁸See Alfred C. Yen, "Restoring the Natural Law," supra, note 1. See also Brad Sherman and Lionel Bentley, The Making of Modern Intellectual Property Law, supra, note 2, who insightfully note, at 42, that "far from resolving the problems the law experienced in its dealings with the intangible, the literary property debate is merely an example of the law working through a set of problems that continue to arise in its dealings with intellectual property."

The reflection that follows formulates a rights-based interpretation of the central doctrine of copyright law: the idea/expression dichotomy. I want to show that the idea/expression dichotomy is intelligible in terms of the proposition that the author of a work has a natural right to the products of her specifically creative labour. My point is that, contrary to still prevailing assumptions, a theoretical approach to copyright law unambiguously centred on authorial right is perfectly capable of accounting for and affirming the public interest in access to and dissemination of intellectual creations.

Prominent among the handful of North American authors who have recently engaged themselves with the project are Justin Hughes, Alfred Yen and Wendy Gordon.⁹ What their work shares, albeit in different senses and to different extents, is an attempt to find in John Locke's labour theory of property support not only for the author's natural right to her work, but also for the public's countervailing right to limit the author's entitlement. Thus the vindication of the author's natural right on the basis of Locke's labour theory of property appears, from the very outset, as inherently connected to the recognition of the public domain.¹⁰

My intent in this paper is to contribute to the effort to formulate a natural rights approach to copyright by questioning the deployment of Locke's labour theory of

⁹See Justin Hughes, "The Philosophy of Intellectual Property," *supra*, note 1; Alfred C. Yen, "Restoring the Natural Law," *supra*, note 1; Alfred C. Yen, "The Interdisciplinary Future of Copyright Theory," *supra*, note 1; Wendy Gordon, "Equality and Individualism," *supra*, note 1.

¹⁰On the public domain, see David Lange, "Recognizing the Public Domain," *supra*, note 7; Jessica Litman, "The Public Domain," *supra*, note 7; and Wendy Gordon, "Equality and Individualism," *supra*, note 1. On Locke's role and influence in the great literary property debate, see Mark Rose, "The Author as Proprietor," *supra*, note 2; Mark Rose, Authors and Owners: The Invention of Copyright (Cambridge: Harvard University Press, 1993). See also Brad Sherman and Lionel Bentley, The Making of Modern Intellectual Property Law, *supra*, note 2. For comparative discussion of Anglo-American and Continental European copyright doctrine and thought, see Neil Weinstock Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation," (1993) 24 Rutgers Law Journal 347. See also Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," in Of Authors and Origins, *supra*, note 1; and Paul Goldstein, "The Two Cultures of Copyright," Chapter 5 of Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox (New York:

property in pursuit of that goal. My concern is that, within the purview of Locke's theory, the public domain arises, and must arise, in terms of Locke's famous proviso that the labourer is entitled to the products of her labour, provided that "there is enough, and as good, left in common for others."¹¹ It may well be true that Locke's proviso operates as a limitation on the right to appropriation, and that this limitation, as Wendy Gordon has argued in the context of intellectual property, is perhaps far more powerful than has been generally appreciated. The proviso not only limits the labourer's *prima facie* claim. In Gordon's account, the proviso in fact enriches and complicates Locke's basic proposition that labour is constitutive of property by casting it in a conceptual context oriented toward not only the author's right in self-expression but also, and simultaneously, toward everyone else's equal and competing right in self-expression.¹² But nor can there be any doubt that, in the context of Locke's theory, the limitation enacted through the proviso arises either as a 'trump' to a property right that has been previously constituted through labour, or, more precisely, as an obstacle to the maturation into a property right of a *prima facie* claim to property that, again, has been previously constituted through labour. Hence the deployment of the proviso as a limitation of the

Hill and Wang, 1994), at 165-196.

¹¹ John Locke, Second Treatise of Government, edited by C.B. Macpherson (Indianapolis: Hackett Publishing Company, Inc., 1980), at 19. The full text of Locke's famous par. 27 of the Second Treatise reads: "Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has a right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others." (Emphases in original). See also par. 44, at 27: "From all of which it is evident, that though the things of nature are given in common, yet man, by being a master of himself, and *proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property*; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others." (Emphasis in original).

labourer's claim appears to leave unanswered a prior question that is certainly worth posing: namely, the question of whether labour is, to begin with, constitutive of property, whether *prima facie* or otherwise.

The perennial difficulty with efforts to derive the property right from the category of labour is that whereas labour is a relation between a person a thing, property is neither a thing nor a relation between a person a thing. It is a relation between persons, albeit in terms of things. This age-old adage already contains the insight that, precisely as a relation between persons, property cannot be derived from a unilateral act - such as labour - of a person on a thing.¹³

In the specific context of copyright law, the assumption that labour is *prima facie* constitutive of property risks obscuring the distinction between *authorship* (conceived as a relation between author and work mediated through labour) and *propriatorship* (conceived as a relation between author and audience mediated through the author's sole right to reproduce the work and the audience's correlative duty to refrain from unauthorized reproduction). As a result, the critical transition from authorship to proprietorship, from labour to copyright, risks remaining assumed rather than justified. The question to be posed, in other words, is not one about the conditions (specified by way of the Lockean proviso) under which the author's labour *fails* to give rise to copyright. Rather, the question to be posed is about the logic whereby the author's labour gives rise to copyright *to begin with*.

Of course, I am by no means suggesting that a thinker of John Locke's stature could have possibly overlooked a proposition as legally and philosophically elementary

¹²See Wendy Gordon, "Equality and Individualism," *supra*, note 1.

¹³See Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge

as the proposition that property is an interpersonal relation. Locke's proviso is after all nothing less than Locke's incorporation of the interpersonal dimension of the property right into his analysis. My concern, rather, is with the *way* in which the interpersonal or intersubjective dimension of the property right arises in Locke's analysis. I want to formulate the claims of the public domain not in terms of an external limit imposed upon the author but rather in terms of an unfolding of the very presuppositions of the author's right. My point is that the author's right necessarily offers, as a matter of its own logic, its own self-limitation. My hope is to show that the limits of the author's right as a matter of copyright are best grasped by incorporating the interpersonal dimension of the property right more deeply into the analysis of the author's relation to her work. My suspicion is that the dignity of the public domain in the law of copyright can be given its proper due only to the extent that the proposition that the author unilaterally constitutes her copyright through her labour is itself questioned and analyzed.

There can be no doubt that, *qua* author, an author is indisputably a labourer. She labours in order to give birth to her work. The analysis of authorship is an analysis of the relation between author and work. This analysis can indeed be conducted under the rubric of labour. For it is labour that, as a category denoting a relation between a subject and an object, a person and a thing, mediates the relation between author and work. Thus, for example, the theorist of artistic production may wish to deploy the category of labour in order to denote the creative processes whereby the author's interiority is externalized as *oeuvre*.

Yet *qua* proprietor, the author cannot be reduced to her identity as labourer any more than property can be understood as a unilateral relation between a person and a

thing. The author is after all a proprietor only in relation to another person. Thus, precisely as a matter of proprietorship rather than authorship,¹⁴ the analysis of copyright is an analysis not of the relation between author and work but of the relation between author and audience. This analysis must be conducted under the rubric of intersubjectivity. For it is intersubjectivity that, as a category denoting a relation between a subject and a subject, a person and a person, mediates the relation between author and members of the author's audience.

Of course, from the point of view of copyright, this intersubjective nexus between author and members of the author's audience is not at issue as some kind of aesthetic nexus between writer and reader of a work of art. It is at issue, rather, as a specifically legal nexus between bearer of right and subject of duty in respect of an intellectual creation. Thus the theorist of copyright deploys the category of intersubjectivity in order to denote the network of obligation attendant on the relation between the author *qua* proprietor and members of the author's audience *qua* unauthorized copyists of the

¹⁴On the historical emergence of the author as proprietor, see Mark Rose, "The Author as Proprietor," *supra*, note 2; Mark Rose, "The Author in Court: *Pope v. Curll* (1741)," in The Construction of Authorship, *supra*, note 1, at 211-230; and Mark Rose, Authors and Owners, *supra*, note 10. See also, Martha Woodmansee, "On the Author Effect: Recovering Collectivity," in The Construction of Authorship, *supra*, note 1, at 15-28; Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'," (1984) 17 Eighteenth Century Studies 425; and Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity," in The Construction of Authorship, *supra*, note 1, at 29-56. Generally speaking, this literature deploys the historicity of authorship in an effort both to unmask the individualized 'modern' author as a 'romantic' fiction and thereby to undermine her claim to proprietorship on the basis of an unveiling of the collective or collaborative nature of intellectual labour and production. My position differs in that I seek not to question what I regard as the irretrievably individual aspects of the author's labour, but rather to preclude the recalcitrant inference that such labour is constitutive of property. I see no need to give up the concept of individual authorship in order to criticize its exaggerations. I cannot help but suspect that, in seeking to 'deconstruct' authorship in order to criticize proprietorship, postructuralism seems to fall prey to an unwitting reproduction of the very equation of authorship and proprietorship that is the intended target of critique. Consider in this regard James Boyle, "Copyright and the Invention of Authorship," in James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (Cambridge: Harvard University Press, 1996), at 51-60. At 60, Boyle writes: "The romantic idea of authorship is no more a 'mistake' than classical economics was a mistake. It is both something more and something less than that. If one is critical of a system built on its presuppositions, one must begin by understanding both its authentic appeal and the deep conceptual itches

author's *oeuvre*. The intersubjectivity of copyright is structured as an irreducible correlativity of legal right and duty.

At the same time, however, this insistence upon the radically intersubjective nature of copyright as a specifically legal phenomenon by no means amounts to a denial of the role of labour in the constitution of copyright. The author's labour is by no means irrelevant to the determination of her legal entitlement to her work. The law of copyright will not protect that which is *not* product of the author's labour. The point is, rather, that the law of copyright will not protect every aspect of author's work - i.e. every aspect of the product of the author's labour. On the contrary, the law of copyright protects the author's expression, but not her ideas, even though the latter are arguably as much a product of the author's labour as the former.¹⁵ Hence, the point is not that labour is irrelevant to the constitution of copyright but rather that the legal meaning of the author's labour cannot to be derived from the category of labour itself.

The category "product of the author's labour" is indeed wider in scope than the category "author's entitlement to copyright." The latter is a selection drawn from the former. From this point of view, the fundamental question of copyright is a question about the logic, if any, of this selection. It is a question about the grammar, so to say, in and through which the meaning of the author's labour is legally construed.¹⁶

it manages to scratch. Only then can one begin the critique."

¹⁵See *Nichols v. Universal Pictures Corporation* 45 F.2d 119 (2d Cir. 1930) [hereinafter *Nichols*].

¹⁶To raise the problem of copyright as a normative problem is - borrowing Wendy Gordon's formulation - to raise the question of defining the conditions under which beneficial effort (i.e. labour) should generate a noncontractual right to reward. As Gordon has it, the author sends her work into the world in the absence of a promise of return. Hence the question to be raised is that of the conditions under which a lack of payment for the benefits gained by the recipients of this work should be deemed to be "unjust." Gordon aptly suggests that we look to the law of unjust enrichment for guidance in the effort to refine our intuitions in respect of the conceptual co-ordinates of the normativity of copyright. See Wendy Gordon, "On Owning Information," *supra*, note 1.

This grammar is that of the intersubjective correlativity of legal right and duty implicit in property as a relation between persons. I want to develop the content of this intersubjectivity determinative of the legal meaning of the author's labour in the law of copyright not philosophically but jurisprudentially. That is, I want to produce an account of the idea/expression dichotomy that reveals that this grammar is, at root, an affirmation of the equality as authors of the parties to a copyright action. My point is that the idea/expression dichotomy both posits and presupposes that the grammar of copyright is an egalitarian grammar.

In Section II of this paper, I formulate a Kantian critique of Locke's theory of property. I do not do so, however, through an exegesis of the relevant chapter of Kant's The Metaphysics of Morals.¹⁷ Rather, I engage in what may be termed an immanent critique of Locke. That is, beginning with Locke's own claim that labour is constitutive of property, I try logically to unfold the quite different proposition that property is a relation between persons which, as such, cannot be derived theoretically from a unilateral act - such as labour - of a person on a thing. The critique is "immanent" in that it seeks to move beyond Locke by taking Locke's own premise as a starting point. In that spirit, I have ventured to write the critique in the first person singular, as if enacting a fictionalized discovery on Locke's part that the proposition that labour is constitutive of property is unsustainable. The critique is "Kantian" rather than *Kant's* because, while of clearly Kantian inspiration, it does not follow Kant's own conceptual steps as closely as an exegesis of Kant's text would.

¹⁷Immanuel Kant, The Metaphysics of Morals, supra, note 13. The chapter in question is the chapter entitled 'Private Right,' at 68-122. For commentary on Kant's theory of property, see Mary Gregor, "Kant's Theory of Property," (1988) 41 The Review of Metaphysics 757. Kenneth Baynes' "Kant on Property Rights and the Social Contract," (1989) 72 The Monist 433, includes a section on Kant's critique of Locke.

In Section III, I elaborate the content of the intersubjectivity of the property right through analyses of the categories of “proximate cause” and “absence of juristic reason” in tort and unjust enrichment respectively. The law of tort distinguishes between a mere accident and a tort. There is recovery not for the plaintiff’s injury *per se*, but, as *Palsgraf v. Long Island Railroad*¹⁸ has it, only for injuries of which the defendant’s action is the “proximate cause.” Similarly, the law of unjust enrichment distinguishes between a mere enrichment and an unjust enrichment. There is recovery not for enrichments *per se*, but only for enrichments for which, in the language of *Pettkus v. Becker*,¹⁹ there is an “absence of juristic reason.” Closely following Ernest J. Weinrib’s account of private law,²⁰ the point I seek to develop is that the law of tort and the law of unjust enrichment both construe the legal meaning of a particular transaction - such as an accident or an enrichment - from the point of view of an intersubjective structure. In the law of tort, this intersubjectivity is that of the parties’ equality as agents. In the law of unjust enrichment, this intersubjectivity is that of the parties’ equality as property owners. Thus Section III both pre-figures and illuminates the claim that, in the law of copyright, the idea/expression dichotomy affirms the equality as authors of the parties to a copyright action.

In Section IV, I present the view that the idea/expression dichotomy fulfils in copyright the same function that the categories of “proximate cause” and “absence of juristic reason” fulfil in tort and unjust enrichment respectively. My claim is that just as there is a difference between an enrichment and an unjust enrichment, and just as there is

For a critical reading of Kant, see Herbert Marcuse, “Kant,” in Herbert Marcuse, *From Luther to Popper*, translated by Joris de Bres (Norfolk: Verso, 1972), at 79-94.

¹⁸248 N.Y. 339 [hereinafter *Palsgraf*].

¹⁹(1980) 2 S.C.R. 834 [hereinafter *Pettkus*].

a difference between an accident and a tort, so there is a difference between authorship and copyright, between, as *Nichols v. Universal Pictures Corporation*²¹ has it, the scope of what the author sends into the world - idea as much as expression - and the narrower scope of what is subject to legal protection - expression alone. My argument here takes up Wendy Gordon's insight that the normative foundations of copyright may be investigated through an analysis of common law concepts.²² In essence, I seek to place *Pettkus*, *Palsgraf* and *Nichols* in a single context - that of the intersubjective structure of property as a relation between persons.

II.

I own the labour of my body. When I act upon an object, therefore, I 'mix' with it something which is properly mine. In doing so, I make it my property.

The earth is not in and of itself beneficial to my survival. It is through my labour that I actualize its potential in regard to my self-preservation. If I have a right to my self-preservation, I must have a right to exercise my labour upon nature. But since to act upon an object is to make it my property, I constitute a property right to the object when I remove it from the state nature presents it to me, when I appropriate it through my labour. The property right follows from the right to appropriation.²³ Hence I regard an object as rightfully mine solely because I acted upon it.

²⁰Ernest J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

²¹Supra, note 15.

²²See Wendy Gordon, "On Owning Information," supra, note 1.

²³Locke writes: "God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And tho' all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion, exclusive of the rest of mankind, in any of them, as they are thus in their natural state: yet being given for the use of men, there must of necessity be *a means to appropriate* them

When I say that an object is rightfully mine, I mean that a usage of it without my consent amounts to doing me a lesion or injury.²⁴ Therefore my claim is twofold. First, since prior to my having appropriated the object, another's activity upon it would have not affected me as subject, I claim that my unilateral activity upon nature has changed *my* relation to the object. Second, since I claim that, if another subject were to mix her labour with the object, it would no longer be the case that she has made it her property, I claim that my unilateral activity upon nature has changed *her* relation to the object. Thus my claim is twofold because it amounts to a claim to have changed both my and her relation to the object.

This twofoldness is expressed in that my relating to the object as mine is fundamentally different from her relating to the object as mine. When I claim my right to the object, I at the same time impose an obligation upon all others which was not otherwise laid upon them. This, of course, is the obligation to abstain from the use of the object without my consent. My right is everybody else's duty. When I constituted my right to the object, I *eo ipso* constituted everybody else's duty. The twofoldness of my claim that the object is rightfully mine is that of an incorporation of the aspect of duty as well as of that of right into the subjective relation to the object.²⁵

some way or other, before they can be of any use, or at all beneficial to any particular man. The fruit, or venison, which nourishes the wild *Indian*, who knows no inclosure, and is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life." Second Treatise, supra, note 11, at 18-19, emphases in original.

²⁴Kant begins his treatment of the property right in Metaphysics, supra, note 13, at 68, emphasis in original, as follows: "That is *rightfully mine* (*meum iuris*) with which I am so connected that another's use of it without my consent would wrong me." The proposition is equally Locke's: "He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his *property*, which another had no title to, nor could without injury take from him." Second Treatise, supra, note 11, at 21, emphasis in original.

²⁵By "subjective relation to the object" I mean the relation of all subjects, both myself and everybody else, to the object. What I am attempting to capture is that at issue are not two distinct relations to the object, one mine - viewed under the aspect of right - and the other everyone else's - viewed under the aspect of duty - but rather a single subjective relation to the object comprised as much of right as of duty. This single

Prior to my having acted upon the object, however, both I and any other subject related to it in the same way. Prior to my having acted upon it, that is, the object was a mere thing, not a rightfully *owned* thing. Thus my twofold transformation of the subjective relation to the object through my labour amounts, so to speak, to a raising of the object from the sphere of nature to that of property. This means that when we now relate to the object, we no longer relate to a mere thing. The relation between us and the object, we might say, is no longer a straightforward relation between human beings and nature. This movement from the sphere of a relation between human beings and mere things to the sphere of a relation between human beings and owned things is the movement which I claim to have brought about unilaterally through my labour, and which has incorporated the aspects of right and duty into the subjective relation to the object.

When I claim an object as mine, I claim the *actuality* of a twofold, newly constituted subjective relation to the object. But since I regard this actuality as the result of a transition from the sphere of nature to that of property, I must regard the *possibility* of such a transition as having been embedded in some sense within the framework of the relation between human beings and mere things. Prior to my having acted upon the object, all subjects, including myself, related to it not only as a mere thing, but also as a *possibly* owned thing. This means two things. First, that we related to the object in terms of the right to appropriation, and therefore in terms of labour. Second, that, as a relation to a mere, yet possibly *owned* thing, the right to appropriation entails the right to impose upon all others an obligation to abstain from the use of an object without (my) consent. The *actuality* of the property right presupposes the exercise of the right to appropriation.

There is no property where there has been no appropriation. But the *possibility* of the property right is given in the right to appropriation itself, regardless of whether the right has in fact been exercised.

I can now begin to broach the meaning of the actuality of the property right. When I say that an object has been raised from the sphere of nature to that of property, I do not mean that the object itself has changed, except, of course, in the sense of its having been physically acted upon and therefore physically altered. I do not mean, that is, that the object has ceased to be a natural object, or a thing upon which any subject, including myself, may exercise physical activity. I mean, rather, that a subject's exercise of that activity no longer entails a relation to the object in terms of the right to appropriation. Prior to the onset of property, to act upon an object meant to appropriate it. But once property has arrived on the scene, acting upon an object is no longer synonymous to appropriating it. Therefore the onset of property amounts to a separation of physical activity upon an object - i.e. labour - from appropriation. The transformation of the subjective relation to the object is a transformation of the meaning of labour. The actuality of the property right means that labour no longer entails appropriation.

Prior to the actuality of the universe of property, it was labour that, by way of its relation to appropriation, constituted that very universe. But once the aspects of right and duty have been incorporated into the subjective relation to the object, it is precisely the universe of property which constitutes the meaning of labour. The relation between subject and object is no longer a straightforward relation between human beings and nature in the specific sense that a subject's physical connection with an object no longer determines or exhausts that subject's connection with it. The twofold reality which I

claim to have constituted through my physical activity upon an object, therefore, is the reality of my relating to it in terms which are no longer dependent on my being physically connected with the object, but rather determine the very meaning of any further physical connection with it. Hence the subjective relation to the object has been changed in the sense that that relation is no longer a merely physical relation.

The actuality of the property right means that I am connected with an object in a non-physical sense. My claim that an object is rightfully mine on the grounds that I acted upon it is, to say the least, a far-reaching claim: through unilateral *physical* activity I constituted a *non-physical* reality.

That I must have made such a claim follows from the fundamental fact that if I do not make this distinction between a physical and a non-physical meaning of the relation between a subject and an object, my claim that an object is rightfully mine is meaningless. To assert that claim is to assert, on the grounds that an object is mine, that the usage of the object by another without my consent amounts to doing me a lesion or injury. But it is impossible to use an object unless one is physically connected with it. Therefore the transgressing subject must be so connected with it. But if physical connection were all there is to the owning of an object, then, inasmuch as it is the transgressing subject, and not I, who is physically connected with it when she uses it, I could not claim, on the grounds that the object is mine, that her action amounts to harming me. Regardless of whether I can claim, on some *other* ground, whatever that may be, that her action does indeed amount to harming me, it is certain that if my claim that an object is rightfully mine is to have any meaning, the reality of my connection with

it must be posited not as physical, but as *intelligible*. It must be posited, that is, as perceivable only by the intellect.²⁶

The transition from the sphere of nature to that of property has changed the subjective relation to the object in the specific sense that once I claim an object as rightfully mine, I have necessarily claimed that I relate to it not in terms of labour as appropriation, use, or physical connection, but rather in terms of an intelligible property right that has no empirical reality. This intelligible dimension of my relation to the object must of necessity be present, even if I still wish to claim, whether correctly or not, that I constituted my property right solely through labour.

The distinction between the physical relation between subject and object in the sphere of nature, on the one hand, and the intelligible character of that relation in the sphere of property, on the other, is a distinction between the framework of appropriation, wherein the subject relates to an object as a mere, yet possibly owned thing, and the framework of property, wherein the subject relates to an object as owned. Yet whereas the *possibility* of the property right is entailed in the right to appropriate by means of labour, the *actuality* of the property right presupposes something other than a merely physical relation between a subject and an object. But since labour amounts to a physical relation between a subject and an object, I am forced to conclude that my activity upon an

²⁶In *Metaphysics*, supra, note 13, at 68, emphasis in original, Kant puts it as follows: “But something external would be mine only if I may assume that I could be wronged by another’s use of a thing *even though I am not in possession of it*. So it would be self-contradictory to say that I have something external as my own if the concept of possession could not have different meanings, namely *sensible* possession and *intelligible* possession, and by the former could be understood *physical* possession but by the latter a *merely rightful* possession of the same object. ... *Intelligible* possession (if this is possible) is possession of an object *without holding it (detentio)*.” And, at 71, emphasis in original: “Something external is mine if I would be wronged by being disturbed in my use of it *even though I am not in possession of it* (not holding the object). I must be in some sort of possession of an external object if it is to be called *mine*, for otherwise someone who affected this object against my will would not also affect me and so would not wrong me. So ... *intelligible possession (possessio noumenon)* must be assumed to be possible if something external is to be mine or yours.”

object, even if I claim it to be necessary, is not sufficient to constitute a property right in regard to that object. Labour cannot account for the transition from the sphere of nature to that of property. The proposition that labour, as the means to appropriate in the sphere of nature, entails the *possibility* of property, does not amount to the quite different proposition that labour constitutes the *actuality* of property. Labour is not in and of itself constitutive of property. Therefore my claim that an object is rightfully mine solely because I acted upon it is incomplete to the extent that the owning of an object presupposes a dimension of pure intelligibility which cannot be constituted through physical activity.

But my claim is not only incomplete. It is also self-contradictory. For when I claim an object as rightfully mine solely on the grounds of my having acted upon it, I claim both that labour does *and* does *not* constitute my property right in regard to that object. I claim the former because I claim that the right follows from my physical activity upon an object. And I claim the latter because I claim that the right amounts to my being tied to the object in some other, non-physical sense.²⁷

The contradictoriness of my claim is rooted in my having failed to distinguish the sphere of physical from the sphere of intelligible relations between a subject and an object. It is precisely because I failed to make that distinction, and therefore failed to appreciate the implications of the transition from one sphere to the other, from nature to property, that I unwittingly grounded the property right in a merely physical relation. My inference from possibility to actuality is an illegitimate inference. Since if I am merely

²⁷Kant, *Metaphysics*, supra, note 13, at 76, emphases in original: “The *thesis* says: *It is possible* to have something external as mine even though I am not in possession of it. The *antithesis* says: *It is not possible* to have something external as mine unless I am in possession of it. *Solution*: Both propositions are true, the first if I understand, by the word possession, empirical possession (*possessio phaenomenon*), the second if I

physically connected with an object it is impossible to claim, on the grounds that the object is mine, that its being used by another without my consent amounts to doing me a lesion or injury, what follows from my attempt to ground the property right in a merely physical relation is in effect the impossibility of that right. The contradictoriness of my claim is thus rooted in its incompleteness.

In order to remove myself from this contradictory situation, I must therefore integrate the central aspect of pure intelligibility into my analysis of the property right.

The twofoldness of the subjective relation to the object in the sphere of property is expressed in that the actuality of the property right is *eo ipso* the actuality of duty. To speak of a property right is necessarily to speak of an obligation imposed upon all others to refrain from use of the owned object in the absence of the consent of the bearer of the right. If I regard an object as rightfully mine, I must of necessity regard *another* subject's relation to the object as rightfully mine. This other's relation to it as rightfully mine is but this other's obligation.

Yet the object itself, as far as its being a natural object is concerned, has not at all changed. An owned object does not cease to be a thing. Therefore it is not because the object itself, but because *my relation* to the object has changed that the *other* subject abstains from its usage without my consent. When another subject relates to the object as rightfully mine, he relates *not* to the object, but to *my right* in regard to that object. Her duty is constituted in and through my right. But it is equally true that since I can relate to an object as rightfully mine if and only if another subject relates to the object as mine, when I so relate to the object, I relate *not* to the object but to *her duty* in regard to the object. Thus my right is as constituted in and through her duty as her duty is constituted

in and through my right. Property is a correlativity of right and duty. The relation of each to the object is not direct but irreducibly mediated in and through the relation of each to the other.²⁸

This irreducibility means that a subject's property right cannot be constituted unilaterally, independently of his relation to others. One might say that whereas the possibility of the property right is entailed in the right to appropriation, and therefore in a relation between a subject and an object, the actuality of the property right both is and presupposes a relation between subjects. Even if all property *begins with* labour it does not follow that property all *comes from* labour.²⁹ The transition from the sphere of nature to that of property is rather the institution of a specific sort of intersubjectivity. The subjective relation to an owned object is not a straightforward relation between human beings and nature precisely because it is rather a relation among human beings themselves.

Thus the actuality of property is the actuality of a specific sort of intersubjectivity. Property is not a physical but an intersubjective reality, not an empirical but an intelligible relation. To integrate this aspect of pure intelligibility into the analysis of that

²⁸Kant, *Metaphysics*, supra note 13, at 82, emphases in original: "The usual exposition of a *right to a thing* (*ius reale, ius in re*), that 'it is a right *against every possessor of it*,' is a correct nominal definition. But what is it that enables me to recover an external object from anyone who is holding it and to constrain him (*per vindicationem*) to put me in possession of it again? Could this external rightful relation be a *direct* relation to a corporeal thing? Someone who thinks that his right is a direct relation to things rather than to persons would have to think (though only obscurely) that since there corresponds to a right on one side a duty on the other, an external thing always remains *under obligation* to the first possessor even though it has left his hands; that because it is already under obligation to him, it rejects anyone else who pretends to be the possessor of it. So he would think of my right as if it were a *guardian spirit* accompanying the thing, always pointing me out to whoever else wanted to take possession of it and protecting it against any incursions by them. It is therefore absurd to think of an obligation of a person to things or the reverse, even though it may be permissible, if need be, to make this rightful relation perceptible by picturing it and expressing it in this way."

²⁹I am here borrowing from Kant's formulation of his transcendental deduction of the a-priori conditions of the possibility of knowledge. In the 'Introduction' to the *Critique of Pure Reason*, translated by Norman Kemp Smith (New York: St. Martin's Press, 1965), at 41, Kant writes: "In the order of time, therefore, we

which we call ‘property’ is to grasp anew the wisdom of the adage that property is neither a thing nor a relation between a person and a thing. It is rather a relation between persons, albeit in terms of things. In short, if Locke’s ‘property’ is to be meaningful at all, then his explanation of it in terms of the category of labour must be self-contradictory.³⁰

III.

Relying on Ernest J. Weinrib’s account of private law,³¹ I want now to elaborate the content of the intersubjective dimension of the property right through an analysis of the concepts of “proximate cause” and “absence of juristic reason” in the law of tort and the law of unjust enrichment respectively. This analysis will facilitate the interpretation of the idea/expression dichotomy in copyright that I will then present in Section IV.

I will deal with the concept of “proximate cause” in tort by way of a brief analysis of *Palsgraf*. I will deal with the concept of “absence of juristic reason” in unjust enrichment by way of a brief analysis of *Pettkus*.

have no knowledge antecedent to experience, and with experience all our knowledge begins. But though all our knowledge begins with experience, it does not follow that it all arises out of experience.”

³⁰ In *Authors and Owners*, supra, note 10, at 5, Mark Rose notes that “C.B. Macpherson’s well-known account of Locke as the self-conscious ideologist of the new bourgeois order has been challenged from many different points of view in the last thirty years – for example, by John Dunn and James Tully, who emphasize the religious dimensions of Locke’s thought. But what Locke may have meant is of less concern here than how his writings came to be used to articulate a certain discourse of property.” The *locus classicus* of Macpherson’s seminal reading of Locke is in his *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962). See also Macpherson’s *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973). For a reading that, though formulated from a different location on the political spectrum, in large part converges with Macpherson’s, see Leo Strauss, *Natural Right and History* (Chicago: The University of Chicago Press, 1971). For a different view, see James Tully, “The Framework of Natural Rights in Locke’s analysis of Property: A Contextual Approach,” in Anthony Parel and Thomas Flanagan, *Theories of Property: Aristotle to the Present* (Waterloo: Wilfrid Laurier University Press, 1979); and Wendy Gordon, “Equality and Individualism,” supra, note 1.

³¹ Supra, note 20.

There is no need to attempt to improve on Cardozo J.'s statement of the facts in

Palsgraf:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man carrying a package, jumped aboard the car but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.³²

Cardozo J. held in the defendant's favour. In essence, Cardozo J.'s point was that the plaintiff's injury did not fall within the reasonably foreseeable orbit of the risk created by the defendant's act:

...[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbour in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behaviour must conform.³³

... ..

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.³⁴

³²*Palsgraf*, at 340-341.

³³*Ibid.*, at 343.

³⁴*Ibid.*, at 344.

Thus, even on the assumption that the defendant's act was the cause *in fact* of the plaintiff's injury, the defendant's act was still not the *proximate* or *legal* cause of the plaintiff's injury. Hence the defendant cannot be captured within the web of liability.

The category of proximate cause formulates the problem of liability neither in terms of whether the defendant in fact caused the plaintiff's injury, nor in terms of whether the defendant subjectively foresaw the plaintiff's injury. On the one hand, the defendant cannot be captured within the web of liability merely because he factually caused the plaintiff's injury. On the contrary, the plaintiff's injury must fall within the foreseeable orbit of the risk created by the defendant. But on the other hand, the defendant cannot escape the web of liability merely because he did not himself subjectively foresee the plaintiff's injury. On the contrary, regardless of his own subjective foresight, the defendant is liable for the *reasonably* foreseeable consequences of his acts.³⁵ In short, the standard of care in the law of tort is an objective standard. It is neither a standard of strict liability attentive solely to the plaintiff's injury nor a subjective standard attentive solely to the defendant's subjectivity.

The distinction between cause in fact and proximate cause amounts to a distinction between a mere accident and a tort. The question of whether the defendant was negligent is a question about whether his act was the proximate cause of the plaintiff's injury. To posit that the injury was indeed within the foreseeable orbit of the risk created by the defendant's act is to construe the accident as much more than a mere happening in the field of social interaction. It is to construe the accident rather as a legal transaction, as an incident giving rise to legal relations, capturing the defendant within

³⁵See *Vaughan v. Menlove* (1837) 132 E.R. 490.

the web of liability. The concept of proximate cause thus orients a selection of torts from a wider field of events comprised of accidents. All torts are accidents, but not all accidents are torts.

Yet while the objective standard of negligence is more restrictive than a standard of strict liability, it is nonetheless more inclusive than a merely subjective standard. To put it otherwise, the objective standard of negligence finds less torts than does a standard of strict liability but more torts than does a subjective standard. This location of the objective standard between strict liability and the subjective standard expresses the fact that the logic whereby the objective standard effects the selection of torts from the wider field of accidents focuses neither on the plaintiff (strict liability) nor on the defendant (subjective standard) but rather on their *equality* as agents. From the point of view of this equality, as we shall presently see, the standard of strict liability and the subjective standard share an error which they express in opposite ways.

The subjective standard grants the defendant a freedom of action unencumbered by any concern with the effects that such action may have on the plaintiff. It is true, of course, that the subjective standard would, on a kind of advertent negligence test, hold the defendant liable for injuries that the defendant subjectively foresaw. But, precisely in so doing, the subjective standard reveals itself as a way of evaluating the effects of the defendant's action on the plaintiff in terms of an inquiry thoroughly internal to the defendant. For a subjective standard of advertent negligence seeks to derive the defendant's duty to refrain from creating certain risks not from a recognition of the plaintiff's correlative right to be free from the harms such acts may result in, but rather from the defendant's own capacities to foresee the results of his own acts. Thus the

inquiry into the defendant's liability becomes an inquiry internal to the defendant which, as such, construes the plaintiff not as an entity in its own right but rather as a mere aspect, as it were, of the defendant's duty to live up to his own internal standards. The subjective standard thus amounts to a formulation of the defendant's agency in a way inconsistent with the plaintiff's. It favours the defendant's agency at the expense of the plaintiff's.

The standard of strict liability makes the opposite mistake. The standard of strict liability holds the defendant liable not for the results of unreasonable risks created by the defendant's acts but for the results of the defendant's acts *simpliciter*. Thus the standard of strict liability permits the plaintiff to recover from the defendant even where the defendant could have not reasonably foreseen the injury caused by the defendant's act. To the extent that action is irretrievably creative of risk, the standard of strict liability strikes not at impermissible action - i.e. action indifferent to its effects on others - but at action as such. To put it otherwise, the standard of strict liability does not recognize a distinction between accidents and torts. It formulates the defendant's liability not as a matter of an impermissible exercise of agency on the defendant's part but rather, regardless of the defendant's fault, exclusively as a matter of the plaintiff's injury. It fails to recognize an acceptable level of risk that the defendant may create in the pursuit of his own goals. Thus it vindicates the plaintiff's entitlements at the expense of the defendant's agency.

Poised between strict liability and the subjective standard, the objective standard of negligence, along with the concomitant category of proximate cause, formulate the distinction between an accident and a tort from the point of view of the equality of plaintiff and defendant as agents. The plaintiff cannot recover for the mere fact of injury

any more than the defendant, as agent, can be held to be at fault for unforeseeable consequences of his acts. Similarly, the defendant cannot escape the web of liability by pointing to merely subjective precautions objectively below the standard of reasonable care any more than the defendant, as agent, can claim that the legitimacy of actions affecting another can be established by standards internal to the self. Thus it follows that the only position consistent with the equality of the parties as agents is that of the objective standard - that of a standard that notionally instantiates the mutual recognition on the part of the parties of each other's dignity as agents. It is this mutual recognition that provides the substance of the intersubjectivity that governs their relation.³⁶

Just as the law of tort distinguishes between a mere accident and a tort, so does the law of unjust enrichment distinguish between a mere enrichment and an unjust enrichment. The law of unjust enrichment thus exhibits a construal of the relation between the parties analogous to that present in the law of tort. I wish to bring this analogy into relief by way of an analysis of *Pettkus*.

In *Pettkus*, plaintiff and defendant sundered their relationship after having lived together as common law wife and husband for many years. Upon the sundering of the relationship, the plaintiff-respondent, Becker, claimed entitlement to a one-half interest in the lands and a share in the beekeeping business the couple had acquired and developed together. The moneys and property had been placed in defendant-appellant Pettkus' name. At no time during the relationship had the parties agreed to share either the moneys or the property.

³⁶The foregoing account is both rooted in and closely follows Ernest J. Weinrib, *The Idea of Private Law*, supra, note 20, at 145- 203. See also Ernest J. Weinrib, "Liberty, Community, and Corrective Justice," (1988) 1 *The Canadian Journal of Law and Jurisprudence* 3; and Ernest J. Weinrib, "Causation and Wrongdoing," (1987) 63 *Chicago-Kent Law Review* 407.

Dickson J. found in favour of the plaintiff on grounds of unjust enrichment. He formulated three requirements that must be satisfied before an unjust enrichment can be said to exist:

... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment.³⁷

Dickson J. applied these requirements to the facts in *Pettkus* in the following manner:

On these facts, the first two requirements ... have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.³⁸

Thus Dickson J. ruled in favour of Becker.

Dickson J.'s reasoning in respect to the third requirement constitutive of a cause of action in unjust enrichment points toward the proposition that "absence of juristic reason for the enrichment" refers to circumstances in which the defendant knew or ought to have known of the plaintiff's non-donative intent. The injustice of unjust enrichment is the injustice of keeping what one knew or ought to have known was not given as a gift.

Thus the category "absence of juristic reason" does not amount to a subjective standard of liability. The defendant cannot escape the web of liability merely by alleging that he was unaware of the plaintiff's lack of donative intent. A finding that the defendant ought to have known of the plaintiff's expectation of remuneration is sufficient to make out the cause of action. Hence, in *Pettkus*, Dickson J. finds the defendant liable

³⁷ *Pettkus*, at 844. See also the similar formulation at 848.

³⁸ *Ibid.*, at 849.

without need to find either that the defendant had promised to pay or that the defendant was subjectively aware of the plaintiff's non-donative intent.

Nor does the category "absence of juristic reason" amount to a standard of strict liability. Neither the defendant's enrichment nor the plaintiff's deprivation are in and of themselves sufficient to establish the grounds of liability. Nor is the mere correspondence of enrichment and deprivation sufficient. Rather, the plaintiff must establish not only that the defendant's enrichment corresponds to the plaintiff's deprivation but also that the defendant's retention of the benefit is unjust. The plaintiff's effort to demonstrate that there is no juristic reason for the defendant's enrichment is an effort to construe the circulation of benefit from plaintiff to defendant as much more than a mere happening in the field of social interaction. It is an effort to construe that circulation rather as a legal transaction, as an incident giving rise to legal relations, capturing the defendant within the web of liability. The category "absence of juristic reason" thus orients a selection of unjust enrichments from a wider field of transactions comprised of mere enrichments. Not all enrichments are unjust enrichments.

This difference between a mere benefit and an unjust enrichment indicates that liability in unjust enrichment is not strict. Thus, in *Pettkus*, it is not the bare showing that the plaintiff benefited the defendant and became correspondingly impoverished that grounds the defendant's liability.³⁹ What grounds liability is rather the showing that the transaction took place in circumstances in which the plaintiff's non-donative intent was reasonably accessible to the defendant's cognition. Had the plaintiff's lack of donative

³⁹*Pettkus*, at 828: "The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another ... It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution."

intent not been reasonably within the defendant's purview, the defendant would have been enriched but not unjustly enriched.

Thus poised between a subjective standard and a standard of strict liability, the category "absence of juristic reason" is rather an objective standard that, as such, both posits and presupposes the equality of the parties as property owners. To say that the injustice of unjust enrichment is the injustice of keeping what was not given as a gift is to say that the defendant's retention of a benefit received in the absence of donative intent amounts to a violation of the plaintiff's right to what is hers until she freely parts with it. The defendant's retention of a benefit so received amounts to an untenable assertion that the plaintiff's right to what is hers ceases to exist as soon as the plaintiff is no longer actually holding it. This assertion is but a reduction of the plaintiff's property to mere possession. Yet this very reduction undoes the defendant's own claim to be *entitled* to retain the benefit - to retain the benefit as a matter of right rather than merely because it wound up in his hands. To put it otherwise, the defendant's claim to retain the benefit as a matter of right is inconsistent with the equality of the parties in that it asserts proprietary entitlements for the defendant but only merely possessory entitlements for the plaintiff. From this it follows that the only position consistent with the equality of the parties as property owners is that the defendant disgorge benefits received in the absence of donative intent.

But it is as essential to this very equality that this absence of donative intent on the plaintiff's part be within the defendant's purview reasonably construed. To put it otherwise, the non-gratuitous character of the benefit in question must show on both sides. It must appear not unilaterally but bilaterally, not merely subjectively - as an

expectation of remuneration on the plaintiff's side cognitively unavailable to the defendant - but intersubjectively. Forcing the defendant to disgorge the benefit received in the absence of such bilaterality would amount to granting the plaintiff the privilege of unilaterally constituting the defendant's obligation. Hence, in *Pettkus*, the plaintiff could have recovered on the basis of a merely subjective expectation of remuneration thoroughly internal to herself only at the expense of reducing - in a manner clearly at odds with the equality of the parties as property owners - the defendant's proprietary entitlements to a function of her private whims.⁴⁰

Thus, just as, in tort, the category of "proximate cause" both posits and presupposes the equality of the parties as agents, so does, in unjust enrichment, the category of "absence of juristic reason" both posit and presuppose the equality of the parties as property owners. Just as, in tort, the risk reasonably to be perceived defines the duty to be obeyed, so, in unjust enrichment, the plaintiff's non-donative intent reasonably to be perceived defines the duty to disgorge the benefit received. This convergence of tort and unjust enrichment brings sharply into relief the intersubjective structure that, in both bodies of law, orders the raw material of sensible impressions arising from the field of social interaction in terms of a specifically legal correlativity of right and duty. As if in and through a deployment of the grammar of legality, this structure gives legal meaning to the otherwise 'merely' social content of the transactions it serves to order. In

⁴⁰See *Taylor v. Laird* (1856) 25 L.J. Ex. 329. See also *Campbell v. Campbell* (1999) 43 O.R. (3rd) 783 (O.C.A.). The law of unjust enrichment refuses recovery for unrequested or officiously conferred benefits - i.e. benefits received in the absence of circumstances in which the defendant knew or ought to have known of the plaintiff's non-donative intent - for the very same reasons of equality that it orders the restitution of benefits received in circumstances in which the defendant knew or ought to have known of the plaintiff's non-donative intent. See Abraham Drassinower, "Unrequested Benefits in the Law of Unjust Enrichment," (1998) 48 *University of Toronto Law Journal* 459. For critical commentary, see Mitchell McInnes, "Unjust Enrichment - Restitution - Absence of Juristic Reason: *Campbell v. Campbell*," (2000) 79 *Canadian Bar Review* 459.

so doing, it distinguishes accidents from torts, enrichments from unjust enrichments.

Like a permeable web at the frontiers of society and law, it filters and thereby translates social into specifically legal interaction, interpersonal into actionable transactions.

IV.

The proposition I now want to venture is that this permeable web is also at the root of the distinction, in copyright, between ideas and expression.

The idea/expression dichotomy amounts to a distinction between aspects of the products of an author's labour that are copyrightable (i.e. expression) and aspects of those same products that are not (i.e. ideas). The idea/expression dichotomy is thus a dichotomy of protection. It provides that an author's ideas, no matter how novel, are not subject to copyright protection. Only her expression of those ideas is.

Assume, for example, that Shakespeare's Romeo and Juliet were now subject to copyright protection. That would mean that, minimally, Shakespeare's literal text is protected. But it would not mean that the idea of "star-crossed lovers," the substance of which Shakespeare's text is an expression, would be subject to protection. And that would be the case even if we were to assume, counter-factually, that Shakespeare was the first to come up with such idea or that the world would have been happily deprived of such idea had Shakespeare not come up with it. In short, the idea/expression dichotomy means that the plaintiff in a copyright action must show not that his ideas have been adopted by the defendant, but that the defendant has copied the plaintiff's expression.

Hand J.'s judgement in *Nichols* remains the *locus classicus* of the idea/expression dichotomy. In *Nichols*, the plaintiff was the author of a play entitled "Abie's Irish Rose."

The defendant produced a motion picture play entitled “The Cohens and the Kellys,” which the plaintiff alleged was taken from her own play. Following a description and comparison of the plays, Hand J. found that “[t]he only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation.”⁴¹ On that basis, Hand J. ruled in favour of the defendant: “A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet.”⁴²

At no point does Hand J. contest the claim that the defendant “took” from the plaintiff. Hand J.’s point, rather, is that what the defendant took did not belong to the plaintiff, even on the counter-factual assumption that the plaintiff had indeed created it, as it were *ex-nihilo*:

We assume that the plaintiff’s play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.⁴³

What Hand J. had “already said,” of course, is that copyright does not protect “ideas”:

If the defendant took so much from the plaintiff, it may well have been because her amazing success seemed to prove that this was a subject of enduring popularity. Even so, granting that the plaintiff’s play was wholly original, and assuming that novelty is not essential to a copyright, there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of *her* “ideas.”⁴⁴

⁴¹At 122.

⁴²Ibid.

⁴³Ibid.

⁴⁴Ibid., emphasis added. The distinction Hand J. draws here between “originality” and “novelty” is a distinction between copyright and patent. In patent, novel means new. If I invent something unaware that you have already invented it, my invention is not patentable in that it lacks novelty, and my usage of it,

The idea/expression distinction thus traverses the product of the author's labour. It is a distinction internal to her creation, dividing it into that which is and that which is not copyrightable. The plaintiff's ideas are not copyrightable even though they may be said to have originated in her - and are therefore "*her*" ideas - as much as her expression.⁴⁵ Hand J.'s counter-factual assumption makes it abundantly clear that it is pointless to attempt to make the distinction between ideas and expression intelligible in terms of the category of labour itself. The legal meaning of the author's labour is not in the author's labour.

Yet although the author's copyright is thus limited to her expression, it is not limited "literally to the text."⁴⁶ Otherwise, Hand J. observes, "a plagiarist would escape by immaterial variations."⁴⁷ To limit copyright literally to the text would be as unfair to the plaintiff, it seems, as Hand J. takes it to be unfair to the defendant to grant the plaintiff a monopoly in "stock figures," "prototypes," or in "too generalized an abstraction from what she wrote." The idea/expression dichotomy thus comes to place itself neither on the side of the plaintiff nor in that of the defendant, but rather between plaintiff and defendant, as the guide in and through which the relation of each and both to the author's *oeuvre* is given legal meaning.

even though it originated in me in the sense that I did not copy it, would amount to an infringement of your patent. But in copyright, original means originating with the author, not copied. Thus, if I rewrite Cervantes' *Don Quixote* out of myself, so to speak, without copying it, I have not infringed copyright (assuming that the *Quixote* is under copyright, of course!). For a fictionalized example of such rewriting, see Jorge Luis Borges, "Pierre Menard, Author of the *Quixote*," in Jorge Luis Borges, *Labyrinths: Selected Stories & Other Writings*, translated by James E. Irby (New York: New Directions, 1962), at 36-44.

⁴⁵"Nor does she [the plaintiff] fare better," Hand J. adds (at *Ibid.*, emphasis added), "as to her characters. It is indeed scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman. The defendant has not taken from her more than their prototypes have contained for many decades. If so, obviously so to generalize her copyright, would allow her to cover what was not original with her. But we need not hold this as a matter of fact, much as we might be justified. *Even though we take it that she devised her figures out of her brain de novo, still the defendant was within its rights.*"

⁴⁶At 121.

Famously, Hand J. writes:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.⁴⁸

The idea/expression dichotomy raises three distinct yet intimately related questions:

- (1) Why can the plaintiff not prevent use of her ‘own’ ideas?
- (2) Why can the defendant not use the plaintiff’s expression?
- (3) How can these two limits respectively placed upon plaintiff and defendant be grasped not as merely juxtaposed but rather as integrated aspects of a single yet differentiated correlativity of right and duty?

The doctrine of originality - i.e. the requirement that she who seeks copyright must be the author of an “original” work - provides a suitable point of access to this threefold constellation. As is well-known, “original,” in copyright, does not mean novel. Novelty is not a requirement of copyright. An original work is not a novel work but a work that originated with the author, a work that has not been copied. Original means not-copied.⁴⁹

⁴⁷Ibid.

⁴⁸Ibid.

⁴⁹“The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work,’ with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work-that it should originate from the author.” *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601. In North America, ‘original’ also means that, in addition to being not-copied, a copyrightable work must be minimally creative. See *Feist Publications Inc. v. Rural Telephone Service Co.*, (1990) 499 U.S. 340; and *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), 76 C.P.R. (3d) 296 (F.C.A.).

The requirement of originality is therefore inseparable from the defence of “independent creation.” The defendant cannot be held liable in copyright where he can show that his work, though identical to or substantially similar to the plaintiff’s, was independently created.⁵⁰ There is no copyright infringement where the defendant has independently created a work. For to make out a defence of independent creation is to make out a claim that the defendant’s work is not copied. An independently created work is an original work, a work originating with the author, a not-copied work.

The defence of independent creation permits the following two observations. The first is that copyright protects the plaintiff’s expression not - to take the case of literary works - as a particular sequence of words *belonging* exclusively to the plaintiff, but rather as a particular sequence of words *originating in the plaintiff*. For if the sequence of words were protected as a sequence of words belonging to the plaintiff, then an identity between the defendant’s work and the plaintiff’s work would - regardless of independent creation by the defendant - amount to an infringement of the plaintiff’s copyright. Thus the defence of independent creation means that it is not the sequence of words as such but rather the sequence of words as exteriorized or expressed that is subject to copyright protection. The law of copyright conceptualizes the author’s work not as an external object in and of itself but as the embodiment of the author’s interiority or personality. Copyright protects the work not as object but as expression. It protects not the work but the link between author and work. The substance of this link is the author’s right to her expression.

⁵⁰See, for example, *Kilvington Brothers Ltd. v. Goldberg* (1957), 8 D.L.R. (2d) 768 (Ont. H.C.).

The second observation made possible by the defence of independent creation is that the plaintiff's right to her expression is limited by the requirement that it be consistent with the *defendant's* equal right to the defendant's own original expression. The plaintiff has a right to her expression only to the extent that her right does not violate the defendant's parallel right to *his* expression. The defence of independent creation is but an insistence on this limit. If the plaintiff has a right to her original expression, then so must the defendant. Precisely because she claims her work as that which originates in her, the plaintiff cannot, in a world premised on equality, consistently deny the defendant's entitlement to what originates in the defendant, even if what originates in the defendant happens to be identical to or substantially similar to the plaintiff's. The defence of independent creation thus emblemizes the equality of the parties. It teaches us that as soon as the law of copyright grants an author rights in her expression, the law of copyright demands that the author submit to every other person's right in *his* original expression. The defence of independent creation is but a way to affirm the parties' equal entitlement to original expression.

The point is that the plaintiff cannot claim an interest whose assertion amounts to a denial of the very possibility of the defendant's assertion of that same interest. As soon as I claim what originates in me as mine I have necessarily accepted - short of a denial of equality - what originates in another as *his*. As the defence of independent creation reveals, the category of originality is through and through a bilateral category. It formulates copyright not as a unilateral relation between author and work but rather as a bilateral relation between persons in and through the work. As that which gives rise to copyright, originality is not merely about the legal link between author and work. It is

also, and necessarily, about the author's relation to other persons. From the very outset, the law of copyright interprets the author's labour intersubjectively.

Nothing in the defence of independent creation suggests that, for the defence to operate, the defendant must show that he had no alternative but to create a work that happened to be substantially similar to the plaintiff's. The defence of independent is indifferent to the question of whether the defendant could have created something other than what the plaintiff happened to have created. That is, the defence of independent creation operates even if the plaintiff's creation leaves enough and as good alternative possibilities of creative expression for the defendant to follow. The point, then, is not that the author must leave "enough, and as good," for others. The point, rather, is that the author's right must stop short of amounting to a denial of the defendant's equal right to authorship.

This limit on the plaintiff's right arises not as an external limit but as a necessary implication of the very structure of the plaintiff's own claim. A plaintiff who claims a right in her own expression while seeking to deny another's equal right is a self-contradictory plaintiff. Since the plaintiff's claim is rooted in the work having originated in her, the plaintiff's denial of the defendant's right to his original independent expression is but a denial of the plaintiff's own standing as plaintiff. An author who seeks to deny another's right to an independent creation deprives herself both of the very grounds upon which she claims her own right to her expression and of the very grounds upon which another can be held to respect the author's own claims.

The equality of the parties as authors thus reveals the mutuality in and through which the author's right to her expression is intersubjectively, relationally constituted.

The relation of each to the work is mediated in and through the relation of each to the other. The law of copyright affirms the author's right to relate to her work as legally hers only to the extent that her claim does not violate the other's equal right to authorship.

The defence of independent creation means that the author's property is mediated in and through the author's relation to the other as himself equally entitled to his original expression. The author appears as proprietor only through the affirmation of the other's authorship. But at the same time, this affirmation of the other's authorship is the ground of this other's respect of the author's expression. In and through the author's work, the parties thus recognize themselves, as Hegel would put it, "as mutually recognizing one another."⁵¹ This mutuality is the irreducible intersubjectivity of copyright.

The parties' status as equally entitled to their own expression - i.e. their equality as authors - already contains an understanding of the idea/expression dichotomy.

Assume for a moment that you were trying to copy an idea, but without copying the expression from which you draw that idea. Say, for example, that you wanted to copy Shakespeare's idea of "star-crossed lovers." But say also that, *ex-hypothesi*, you set about doing that without copying Shakespeare's text, Shakespeare's expression of that idea. In order to do that, you would necessarily have to express the idea anew, in a new way, your own way. That is, where one copies ideas, but not expression, one necessarily exercises one's own capacities of expression in order to express the idea anew. Ideas are irrelevant to copyright because ideas cannot be copied. They can only be re-expressed anew.

⁵¹G.W.F. Hegel, Phenomenology of Spirit, translated by A.V. Miller (Oxford: Oxford University Press, 1977), at 112.

Where the defendant expresses an idea in his own words, the plaintiff cannot complain of a violation of her copyright because her own claim to copyright is but an affirmation that person's have a right to their expression. What the plaintiff would have to say in order to claim copyright in an idea is that she, but not the defendant, has rights in her expression. To copyright an idea is to deny another's entitlement to his original expression. Yet that denial would, of course, contradict the equality of the parties as authors, as originators of copyrightable expression. In so doing, it would undermine the plaintiff's own claim to her expression, in that it would fail to provide a reason for which the defendant can be legitimately obligated to respect it. The plaintiff's demand that the defendant not copy her expression is the very reason for which the plaintiff cannot preclude the defendant from "copying" ideas from her work. To put it otherwise, the defendant's entitlement to draw ideas from the plaintiff's work is but an implication of the plaintiff's own claim. The plaintiff is but an author among authors. The proposition that only expression is copyrightable, and not ideas, is thus necessarily rooted in the equality of the parties as authors. By the same token, copyrighting ideas is therefore inconsistent with the doctrine of originality and its normatively necessary corollary, the defence of independent creation.

It is true, of course, that to suggest that this inconsistency between the doctrine of originality and the copyrighting of ideas amounts to a justification of the idea/expression dichotomy is to presuppose that the definition of originality exclusively as *expression* originating in the author is itself justified. That is, while it may well be true that copyrighting ideas is incompatible with the way in which the law of copyright defines originality, this does not yet explain why the law of copyright defines originality as

pertinent only to expression, and not to idea. What, then, is it that informs the necessity to define authorship exclusively as a matter of expression rather than ideation? Why is it that copyright protects only expression?

Imagine a plaintiff that, having come up with an indisputably novel idea, complained that, even if copyrighting ideas is inconsistent with the definition of originality, there is nonetheless nothing in the concept of the parties' equality as authors that necessitates such a definition. Such a plaintiff may argue as follows: "I want to claim not that I have a right to my own expression but that I have a right to what originates in me, regardless of whether it is expression or idea. This novel idea here, and not only its expression, originated in me. I have no problem in acknowledging that others, too, have a right to the exclusive use of the ideas that they themselves originate. Nor do I have any difficulty in acknowledging a defence of independent *ideation*. Thus nothing in my claim to copyright my novel idea contradicts everyone else's status as originators of ideas, if and when they in fact come up, as I have, with a novel idea of their own. The law of copyright ought to affirm our equality not only as expressive beings but also as thinking beings, not only as beings who originate expression but also as beings who originate ideas."

It goes without saying, of course, that this plaintiff's position has no legal weight. Even if we were to assume, as does Hand J. in *Nichols*, that the plaintiff truly originated an idea *de novo*, it is abundantly clear that the law of copyright would not grant her protection of that idea. But the question here is not whether the plaintiff would succeed in court but rather whether her failure is justified from the point of view of the equality of the parties as authors. The force of the plaintiff's objection is that there is nothing in the

equality of the parties that necessarily commands that copyright be restricted to expression. In fact, the plaintiff's objection is that permitting the defendant to draw from her ideas is but a refusal to recognize the equality of the parties as originators of ideas. In other words, the plaintiff's objection demands that we understand why the law of copyright finds authorship in expression but not in idea.

The reason that copyright law refuses to protect ideas is that ideas can be said to enter the sphere of right, of relations between persons, only as expressed. It is expression, not ideation, that renders thought a matter of right, that plunges thought into the field of intersubjectivity. The plaintiff's identity as a thinking being, as distinct from her identity as an expressive being, is a matter thoroughly internal to the plaintiff, outside the purview of the plaintiff's relation to others. Considered as bare ideation, the plaintiff's thought cannot help but be legally irrelevant. She cannot claim an entitlement to her thoughts, or as arising exclusively from her thoughts, any more than, in the context of first possession in the world of real property, a plaintiff can claim that her bare intention to possess an object, in the absence of an unequivocal and publicly recognizable manifestation of that intention, is sufficient to constitute another person's obligation to refrain from using the allegedly possessed object.⁵² Ideas are no more relevant in copyright than mere intentions are in the context of first possession. So serious is the law of copyright about the necessity for an author's externally recognizable manifestation of her thought that it in fact refuses to copyright expression itself where such expression is not "fixed" in tangible form.⁵³

⁵²See *Pierson v. Post* 3 Cai, R. 175 (N.Y. Sup. Ct. 1805).

⁵³See *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 384; *Gould Estate v. Stoddart Publishing Co.* (1996), 30 O.R. (3d) 520 (Gen.Div.).

Yet as distinct from what we may call the merely subjective emptiness of bare ideation, expression is always expression toward another. Whatever we might wish to say about the meaning of authorship in an extra-legal context, legally speaking an author is not someone who thinks; she is someone who expresses her thoughts. Not the silence of thought but the intersubjectivity of speech is at the heart of the legal concept of authorship. One might even say that it is precisely the transition from thought to speech, idea to expression, inchoate intention to spoken word, that the law of copyright calls authorship. There is a defence of independent creation, not independent ideation, because bare ideation is legally irrelevant. Copyright is necessarily copyright in expression because only expression, not ideation, can have legal import.

Two further observations are here in order. The first is that this refusal to recognize ideas as within the necessarily intersubjective purview of copyright law manifests not only an evidentiary but also a normative concern. There is no need to rehearse here either the extraordinary difficulties attendant on demarcating a mere idea as subject to a proprietary entitlement, or the equally insurmountable obstacles that would accompany any serious inquiry into the origin of something as elusive as an idea.⁵⁴ The point is also that, even if it were possible to have access to the plaintiff's ideation as distinct from her expression, such access would still be legally irrelevant. It would be irrelevant because the inquiry into the defendant's liability cannot - in a manner consistent with the equality of the parties - be a matter internal to the plaintiff. Copyright is about expression not because ideas cannot be tendered in evidence without being expressed but because, even if they could be examined aside from their expression, the

⁵⁴See, for example, Jessica Litman, "The Public Domain," *supra*, note 7; and Alfred C. Yen, "Restoring the Natural Law," *supra*, note 1.

contents of a person's mind cannot be normatively constitutive of another's obligation. Once again, copyright is through and through a bilateral, relational phenomenon. The law of copyright concerns itself exclusively with expression because it is through - or even *as* - expression that ideation engages an author's relation to another. The exclusion of ideas from the purview of copyright is thus an instance of the normativity of copyright as a relation between persons.

The second observation may be formulated as an objection to the proposition that ideas are not subject to copyright protection because, as I have just stated, they are 'a matter internal to the plaintiff.' Left as it stands, the proposition seems to rest on the erroneous assumption that ideas cannot be expressed to another – and therefore be found in the field of relations between persons – in a manner that fails to attract copyright protection. But that is clearly untrue. Not every communication to another is subject to copyright protection. To put it otherwise, not every instance of *communication* is, by that token alone, a copyrightable *expression*. The law of copyright does not define the domain of ideas as a private or "internal" domain. On the contrary, the problem is precisely that, for the purposes of copyright law, the domain of ideas is a radically public domain. Thus, for example, in *Nichols* itself, the defendant was within her rights in appropriating the plaintiff's ideas because, though communicated in the sense of available to the defendant, they were nonetheless denied copyright protection. But this denial of protection cannot be explained by way of the proposition that the plaintiff's ideas were merely internal. After all, the defendant could have hardly "taken" them had they been merely internal to the plaintiff.

In fact, the distinction with which Hand J. operates is perhaps less a distinction between internal and external than a distinction between abstract and concrete, general and particular. Thus, the plaintiff's ideas are not so much internal as much as "too generalized an abstraction" to be worthy of copyright protection. The "less developed the characters," Hand J. writes elsewhere in the judgment, "the less they can be copyrighted; that is the penalty the author must bear for marking them too indistinctly."⁵⁵ From the point of view of copyright law, that is, the labour of authorship is the translation of the general into the particular, the abstract into the concrete, idea into expression. Neither an unexpressed idea, nor an idea communicated at too high a level of generality, nor even an idea underlying thoroughly concretized expression, is subject to copyright protection. Only the final moment of the labour of authorship, the expression embodied as a copyrightable work, is sufficient to warrant legal protection. It is only at that moment that, as far as the law of copyright is concerned, the labour of authorship enters the specifically normative intersubjectivity of proprietorship. For it is only at that moment that, having marked its subject-matter with sufficient distinctiveness, the plaintiff's claim is no longer, by virtue of its inchoate generality, inconsistent with the defendant's equal claim to authorship. Thus ideas are a 'matter internal to the plaintiff' in the specific sense that, even where communicated, they are not *per se* sufficient to constitute the defendant's obligation to refrain from copying.

I can now offer, by way of conclusion, the following answers to the three questions that I raised at the beginning of this Section. First, the plaintiff cannot prevent use of her 'own' ideas because to copyright an idea is to find infringement even where

⁵⁵ At 121.

the idea has been originally expressed anew by another. Yet an author is an author only by virtue of her expression, only by virtue of her having entered the field of intersubjectivity by way of her expression. The unacceptable unilaterality implicit in any effort to copyright ideas thus manifests itself in the denial of another's entitlement to her original expression that such copyright would entail. The plaintiff's ideas cannot be copyrighted in the name of the protection of the plaintiff's authorship not only because authorship has nothing to do with bare ideas, but also because - to say the same thing from another point of view - the copyright of ideas in fact denies the possibility of the defendant's authorship. The plaintiff can claim authorship only as an author among authors. The defendant cannot be held to have a duty to respect in the plaintiff what the plaintiff - by way of an effort to copyright 'her' ideas - refuses to respect in the defendant. Second, the defendant cannot use the plaintiff's expression because, just as the copyright of ideas amounts to a denial of the defendant's authorship, so does the defendant's unauthorized copying of the plaintiff's expression amount to a denial of the plaintiff's. The defendant cannot claim the plaintiff's expression as a matter of right because the defendant's unauthorized copying of the plaintiff's expression is a denial of the possibility of entitlement in expression. It follows that what precludes the plaintiff from copyrighting ideas - i.e. the equality of the parties as entitled to their original expression - is precisely what precludes the defendant from unauthorized use of the plaintiff's expression. Thus the two limits respectively imposed upon plaintiff and defendant reveal themselves not as merely juxtaposed but rather as integrated aspects of a single yet differentiated correlativity of right and duty.

This differentiated unity is the unity of copyright as a relation between persons considered in their equality as authors: it is the intersubjective relation between plaintiff and defendant in terms of the plaintiff's copyrightable work. From this point of view, the public domain is the domain of the defendant's authorship. To recognize the public domain is to recognize the defendant's dignity as an author. The limits of the plaintiff's right are the contours of a public domain that it itself must both posit and recognize.

In that vein, then, the idea/expression dichotomy is neither on the side of the plaintiff nor on that of the defendant because - like proximate cause in tort and absence of juristic reason in unjust enrichment - it is rather the instantiation of their equality.

Palsgraf, *Pettkus* and *Nichols* are thus placed under a single rubric - that of the intersubjective structure that differentiates accidents from torts, enrichments from unjust enrichments and ideas from expression. One may venture that the entitlement to one's expression is as constitutive of personality as are agency and property.