

The Idea Exclusions in Intellectual Property Law

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“In such cases we are rather concerned with the line between expression and what is expressed. . . . Nobody has ever been able to fix that boundary, and nobody ever can.”—Judge Learned Hand²

“Don’t look at me - I’m just the idea guy.”—Chidi Anagonye, *The Good Place*³

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² *Nichols v. Universal Pictures Corp. et al.*, 45 F.2d 119, 121 (2d Cir. 1930).

³ *The Good Place: Season 4, Episode 10* (NBCUniversal Television Distribution 2019).

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Introduction

Ask almost any one the question “What is intellectual property law?” and the typical response you will receive will be something along the lines of “It’s the law that protects a person’s ownership of her ideas as her property”.⁴ Of course this widely held misperception is wholly incorrect—while intellectual property law affords creators, inventors, and other innovators a variety of legal rights and property interests, it does not extend legal protection to mere ideas—at least not “ideas” in the ordinary sense of the word. Indeed, a fundamental precept common to all forms

⁴ See, e.g., Statement of Senator John Kennedy on May 2, 2019 in support of The “Copyright Alternative in Small-Claims Enforcement Act of 2019” (HR 2426) and (S. 1273), <https://www.kennedy.senate.gov/public/media?page=36>, “Creative ideas are your property. . .”; Scott Allen, *Intellectual Property 101: Patents and Trademarks*, The Balance Small Business, <https://www.thebalancesmb.com/intellectual-property-patents-trademarks-1201095>, “‘Intellectual property’ refers to those ideas that can be considered ‘owned’ by an individual or company and are therefore protectable under the law.”.

of intellectual property protection is the preservation of the public's right to use freely and develop ideas, whether they are one's own ideas or the ideas of others. Consequently, pervasive throughout American intellectual property law are doctrinal mechanisms which explicitly *exclude* ideas from protection as property.

But if intellectual property law does not grant ownership of ideas, what then is the purpose of intellectual property protection? The thesis of this article is that the primary social objective of the intellectual property law is to incentivize individuals to *act* upon ideas; to undertake specific, enumerated intellectual endeavors which not only enhance social productivity, but also promote social justice.

Copyright law incentivizes intellectual action directed toward the creative expression of ideas. Patent law incentivizes intellectual action directed toward the reduction of utilitarian ideas to new and useful embodiments. And while perhaps with less acuity than the analogous doctrines in copyright and patent, trade secret law also employs mechanisms to exclude mere ideas from protection, and accordingly incentivizes intellectual action directed toward the identification, development, and use of discrete, commercial applications for ideas to the extent that such applications are not already in the public domain.

At the same time, however, whereas the immediate objective of intellectual property protection is to foster each of the foregoing kinds of "action upon ideas," the overarching social ordering function of intellectual property protection is to promote intellectual endeavor to society's greatest benefit. It is this overarching purpose that mandates that the intellectual property law universally prohibit property rights in mere ideas. Permitting any one person to "own" an idea would impede the ability of others to act upon and further develop that idea, and thus would lead to an artificial "depletion" of this human resource. Moreover, intellectual property ownership in ideas would also tend to favor those who enjoy certain privileges and advantages in society, such as economic and racial capital, which can provide greater and more variegated access to ideas and are often essential to implementing an individual approach toward developing an idea. Ownership in ideas would therefore unfairly disadvantage those who lack such privileges and advantages, and would further harm society as a whole, in as much as we would all be deprived of the creative, inventive, and entrepreneurial accomplishments that such "second-comers" might otherwise contribute to the greater good.

To avoid such socially detrimental consequences, the intellectual property legal regime employs certain doctrinal safeguards which can be collectively referred to as the *Idea Exclusions*. The Idea Exclusions serve to delineate and preserve a public domain of ideas for unlimited individual action and development. Extant in copyright, patent, and trade secret protection, the Idea Exclusions ensure the social maximization of human ideas. Further, the Ideas Exclusions also implement and promote *Intellectual Property Social Justice*—the aspirational theory which acknowledges obligations of socially equitable access, inclusion, and empowerment as inherent to intellectual property protection—by guaranteeing democratic participation in the intellectual property system.

The Idea Exclusions: Promoting IP Social Utility and IP Social Justice

This article explores how the Idea Exclusions enhance social efficiency and promote social justice within the intellectual property legal eco-system. The Idea Exclusions ensure perennial, inclusive, and democratic access to ideas, thereby balancing symbiotic property right incentives which help to stimulate individual intellectual action toward the production of intellectual public goods. The Idea Exclusions ensure that a broad and diverse populace enjoys virtually inexhaustible opportunities for self-actualization and socio-economic uplift through participation in the intellectual property regime.

Part I briefly reviews the two best known Idea Exclusions in intellectual property law. In copyright law the “Idea/Expression Dichotomy” protects the public’s access to aesthetic and informative ideas.⁵ In patent law the “Abstract Idea Exemption” protects the public’s access to utilitarian ideas.⁶

Part II then delineates the heretofore largely overlooked Idea Exclusion, which emerges from careful examination of how the courts exclude ideas from trade secret protection. Notwithstanding the absence of a segregate Idea Exclusion doctrine, the judicial requirements that trade secret subject matter be useful, discrete, and provide a competitive commercial advantage effectively preclude protection for abstract ideas. These prerequisites comprise an “Idea/Discrete Application Rule” which preserves the public’s access to the ideas embodied within trade secret subject matter.

Having confirmed the Idea Exclusions as ubiquitous across the intellectual property legal regime in Part II, Part III next explores the proposition that the prevalence of the Idea Exclusions is not coincidental but rather is a fundamental attribute of a socially efficacious IP system. This proposition is tested by demonstrating that the preclusion of ownership of ideas is endemic to leading theoretical rationales of intellectual property protection. Ecological commons theory, John Locke’s labor theory, the utilitarian law and economics rationale, and John Rawls’ deontological theory of distributive justice each require the preclusion of ownership of ideas as a means by which to prevent the “artificial depletion,” waste, or inefficient or socially inequitable exploitation of the resource of human ideas.

Finally, Part III also explicates how confirmation of the prevalence of the Idea Exclusions substantiates Intellectual Property Social Justice as a theoretical rationale for intellectual property protection. The contemporary evolution of global civilization continually affirms adherence to social justice as a vital aspect of human progress.⁷ One important recent example of the pervasive proliferation of and appreciation for social justice awareness is the collective public acknowledgement by

⁵ See, e.g., *Nichols*, 45 F.2d 119; *Golan v. Holder*, 565 U.S. 302, 328–29 (2012); 1 NIMMER ON COPYRIGHT § 2A.06 (2018).

⁶ See, e.g., *Diamond v. Diehr*, 450 U.S. 175, 185 (1981); *Wyeth v. Stone*, 30 F. Cas. 723, 727 (No. 18,107) (C.C. D. Mass. 1840); 1 CHISUM ON PATENTS § 1.03 [2] (2018).

⁷ See AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

dozens of the most prominent business corporations in the world's leading capitalist economy that corporate social responsibility is critical to the social efficacy of high commerce in the political economy.⁸ Intellectual Property Social Justice identifies and delineates these aspirational attributes as extant within the intellectual property legal regime.

Intellectual Property Social Justice theorizes that intellectual property protection should be understood to aspire toward broad deontological goals of ecumenical social progress and advancement, through *among other things*, utilitarian mechanisms of economic property rights and interests. In this regard, Intellectual Property Social Justice transcends the traditional and often polarized debate between utilitarian and deontological intellectual property theorists and policy advocates. The Idea Exclusions embody this balanced perspective – they provide an essential check upon the property right incentives that help to stimulate creative, inventive, and entrepreneurial action upon ideas. The Idea Exclusions thereby facilitate socially equitable and inclusive participation in the intellectual property system. In ensuring this systemic social equipoise, the Idea Exclusions manifest and implement the Intellectual Property Social Justice core precepts of access, inclusion, and empowerment.

I. The Idea Exclusions in Copyright and Patent Law

The prime directive of intellectual property law is to provide individuals with secular incentive to undertake intellectual action upon ideas toward society's ultimate gain.⁹ Many individuals apply their creative and inventive energies toward the use and development of myriad ideas simply as a matter of innate curiosity or aesthetic inspiration.¹⁰ Many others are motivated to act upon ideas in order to address

⁸ Jena MacGregor, *Group of top CEOs says maximizing shareholder profits no longer can be the primary goal of corporations*, THE WASHINGTON POST (Aug. 19, 2019) (“Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.”).

⁹ See U.S. CONST. art. 1, § 8 (Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”). See generally *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954). See, e.g., Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 369, 396–98 (2004) (“In accordance with [the] constitutional mandate, both Congress and the courts have determined that the ‘overarching object of copyright law in the United States is to encourage the widest possible production and dissemination of literary and artistic works.’ Through widespread production and dissemination, the greatest amount of creative works is likely to reach the largest audience, who will not only benefit from exposure to these works, but who will in turn build upon the ideas advanced therein and produce additional work.”)

¹⁰ See Nathan H. Lents, Ph.D., *Why Do Humans Make Art?* PSYCHOLOGY TODAY, <https://www.psychologytoday.com/us/blog/beastly-behavior/201709/why-do-humans-make-art>; Gerard J. Puccio, *From the Dawn of Humanity to the 21st Century: Creativity as an Enduring Sur-*

specific problems concerning human health, the physical environment, or any number of social and economic needs and deficiencies.¹¹ For those who see creative and inventive endeavor as a means toward personal or communal economic independence and social advancement, however, intellectual property protection can provide critical secular incentives and rewards.¹²

While the particular impetus to engage with an idea will vary, individual intellectual action upon ideas is the means whereby abstract ideas are cultivated towards society's tangible benefit. But whatever the benefits derived from any particular expression or application of an idea, the social value of the idea *itself* is potentially without limit, in as much as ideas are non-rivalrous.¹³ Innumerable individuals can interact with an idea without exhausting its potential as the source for other and future inspirations, developments, and applications. Consequently, no matter how beneficial any particular application of an idea, it is in society's best interest to preserve access to that idea for further exploration, without regard to whoever first applied or even conceived it.¹⁴

In order to safeguard society's access to the full social potential of ideas, intellectual property jurisprudence has developed the Idea Exclusions, which ensure that no single creative, innovative, or entrepreneurial advance comes at the expense of

vival Skill, Vol. 51, Iss. 4 THE JOURNAL OF CREATIVE BEHAVIOR 330–31 (2017) (“Comparatively speaking humans are a weak species. We are not naturally designed for a wide range of environmental conditions. Yet humans inhabit all regions of the globe. We cannot fly away from danger, hide through natural camouflage, or outrace many four-legged creatures. Despite our obvious physical deficiencies, the human species has survived and thrived. What then has been our competitive advantage? One abundantly clear answer is Creativity. . . . our competitive advantage, the creative mind, results in creative products, both tangible and intangible, that fundamentally change the environment. Our creativity creates a cycle in which we produce creative ideas that allows us to more effectively adapt to our environment, yet at the same time alters the environments in which we live and work.”).

¹¹ See, e.g., Christopher W. Schmidt, *Why the 1960 Lunch Counter Sit-Ins Worked: A Case Study of Law and Social Movement Mobilization*, 5. IND. J.L. & SOC. EQUALITY 281 (2017); William Kawkwamba, *The Boy Who Harnessed the Wind*, https://en.wikipedia.org/wiki/William_Kamkwamba; Kim Zetter, *Teen's DIY Energy Hacking Gives African Village New Hope*, WIRED (Oct. 2, 2009, 1:32 PM), <https://www.wired.com/2009/10/kamwamba-windmill/>.

¹² See LATEEF MTIMA, INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES (Edward Elgar 2015). See generally *What Is Social Entrepreneurship?* <https://www.schwabfound.org/what-is-social-entrepreneurship>.

¹³ See, e.g., Non-Rivalrous Goods, <https://corporatefinanceinstitute.com/resources/knowledge/economics/non-rivalrous-goods/>; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 315 (1988) (“[I]t does not take an unrehabilitated Platonist to think that the ‘field of ideas’ bears a great similarity to a common . . . Ideas can be used simultaneously by everyone. Furthermore, people cannot be excluded from ideas in the way that they can be excluded from physical property . . . The ‘field’ of all possible ideas prior to the formation of property rights is more similar to Locke’s common than is the unclaimed wilderness.”)

¹⁴ See, e.g., *Data East USA, Inc. vs. Epyx, Inc.*, 862 F. 2d 204, 207–08 (9th Cir. 1988) (noting the “strong public policy” that mandates that ideas remain free for all to use.) See generally Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965 (1990).

future development of the ideas upon which it is based.¹⁵ The two most widely recognized Idea Exclusions, the Idea/Expression Dichotomy and the Abstract Idea Exemption are briefly reviewed below.

A. Copyright and the Idea/Expression Dichotomy

Copyright law provides what is perhaps the most well-developed Idea Exclusion doctrine in American intellectual property law. Pursuant to the Idea/Expression Dichotomy, copyright protection extends only to an author's individual creative expression of an idea and does not encompass any such ideas or facts embodied within that expression.¹⁶

The case that is perhaps the most closely associated with the Idea/Expression Dichotomy is *Baker v. Selden*.¹⁷ In *Baker*, the holder of the copyright in a book which explained "a peculiar system of book-keeping"¹⁸ sued the author of a subsequent book which described the same book-keeping system. The plaintiff contended that the defendant's work infringed plaintiff's copyright, in that it presented the same subject matter as set forth in the prior book.¹⁹

The Supreme Court held for the defendant, holding that plaintiff's copyright extended only to the *expression* of the subject matter covered in the earlier work, and did not encompass the *subject matter or ideas* presented therein.²⁰

¹⁵ See 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 6:3 (5th ed.) "Contrary to popular belief, neither patent, trademark nor copyright law protects a mere idea An idea per se is not patentable, only a tangible application of an inventive idea Copyright deals with visual and aural expression and the communication of information and ideas reduced to tangible form." See also Hughes, *supra* note 13, at 295 "[T]here are some clear limits to the bundle of rights we will drape around an idea . . . '[a] fundamental principle common to all genres of intellectual property is that they do not carry any exclusive right in mere abstract ideas. Rather, their exclusivity touches only the concrete, tangible, or physical embodiments of an abstraction.'"

¹⁶ See, e.g., *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir. 1992) ("The Copyright Act extends copyright protection to 'original works of authorship fixed in any tangible medium of expression.' . . . however[,] . . . 'In no case does copyright protection for an original work of authorship extend to any *idea*, . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.'" (emphasis added) citing 17 U.S.C.A. § 102(a)(b)); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.* 499 U.S. 340, 349 (1991). (Others are free to utilize the "idea" so long as they do not plagiarize its "expression."); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir.1971) ("A copyright. . .bars use of the particular 'expression' of an idea in a copyrighted work but does not bar use of the 'idea' itself. Others are free to utilize the 'idea' so long as they do not plagiarize its 'expression.'"); *Coquico, Inc. vs. Rodriguez-Miranda*, 562 F. 3d 62, 67 ("Of course, copyright law protects original expressions of ideas, not the ideas themselves." citing *Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir.2005).)

¹⁷ 101 U.S. 99 (1879).

¹⁸ *Id.* at 100.

¹⁹ See *Id.*

²⁰ In this case, the "idea" or subject of plaintiff's book was plaintiff's system for book-keeping. See 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 6, § 2.3.2; Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417, 442 (2016). While plaintiff's system for book-keeping was potentially eligible for protection under the patent and trade secret laws, given that he had not applied for a patent, upon the publication of his book, the system was ceded to the public domain. Accordingly, others were free to use, as well as describe or express,

There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective,— would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein.²¹

Consequently, while defendant's subsequent work did indeed cover the same subject matter, i.e., the system for book-keeping, defendant employed his own expression to describe and explain the system, which he was free to do under copyright law.²²

Works which involve the expression of literary ideas or aesthetic concepts are of course closer to the core focus of copyright. The seminal case concerning application of the Idea/Expression Dichotomy in the context of a literary work is *Nichols v Universal Pictures Corporation et al.*²³ In *Nichols*, the plaintiff author wrote a play about a romance between two young people of Jewish and Irish Catholic religious faiths, with each having a widowed father who would object to their relationship on religious grounds. The ensuing story line involves a secret marriage, rejection by both fathers, the birth of twins, and eventual familial reconciliations and accompanying acceptance of perspectives of religious tolerance.

Subsequent to the publication of plaintiff's play, the defendants produced a movie about a Jewish and an Irish Catholic family living side by side in a New York City tenement "in a state of perpetual enmity . . . [who] share in the mutual

the system as they saw fit. *Selden* at 100–01 "Where the truths of a science or the methods of an art are the common property of the whole world, an author has the right to express the one, or explain and use the other, in his own way."

²¹ *Selden* at 101–02. The Idea/Expression Dichotomy has since been codified at Section 102(b) of the Copyright Act. See NIMMER, *supra* note 5, § 2A.06[A] "[Section 102(b)] operates as an exclusionary provision by eliminating specified matters from the scope of coverage. . ." Pursuant to Section 102(b) of the Copyright Act, copyright protection is also withheld from procedures, processes, systems, methods of operation, concepts, principles, and discoveries. To the extent that intellectual property protection is warranted for such accomplishments, it is provided under the patent law and other regimes which protect utilitarian invention. Of course, an author's *creative expression* of such concepts, for example, a description of the steps that make up a particular process, or an explanation of how a particular process works, is eligible for copyright protection. See generally Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007).

²² Defendant also replicated some of the actual expression contained in plaintiff's book, however, that expression was excluded from copyright protection pursuant to the copyright merger doctrine. See, e.g., *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138–39 (5th Cir. 1992) ("[T]he court must first identify the idea that the work expresses, and then attempt to distinguish that idea from the author's expression of it. If the court concludes that the idea and its expression are inseparable, then the merger doctrine applies and the expression will not be protected.")

²³ 45 F.2d 119 (2d Cir. 1930).

animosity, as do [their] two small sons, and even the respective dogs.”²⁴ Similar to the characters and events depicted in the plaintiff’s play, a daughter and a son from each family become romantically involved, secretly marry, and give birth to a child. At the same time, the film contained many plot lines and characters completely different from those of plaintiff’s play, including confusion regarding an inheritance, the still-living mothers of the young lovers, and a scheming, covetous lawyer. Moreover, the movie did not replicate any literal expression from the play. These distinctions notwithstanding, the plaintiff brought copyright infringement litigation against the producers of the film.

The court began its analysis by noting that whereas literal creative expression is protected under copyright, the question of infringement is more complicated where two works are based upon the same idea. “[W]hen the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome.”²⁵ While the idea that is the subject of an expressive work can be creatively conveyed through the author’s personal selection of literal words, brush strokes, or musical notes, creative choices can also be reflected in the “non-literal” selection and arrangement of plot lines, character constructions, and other constituent elements of the work. Copyright protection also extends to such non-literal creative expression,²⁶ and consequently where two works share a common idea, a court will often find it necessary to segregate both literal and non-literal creative expression from the ideas embodied therein.

In distinguishing between protectable non-literal expression and unprotectable ideas, the court noted the importance of recognizing that there can be non-literal components or attributes that are integral to, and thus elements or aspects of an idea:

“If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare’s ‘ideas’ in the play, as little capable of monopoly as Einstein’s *Doctrine of Relativity*, or Darwin’s theory of the *Origin of Species*.”²⁷

Building upon the Idea/Expression Dichotomy, Judge Learned Hand formulated what has since become the seminal methodology for comparing expressive works that share common ideas, themes, and settings, and distinguishing the protectable literal and non-literal expression therein from the unprotectable ideas they are intended to convey.

Upon any work, and especially upon a play, a great number of patterns of in-

²⁴ *Id.* at 120.

²⁵ *Id.* at 121.

²⁶ *Id.* “It is of course essential to any protection of literary property. . .that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”

²⁷ *Id.*

creasing 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 . . . Nobody has ever been able to fix that boundary, and nobody ever can.²⁸

The court concluded by holding for the defendant, having found that the elements present in both works were only those *intrinsic to the common idea* that each work was intended to convey.

In the two plays at bar we think both as to incident and character, the defendant took no more—assuming that it took anything at all—than the law allowed. . . . 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. . . 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.’²⁹

The Idea/Expression Dichotomy serves as an important demarcation pylon of copyright protection.³⁰ It supports the myriad expression of ideas throughout the spectrum of human imagination and facilitates the broad dissemination of fresh per-

²⁸ *Id.* at 121.

²⁹ *Id.* at 121–22 “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*.” Of course, the high universal literary theme of “love conquers all”, or at least that true love should be considered more important than personal prejudices or disagreements, is expressed in many great works. In Robert Wise and Jerome Robbins musical narrative *Westside Story*, the idea is expressed in tragedies about young lovers from different racial and ethnic backgrounds. Other expressions of this idea include the Celtic legend of *Tristan and Iseult* and the Chinese tale of *The Butterfly Lovers*. There are innumerable ways in which to express this and other ideas.

³⁰ The Idea/Expression Dichotomy has also proven amenable to adaptation to novel, contemporary challenges such as those presented by the extension of copyright to non-traditional subject matter such as computer software programs, which serve primarily utilitarian as opposed to expressive or aesthetic purposes. See National Commission on New Technology Uses of Copyrighted Works (CONTU); the Computer Software Protection Act of 1980. See generally *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823 (10th Cir. 1993); *Lexmark International, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943, 958 (E.D. Ky. 2003). Courts generally regard the function of a software program as the “idea” of the work. See, e.g., *Computer Associates v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992). Consequently copyright protection extends only to the creative expression of the function that a software program is designed to perform, as set forth in the program’s literal source and object code, much the same as copyright protects the sentences in a textbook or novel. Moreover, the courts have also adapted the protection available for the non-literal but nonetheless expressive elements of a creative work as set forth in *Nichols*, to the non-literal, expressive aspects of a computer software program. Such elements can include the structure and organization of a software program, much the same as copyright protection is available for such non-literal, expressive features as a novel’s plot and character elements.

spectives on venerable ideas for new generations.³¹

B. Patent and the Abstract Idea Exemption

Just as copyright law relies upon the Idea/Expression Dichotomy to distinguish protectable creative expression from unprotectable ideas, patent jurisprudence has long employed the Abstract Idea Exemption to safeguard public access to the utilitarian ideas embodied within patented inventions. “Like copyright, which only protects the expression of an idea and not the idea itself. . . a patent does not protect an abstract idea of an invention. Rather, it only protects the expression of the idea as embodied in the claimed physical realization of the idea.”³²

One of the earliest articulations of the Abstract Idea Exemption by an American court can be found in *Rubber-Tip Pencil Co. v. Howard*.³³ The claimed invention in that case was the placement of a piece of rubber on the end of a pencil for use as an eraser. The patentee therein described his invention so as to encompass virtually any attachment of a piece rubber (or similar material) to one end of a pencil (or similar implement) for this purpose.

A patent may be obtained for a new or useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof. In this case [the] patent was for ‘a new manufacture,’ being a new and useful rubber head for lead-pencils. It was not for the combination of the head with the pencil, but for a head to be attached to a pencil or something else of like character. . . . It is to be made of rubber or rubber and some other material which will increase its erasive properties. This part of the invention alone could not have been patented. Rubber had long been known, and so had rubber combined with other substances to increase its naturally erasive qualities. It is to be of any convenient external form . . .

³¹ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . [T]he ultimate aim [of copyright is] to stimulate artistic creativity for the general public good.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). See also Litman, *supra* note 14, at 1015 (“Giving an author a copyright in something that is a basic building block of her art thus risks denying that basic building block to all other authors who come into even fleeting contact with the first author’s work.”).

³² 3 Annotated Patent Digest § 20:9. In fact, the Abstract Idea Exemption is but one of three distinct, judicially created categories of exemption from patentable subject matter. See generally *Mayo Collaborative Services vs. Prometheus Laboratories, Inc.*, 566 U.S. 66, 70 (2012) (“Section 101 of the Patent Act defines patentable subject matter. . . . The [Supreme] Court has long held that this provision contains an important implicit exception. ‘[L]aws of nature, natural phenomena, and abstract ideas’ are not patentable.”); *Bilski v. Kappos*, 561 U.S. 593, 601–02 (2010) (“The Court’s precedents provide three specific exceptions to Section 101’s broad patent-eligibility principles: ‘laws of nature, physical phenomena, and abstract ideas.’ While these exceptions are not required by the statutory text, they are consistent with the notion that a patentable process must be ‘new and useful.’ And, in any case, these exceptions have defined the reach of the statute as a matter of statutory *stare decisis* going back 150 years. . . . The concepts covered by these exceptions are ‘part of the storehouse of knowledge of all men . . . free to all men and reserved exclusively to none.’”); *O’Reilly v. Morse*, 56 U.S. 62, 112–20 (1853); *Le Roy v. Tatham*, 55 U.S. 156, 174–75 (1852).

³³ 87 U.S. 498 (1874).

the patentee is careful to say that ‘he does not limit his invention to the precise forms shown, as it may have such or any other convenient for the purpose, so long as it is made so as to encompass the pencil and present an erasive surface upon the sides of the same.’ . . . What, therefore, is left for this patentee but the idea that if a pencil is inserted into a cavity in a piece of rubber smaller than itself the rubber will attach itself to the pencil, and when so attached become convenient for use as an eraser? *An idea of itself is not patentable, but a new device by which it may be made practically useful is.* The idea of this patentee was a good one, but his device to give it effect, though useful, was not new.³⁴

By attempting to claim any means whereby material with “erasive properties” is “attached to a pencil or something else of like character,” the patentee sought to patent the very idea of affixing an eraser to a writing implement. Had the Supreme Court upheld the patentee’s contention that his description constituted a patentable invention, his patent could conceivably encompass virtually any tangible mechanism which combines writing and erasing capabilities and would thereby foreclose the development of any number of devices which combine these functions.³⁵

Similarly in *Burr v. Duryee*,³⁶ the holder of a patent for a machine used for incorporating fur fibers in to the manufacturing of certain kinds of women’s hats sought to establish that his patent was infringed by a subsequent machine which performed the same task.³⁷ The Court determined that plaintiff’s patent did not grant him ownership of the idea embodied therein, i.e., the function that the machine was designed to perform.

The law requires that the specification ‘should set forth the principle and the several modes in which he has contemplated the application of that principle. . . by which it may be distinguished from other inventions, and shall particularly point out [that] which he claims as his own invention or discovery.’ We find here no authority to grant a patent for a ‘principle’ or a ‘mode of operation,’ or an *idea*, or any other abstraction.³⁸

Once again the Supreme Court distinguished the specific embodiment of a useful idea from the idea itself, or as in the case before it, a specific machine from the function it embodies or performs.

That two machines produce the same effect, will not justify the assertion that they are substantially the same, or that the devices used by one are, therefore, mere equivalents for those of the other. . . . If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation

³⁴ *Id.* at 505–07 (emphasis added).

³⁵ *See, e.g.*, *Gottschalk vs. Benson*, 409 U.S. 63, 67 (1972) (“[A]bstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.”). Moreover, as the Court noted, even if the patentee had limited his claim to the particular combination he conceived, his specific attachment of a piece of rubber to a pencil for use as an erasure was not a novel device.

³⁶ 68 U.S. 531 (1863)

³⁷ 68 U.S. 531, 567–68 (1863).

³⁸ *Id.* at 570 (emphasis added).

the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way.’ . . . The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of the first.’³⁹

The Court thus rejected plaintiff’s claims as an attempt to extend his legitimate rights to his invention to an illegitimate dominion over the idea it embodied. “In this case we have an attempt to convert [a] machine into an abstraction, a principle or mode of operation, or a still more vague and indefinite entity often resorted to in argument, an ‘idea.’”⁴⁰

Much the same as with the Idea/Expression Dichotomy, the courts have developed an extensive body of jurisprudence applying the Abstract Idea Exemption to preclude the extension of patent property rights to mere ideas.⁴¹ Although in recent years there has been considerable uncertainty as to how the Abstract Idea Exemption should be applied,⁴² particularly in connection with new and developing fields of innovation,⁴³ the Abstract Idea Exemption remains one of the principal judicial

³⁹ *Id.* at 572–73.

⁴⁰ *Id.* at 577. (emphasis added). *See also*, *Accord*, *Carver vs. Hyde*, 41 U.S. 513, 519 (1842) (“[T]he end to be accomplished is not the subject of a patent. The invention consists in the new and useful means of obtaining it.”); *O’Reilly v. Morse*, 56 U.S. 62 (1854); *RCA Corp. v. Applied Digital Data Systems, Inc.*, 730 F. 2d 1440, 1445 (Fed. Cir. 1984) (“It is hornbook law that abstractions, i.e. concepts, are not patentable subject matter.”).

⁴¹ *See, e.g.*, *Alice Corp. PTY. Ltd. v. CLS Bank Int’l.* 573 U.S. 208 (2014); *Mayo Collaborative Serv. v. Prometheus Lab., Inc.*, 566 U.S. 66, 70 (2012); *CyberSource Corp. v. Retail Decisions, Inc.* 654 F. 3d 1366 (Fed. Cir. 2011); *Bilski v. Kappos*, 561 U.S. 593 (2010).

⁴² *See, e.g.*, Kevin Madigan & Adam Mossoff, *Turning Gold into Lead: How Patent Eligibility Doctrine is Undermining U.S. Leadership in Innovation*, 24 GEO. MASON L. REV. 939, 941 (2017) (“In four decisions issued between 2010 and 2014, the Supreme Court created a new legal test for determining whether an invention or discovery fundamentally counts as a technological innovation worthy of a patent under § 101 of the Patent Act. Unfortunately, as commentators have pointed out, this legal test is rife with indeterminacy, creating substantial doubt as to whether long-term research and development expenditures can be recaptured through stable and effective property rights in technological innovation.”); Colleen Chien & Jiun Ying Wu, *Decoding Patentable Subject Matter*, PATENTLY-O PATENT LAW JOURNAL (2018); Joshua Sarnoff, *A Response to “Is there Any Need to Resort to a § 101 Exception for Prior Art Ideas?”*, PATENTLY-O PATENT LAW JOURNAL (2019); Dennis Crouch, *Abstract Ideas: The Turnstile Keeps Spinning*, PATENTLY-O PATENT LAW JOURNAL (2017); Dennis Crouch, *Do You Get the Gist: Tracking Mail is an Abstract Idea*, PATENTLY-O PATENT LAW JOURNAL (2017). *See generally* *HP Inc. v. Berkheimer*, 2018 WL 6445985; *Innovation Sciences, LLC v. Amazon.com, Inc.* (Fed. Cir. 2019), <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/18-1495.Opinion.7-2-2019.pdf>; *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC* (Fed. Cir. 2019), <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/18-1763.Opinion.10-3-2019.pdf>; *PPS DATA, LLC v. Jack Henry & Assoc., Inc.* (E.D. Tex. Sept 2019), <https://law.justia.com/cases/federal/district-courts/texas/txedce/2:2018cv00007/180119/69/>

⁴³ The watershed decision in this respect is perhaps the Supreme Court’s opinion in *Bilski v. Kappos*, 561 U.S. 593, 598 (2010), wherein the claimed invention was described as “a procedure for instructing buyers and sellers how to protect against the risk of price fluctuations in a discrete section of the economy.” The Supreme Court held that the claimed invention was unpatentable as an abstract idea. “Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or pro-

doctrines which determine the parameters of patent-eligible subject matter.

C. Promoting Inclusive Creative and Innovation Action upon Ideas

The copyright and patent Idea Exclusions limit the property rights in creative and inventive works to the author or inventor's individual expression or embodiment of the ideas therein. This ensures that subsequent individuals will also enjoy the opportunity to develop the ideas which underlie such works, and thereby maximizes their social potential.⁴⁴ Without the Idea Exclusions, those first person to act upon an idea to produce an intellectual work could prevent or curtail further development of that idea, and society would lose the benefit of a potentially infinite number of additional intellectual works derived from a single conceptual progenitor.

The relationship between the copyright and patent Idea Exclusions and intellectual property production incentives is well established. Whether this relationship and its attendant social efficiency effects can be characterized as ubiquitous across the IP ecosystem is dependent upon the identification of an Idea Exclusion mechanism in trade secret law.⁴⁵

protecting against risk [and] [h]edging is a fundamental economic practice long prevalent in our system of commerce. . . . The concept of hedging. . . reduced to a mathematical formula in. . . is an unpatentable abstract idea. . . . Allowing petitioners to patent risk hedging would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea." *Id.* at 609–612. Various legal scholars have commented that the Court's stated basis for its decision, that hedging is a long prevalent economic practice, does little to explain the conclusion of ineligibility under the Abstract Idea Exemption. *See, e.g.*, Kevin Madigan and Adam Mossoff, *supra* note 42, at 947–48 ("In reaching this decision, the Court provided no legal guidance on how to determine what counts as an unpatentable "abstract idea," creating an ambiguous legal precedent that has provided no guidance to stakeholders in the high-tech industry as to how it might be applied to their inventive work-product. Unsurprisingly, commentators bemoan how *Bilski* started a legal practice of mass invalidation of patents on software, business methods, and diagnostic methods with vague or conclusory court opinions, which only picked up speed in the ensuing years.").

⁴⁴ *See* Eric R Claeys (2018) *Intellectual Property and Practical Reason*, JURISPRUDENCE, 9:2, 251, 272 "An inventor may discover a useful invention, but do so by discovering a mathematical theorem and applying it to a practically relevant context. Thanks to the doctrine of patentable subject matter, the inventor can claim a patent in the invention but not in the theorem. If an original news article is the first to report on a fact, copyright's exclusion for facts limits the reporter to copyright in the words of the article only. . . . In each of these situations, we can understand why the creator might claim property not only in the specific invention or authorial work but also in the generic materials associated with the invention or work. . . . [H]owever, IP law deems the generic elements as information appropriately kept in the public domain."

⁴⁵ Similar to copyright and patent protection, the primary purpose of trade secret protection is to incentivize intellectual action toward the production of intellectual goods. Accordingly, the premise that the Idea Exclusions are fundamental to intellectual property protection requires an accounting of their role in trade secret law. On the other hand, the primary objectives of the trademark law and publicity rights are somewhat different albeit related, and instead emphasize fair competition, quality control, and consumer protection in the commercial marketplace, and individual investment in one's personae respectively. *See* Peter Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 PROP. RIGHTS CON. J. 147, 154 (2016) ("Patent protection, copyright protection, and the law of trade secrets are principally based on the utilitarian goal of promoting innovation and creativity. Trade secrecy law also brings in notions of commercial morality. Trademark protection, by contrast, focuses on safeguarding the integrity of markets. It is more of a consumer protection regime. But by lowering consumer search costs, it also serves a commercial

II. The Idea Exclusion in Trade Secret Protection: The “Idea/Discrete Application Rule”

At first glance, trade secret jurisprudence appears bereft of an explicit, segregate Idea Exclusion doctrine. A careful review of the prerequisites to trade secret protection, however, and particularly how courts typically construe these requirements, confirms that trade secret protection does not extend to abstract ideas.

One of the most widely accepted definition of trade secrets is provided by the Uniform Trade Secrets Act.⁴⁶ Pursuant to the UTSA, a trade secret is defined as

purpose and indirectly promotes investment in creating quality brands.”) Nonetheless, it is well accepted that neither trademark protection nor publicity rights extend to the protection of ideas. *See, e.g.*, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 6:3 (5th ed.) “Trademark law does not protect an idea for a using a certain designation as a mark. . . . Trademark rights grow out of use, not mere invention. To acquire ownership of a trademark, one must actually use the designation in the marketplace as a mark in the sale of goods or services. . . . A business plan or a concept for a new trademark does not itself create legally recognizable trademark rights.”; Litman, *supra* note 14, at 972–73 “The trademark claimant proves ownership of a mark by proving that she has actually used it in trade and that the public has come to recognize that mark as her signature. The property rights she gains from such a showing are limited to the exclusive use of the mark in circumstances in which the public is likely to perceive it as emanating from her.” Moreover, the cause of action for traditional trademark infringement will lie only where the second comer duplicates the rightsholder’s “expression” of the idea that her mark embodies (i.e., the literal mark or a confusingly similar or “non-literal” replication of the mark). Thus, for example, both clouds and angels can be used as independent trademarks to convey the idea that toilet paper is “heavenly soft” without triggering trademark infringement issues. For the preclusion of publicity rights to ideas *see e.g.*, *White v. Samsung*, 971 F. 2d 1395, 1408, *concur. op.*, wherein the court explains the need to balance “protect[ing] and reward[ing] the work and investment of those who create intellectual property” as against the need to “prevent the creation of a monopoly that would inhibit the creative expressions of others. . . . by allowing the copying of an idea. . . .” The court concludes that while “the idea of a glamorous female game show hostess” is in the public domain, the right of publicity precludes “appropriati[on of] Vanna White’s expression of that role.”

⁴⁶ *See, e.g.*, 3 UNIFORM TRADE SECRETS ACT (UTSA), § 1(4), 14 U.L.A. 438. The UTSA provides one of the three prevailing but largely consistent definitions of trade secrets generally relied upon by the courts; *see* JAMES POOLEY, TRADE SECRETS § 4.01 (edition and year); 3 UNIFORM TRADE SECRETS ACT “[W]e find ourselves today with three primary sources that describe the elements of a trade secret: the Restatement of Torts Section 757, 2 Restatement of Torts, § 757, comment b (1939): ‘A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.’” The Economic Espionage Act, as amended by the Defend Trade Secrets Act of 2016, uses a variation of this language that is not substantially different: “(3) the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—(A) the owner thereof has taken reasonable measures to keep such information secret; and”(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.”. . . [And finally the] Restatement (Third) of Unfair Competition. 4 Restatement (Third) of Unfair Competition, § 39 (1995): “A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” These sources, as well

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁴⁷

The UTSA definition implicates two of the principal ways in which courts and individuals typically use the term “idea”.⁴⁸ In general parlance and especially in the context of intellectual property, the term “idea” is usually intended to mean “concept”,⁴⁹ such as when referring to the idea (i.e., storyline or plot) of a novel or the idea (i.e., purpose or function) embodied in a machine designed to perform a particular task. Courts and individuals often also use the term “idea” to refer to specific facts or knowledge, such as a combination of various ingredients or elements, or of prospective plans or intentions, such as the intention to launch a marketing campaign on a future date.⁵⁰ The former use of idea as indicating concept is implicated by the USTA’s illustrative examples of trade secret subject matter; the latter use of the term idea as indicating specific facts or knowledge is implicated by the UTSA’s definitional reference to “information”. As discussed below, however, in neither situation does trade secret protection extend property rights to abstract ideas.

A. Idea as “Concept”: The Requirements of Utility and Commercial Advantage Preclude Protection for Abstract Ideas

The various statutory and judicial examples of trade secret subject matter reference the utility of qualifying information, which thereby indicates that abstract or conceptual ideas are insufficient. “Generally, a trade secret is described as a plan or

as judicial decisions, also suggest a number of factors to be considered in assessing whether the requisite elements are present. . . . See, e.g., RESTATEMENT OF TORTS, § 757, Comment b: “Some factors to be considered in determining whether given information is one’s trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” These factors continue to be cited even in states that have enacted the Uniform Trade Secrets Act.

⁴⁷ UTSA, *supra* note 46, at § 1(4).

⁴⁸ “[C]ourts use the term “idea” in at least two different ways: one, as a description of those abstract concepts and principles in copyrighted works that are not within the scope of that law’s protection, and second, as a metaphor for various types of unprotectable elements embodied in copyrighted works, such as the procedures, processes, systems, methods of operation, facts, and functions understood to be outside the scope of copyright under § 102(b).” *Samuelson*, *supra* note 20, at 442.

⁴⁹ See e.g. Webster’s New Universal Unabridged Dictionary (1996), which defines “concept” as 1. a general notion or idea; conception. 2. An idea of something formed by mentally combining all its characteristics or particulars; a construct. 3. A directly conceived or intuited object of thought.

⁵⁰ Some other examples of “idea” as information include idea as “notion” (e.g., “it was my idea that we have Italian for dinner”) and idea as “aspiration” (e.g., “my idea for tomorrow’s aerobic exercise is to swim ten laps”). As discussed *infra*, in the appropriate circumstances, this kind of factual data or “idea” can qualify as trade secret subject matter.

process, tool, mechanism, compound, or informational data utilized by a person in his business operations. . .”⁵¹

While some abstract or conceptual ideas might initially seem evidently useful – for example, the idea “to organize inventory” or the idea for “a recipe for barbeque chicken”, these general articulations merely identify the subject or ultimate objective of the idea. What method of arrangement is called for in accordance with the general directive to “organize”? Is the inventory to be arranged by size, shape, color, or by some other characteristic or criteria? What particular spices are to be included in the recipe for barbeque chicken, and at what point in the preparation of the dish should a particular spice be applied? Stated as only a general proposition, the *potential utility* of each of these ideas is obvious, but until delineated into specific or discrete steps to be performed or components which can be applied, each directive merely articulates a specified utilitarian aspiration and does not provide any actual methodology or instruction.⁵² In short, abstract or conceptual ideas are bereft of concrete utility, and consequently lack a prerequisite attribute to trade secret protection.

Accordingly, courts consistently require that the application of a conceptual idea consist of discrete constituent elements and discernible parameters, in order to be eligible for trade secret protection. “One way the courts have sought to enforce the policy boundaries of trade secrets is to require that the matter claimed be concrete. In other words, the information to be protected must be more than a vague and abstract concept—it must be something real that can be applied in a business to provide it with some competitive advantage.”⁵³

Consequently, courts have construed the legal prerequisites to trade secret protection to preclude protection for conceptual or abstract ideas. For example, in *Postal Presort, Inc. vs. Stasieczko*,⁵⁴ plaintiff sought enforcement of a former employee’s non-competition agreement in connection with a prospective, secret plan to undertake direct mail advertising through a network of photocopy machine distributors.

The appellate court affirmed the trial court’s finding that the subject “plan” was insufficiently discrete to qualify as a trade secret:

[T]he district court essentially concluded that the concept of marketing direct mail services of the type Postal Presort provides through a network of photocopier distributors lacked the degree of development and concreteness necessary to be a

⁵¹ *Ilg Indus. v. Scott*, 273 N.E.2d 393, 395 (Ill. 1971).

⁵² *See, e.g.*, *The Telephone Cases*, 126 US 1, 30–32 (1888) (“It had long been believed that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. How to do it was the question.”). *See also* definition of the word “useful” at <https://www.merriam-webster.com/dictionary/useful> (“capable of being put to use. . .serviceable for an end or purpose. . .of a valuable or productive kind”).

⁵³ POOLEY, *supra* note 46, § 4.01(3)(a)(ii).

⁵⁴ 2015 Kan. App. Unpub. 2015 WL 770171.

trade secret. At the point [defendant] left Postal Presort and took steps to develop the concept, it was. . . simply an idea. And that is not enough to be protected under the Act. . . . For example, running a light rail commuter service from Wichita to Kansas City is an idea, but it is not a trade secret. Even meeting with potential investors or design engineers to discuss the concept doesn't turn it into a trade secret. While the idea behind. . . marketing direct mail services through distributors in a related industry may be more doable than a commuter train or a private space station. . . the ultimate practicality of an idea doesn't make it a trade secret either. As the statutory definition requires, a trade secret must be possessed of something present. . . and that something must have substantial content or structure in the nature of a formula, method, or process.⁵⁵

At the same time, however, the *Postal Presort* court noted that, had plaintiff reduced its direct mail advertising idea to specific steps, the resulting "plan" would then be sufficiently discrete (and useful) to be eligible for trade secret protection.

Had Postal Presort . . . actually signed up photocopier distributors under an agreed compensation scheme, the business plan clearly would include proprietary information of interest to competitors and presumably could be classified as a trade secret. Armed with precise information about compensation and other particulars of the arrangement, competitors could outbid Postal Presort. . . for the services of the photocopier distributors and effectively appropriate the operation. Even an as yet-to-be implemented business plan with a compensation schedule and similar details likely would be proprietary and might well be a trade secret. But [here the evidence shows] that Postal Presort really had nothing much beyond a bare idea. . .⁵⁶

Similarly in *Computer Care v. Serv. Sys. Enters.*,⁵⁷ the plaintiff claimed a trade secret in connection with its auto service 'reminder letter' business. Plaintiff used a computer program to generate letters on behalf of its auto dealership and repair shop clients which letters reminded car owners that it was time to bring their vehicles in for some type of maintenance service, such as an oil change or a tune up.⁵⁸ In addi-

⁵⁵ *Id.* at *5–*6, *7; *See generally* POOLEY, *supra* note 46 ("A trade secret. . . must consist of qualifying information; that is, one must be able. . . to articulate what it is in such a way that it may be distinguished from general knowledge and skill."); *See also* Waymo LLC v. Uber Techs., Inc., 2017 U.S. Dist. WL 2123560, at *7 (distinguishing plaintiff's right to trade secret protection for its *specific* approach to improving self-driving vehicle technology from claims to rights over the general idea embodied in its approach). "Waymo's descriptions of its asserted trade secrets follow a pattern of claiming broad swaths of solutions to general competing considerations and engineering tradeoffs rather than the single, specific solution adopted by Waymo. . . . Every company in the field can be expected to settle on some specific resolution thereof, and every company's specific resolution may well qualify as a trade secret. But it would be wrong to allow any company to leverage a single solution into a monopoly over broad swaths of other solutions. . . merely because they all fall on the side of generally favoring a particular consideration over others."

⁵⁶ *Postal Presort* at *5–*6, *7. *Accord*, *Waymo LLC v. Uber Techs., Inc.*, at *25. "At face value, [plaintiff's] asserted trade secret broadly captures the *concept* of. . . diodes on printed circuit boards in a LiDAR transmit block." (Emphasis in original).

⁵⁷ 982 F.2d 1063 (7th Cir. 1992)

⁵⁸ *Id.* at 1065.

tion to sending letters to its clients' maintenance customers, plaintiff also prepared monthly reports which indicated the amount of business generated by the reminder letters, the particular services maintenance customers would elect in connection with the letters, and other information related to the efficacy of plaintiff's service.

At trial, plaintiff submitted evidence detailing the features of its service, which included using twelve service categories as "triggers" for generating letters to individual auto service customers (as opposed to sending reminder letters in connection with only one or two service categories); sending a second reminder letter to customers who did not respond to the initial letter; placing non-responsive customers in an "inactive" file; and similar steps. Although the district court found that plaintiff's service qualified for trade secret status, the Court of Appeals for the Seventh Circuit reversed, holding that the district court had effectively extended trade secret status to a "mere idea":

[T]he district court's injunction does not merely protect Computer Care's twelve triggers, but grants Computer Care a trade secret in the mere *idea* of using more than one trigger. We do not think that the use of multiple triggers is sufficiently 'secret' to be protected. . . . Nothing in the record suggests that the possibility of using more than one trigger would not be obvious to someone entering the reminder letter business. . . . Further, the fact that Computer Care is the only company in the industry, other than Service Systems, that uses multiple triggers does not show that the use of multiple triggers is a trade secret. 'Simply being the first or only one to use certain information does not in and of itself transform otherwise general knowledge into a trade secret.'⁵⁹

In other words, using multiple service categories as "triggers" for sending maintenance service reminder letters is simply an inherent and obvious (and thus generally known) aspect of the idea of generating auto service business by reminding existing customers when it is time to have routine maintenance work done on their vehicles.⁶⁰ Vehicle maintenance obviously involves more than one kind of maintenance service; common sense dictates that a service provider is likely to generate more business by reminding its customers of multiple service needs.⁶¹ While the court acknowledged that evidence which demonstrates that reminder letters sent

⁵⁹ *Id.* at 1073.

⁶⁰ *See, e.g., Metallurgical Indus. v. Fourtek, Inc.*, 790 F.2d 1195, 1199 (5th Cir. 1986) ("matters of general knowledge in an industry cannot be appropriated by one as his secret."); *Microbix Biosystems v. BioWhittaker, Inc.*, 172 F. Supp. 2d 665, 674 (D. Md. 2000) ("If . . . there is no substantial difference between the alleged trade secret and what is generally known, there is no protectible trade secret."); 1 MILGRIM ON TRADE SECRETS § 1.09 ("[F]ile memoranda are not elevated to trade secret status by virtue of their being labelled 'Confidential,' if in fact their information is generally known.").

⁶¹ The court reached the same conclusion in connection with plaintiff's practice of sending a second reminder letter to customers who did not respond to the initial reminder. "Computer Care failed to establish that the idea of sending a second reminder letter to a customer who does not respond the first time is a trade secret, rather than simple common sense. . . . This is not really surprising, given that the use of follow-up letters is an obvious sales method, as anyone who has ever allowed a magazine subscription to run out can attest." *Computer Care, supra* note 57, at 1074.

in connection with a *particular set or grouping* of service items are more effective in generating business could be sufficient to establish trade secret subject matter, there was no such evidence or claim in the case. In fact, plaintiff did not even specify any of the purported twelve categories of service which comprised its individual “trigger” list, but sought instead to covet the idea that sending letters in connection with *multiple services* is more effective than sending letters in connection with only a single service need.⁶²

In addition to the codependent requirements of utility and specificity, the further requirement that trade secret subject matter bestow a competitive or commercial advantage or otherwise possess economic value,⁶³ further militates against the eligibility of conceptual or abstract ideas for trade secret protection. While an abstract idea or general concept can provide invaluable entrepreneurial *inspiration*, that idea must be reduced to a concrete application, such as a particular process or a compilation of specific factual data or information, in order to provide a genuine competitive or commercial advantage over those who are unaware of it. The *potential* competitive or commercial value of many an abstract idea or concept is typically obvious to those experts in any given field of industry or technology, but said advantage becomes manifest only when someone conceives of an *actual means for putting it into practice*. It is this kind of practical action upon the abstract idea—together with the decision to keep the achievement exclusive for one’s own business use—that provides a commercial advantage over one’s competitors.⁶⁴

⁶² The court made a similar observation in connection with another feature of plaintiff’s “secret method”, i.e., its practice of timing the service reminder cycles at the intervals requested by its clients, as opposed to the intervals recommended by automobile manufacturers. “Computer Care’s use of adjustable service cycles is not a novel idea developed by Computer Care, but simply a response to its customers’ requests. . . . There is nothing secret about the idea of listening to a customer and accommodating his wishes.” *Id.* at 1072–73. “All of the individual features discussed above are either sufficiently obvious that anyone entering the reminder letter business would be likely to incorporate them into his system, or easily duplicated by anyone with legitimate, publicly available knowledge of Computer Care’s business.” *Id.* at 1075. Accord *Daktronics, Inc. v. McAfee*, 599 N.W.2d 358, 361 (Sup. Ct. S.D. 1999) (“[S]imply possessing a non-novel idea or concept without more is generally, as a matter of law, insufficient to establish a trade secret.”). *But cf. Computer Care*, at 1073 “Of course, the way in which Computer Care adjusts its service cycles—that is, the software it uses to perform that task—is protectable, but that is distinct from the mere idea of adjusting service cycles to customers’ needs.”

⁶³ *Metallurgical Indus. v. Fourtek, Inc.*, 790 F.2d 1195, 1201 (5th Cir. 1986) (“That the cost of devising the secret and the value the secret provides are criteria in the legal formulation of a trade secret shows the equitable underpinnings of this area of the law. . . . If a businessman has worked hard, has used his imagination, and has taken bold steps to gain an advantage over his competitors, he should be able to profit from his efforts. Because a commercial advantage can vanish once the competition learns of it, the law should protect the businessman’s efforts to keep his achievements secret.”).

⁶⁴ *See, e.g., SI Handling Sys. v. Heisley* 753 F.2d 1244, 1267 (3d Cir. 1985) (Adams, J., concurring) (“When deciding the equitable issues surrounding the request for a trade secret injunction, it would seem that a court cannot act as a pure engineer or scientist, assessing the technical import of the information in question. Rather, the court must also consider economic factors, since the very definition of ‘trade secret’ requires an assessment of the competitive advantage a particular item of information affords to a business. Similarly, among the elements to be weighed in determining trade

B. Idea as “Non-discrete Factual Information”: The Rights of Independent Discovery and Reverse Engineering Preclude Ownership of Ideas

In some situations, the term idea is used to refer to knowledge comprised of specific facts or other non-discrete information. For example, a business decision to research an area of commercial industry or to commence a television advertising campaign is often referred to as the “idea” to undertake such pursuits. Moreover, even before such ideas or plans are reduced to specific steps or discrete details, the mere knowledge of a competitor’s business intentions can constitute “useful” information⁶⁵ which provides a competitive or commercial advantage in a highly competitive market. Consequently, when such information is kept secret, this kind of “idea” can qualify as trade secret subject matter.⁶⁶

In *Altavion, Inc. vs. Konica Minolta Systems Laboratory, Inc.*,⁶⁷ the plaintiff made confidential disclosures to defendant regarding plaintiff’s secret method of digital document authentication, comprised of a digital stamping technology or “DST”, in connection with negotiations to license plaintiff’s technology. When defendant instead used the information to develop and then patent its own DST, plaintiff brought suit for trade secret misappropriation in connection with (i) defendant’s use of certain aspects of plaintiff’s DST method, and (ii) defendant’s use and public disclosure of plaintiff’s general concept, i.e., the “idea” of undertaking a DST approach toward document authentication.

With respect to plaintiff’s claims in connection with the use of its specific DST method of document authentication, the appellate court affirmed the trial’s court’s finding that plaintiff had detailed its process with sufficient particularity to warrant trade secret status.

The [trial] court explained [plaintiff’s process] was a method of creating ‘a self-authenticating paper document, through the use of a digital stamp. . . . It is ‘unique,’ . . . in that it could detect alterations as well as show where the alterations had occurred in the document.’ . . . [T]he trial court found [defendant] misappropriated particular design concepts identified [by plaintiff] especially aspects of [its enumerated] trade secrets. . . . The Complaint alleges . . . that [plaintiff] “has creat-

secret status are the value of the information to its owner and to competitors, and the ease or difficulty with which the information may be properly acquired or duplicated.”).

⁶⁵ The extension of trade secret protection to this kind of information is predicated upon the perspective that its strategic usefulness to the competitor (as opposed to the party who came up with intention or “idea” in the first place) satisfies the utility requirement; as discussed above, such general “ideas” otherwise lack objective utility until they are reduced to delineated steps or other particulars.

⁶⁶ See, e.g., *Pepsico Inc. vs. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (Prospective timing of company’s product release dates and marketing campaign protected as trade secret.); 1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.01 (2020) (“The classic definition of trade secrets. . . covers any information. . . used in business and lending the opportunity to attain a competitive advantage over others who do not know the information.”).

⁶⁷ 171 Cal. Rptr. 3d 714 (2014).

ed and perfected a novel set of digital document security platform technologies, which are the first of their kind to provide the dual functionality of document authentication via the use of novel stamp embedding techniques and document integrity assessment via novel tamper detection techniques. . . . [T]he trial court adequately identified the particular. . . design concepts misappropriated by [defendant]. . . . Although [plaintiff] does not analyze each aspect of [all of its] trade secrets [plaintiff] does identify specific aspects of the identified trade secrets that were misappropriated by [defendant].⁶⁸

With respect to plaintiff's claims for misappropriation of its general DST concept, the court held that under the circumstances, the knowledge of plaintiff's approach toward the task of document authentication constituted information which qualified for protection as a trade secret. "[A] trade secret may consist of something we would not ordinarily consider an *idea* (a conceptual datum) at all, but more a *fact* (an empirical datum), such as a customer's preferences, or the location of a mineral deposit."⁶⁹ Here, the very fact of plaintiff's DST concept or approach had been kept secret and disclosed only in the course of the parties' confidential negotiations. Defendant not only used this information but also destroyed its value as a trade secret by disclosing it in a patent application.

[Defendant] misappropriated Altavion's DST concept as a whole, both by using Altavion's DST in developing [defendant's] own DST and by disclosing aspects of Altavion's DST in [defendant's] patents and patent applications. . . . Because . . . the detailed design concepts underlying Altavion's DST were undisclosed, a finding of trade secret appropriation could be based on misappropriation of Altavion's DST concept as a whole. . . . [Defendant] does not [dispute] that [it] did not independently develop the digital stamping concepts reflected in its patents. And [defendant] does not dispute that use of Altavion's trade secrets to further its own development would constitute misappropriation. . . . Thus, even if the patents did not ultimately disclose Altavion's DST in all its particulars, [defendant's] use of Altavion's DST *on the whole* to further its own DST development and craft its patents and patent applications was a proper basis for a misappropriation finding.⁷⁰

Despite holding that plaintiff's concept was entitled to trade secret protection, the court further noted that plaintiff did not own the "idea" of undertaking a DST approach to document authentication. "[T]he trade secret is not the idea or fact itself, but *information* tending to communicate (disclose) the idea or fact to another."⁷¹ Although plaintiff had been the first to pursue the DST approach, anyone, including the defendant, remained free to independently "discover" that idea on their own. In this case, however, the defendant "had no idea, interest or information

⁶⁸ *Id.* at 729–32, 733.

⁶⁹ *Id.* at 736.

⁷⁰ *Id.* at 730–31, 733; *accord*, *Buffets, Inc. v. Klinke*, 73 F. 3d 965, 968 (9th Cir. 1996) (noting that trade secret status can be afforded to information that is "novel" or that has been disclosed on a confidential basis.)

⁷¹ *Altavion*, *supra* note 67, at 736.

about DST. . . prior to their dealings with [plaintiff]”.⁷²

The *Altavion* court’s observations regarding the limits of plaintiff’s trade secret rights denotes another application of the Idea Exclusion principle in trade secret law. All trade secret rights, whether based upon a discrete application of a general or abstract idea (conceptual datum) or on non-discrete factual information (empirical datum), are limited by the doctrines of independent discovery⁷³ and reverse engineering.⁷⁴ Indeed, these doctrine are particularly relevant to delineating “empirical datum” trade secrets, wherein the protection afforded to factual information is limited to “*the right to control the dissemination of information.*”⁷⁵

[I]t is clear that if a patentable idea is kept secret, the idea itself can constitute information protectable by trade secret law. In that situation, trade secret law protects the inventor’s “*right to control the dissemination of information*” . . . the information being the idea itself—rather than the subsequent use of the novel technology. . . . In other words, trade secret law may be used to sanction the misappropriation of an idea the plaintiff kept secret.⁷⁶

C. The Idea/Discrete Application Rule: The Idea Exclusion in Trade Secret Law

As the foregoing case law illustrates, where a trade secret is comprised of the application or formulation of a useful idea, the attendant property rights do not extend to the abstract idea or concept embodied therein. Instead, to qualify for trade secret protection, a useful and commercially valuable application of an abstract idea must also be specific and discrete. This “Idea/Discrete Application Rule” implements the Idea Exclusion principle in trade secret law. Moreover, the “Idea/Discrete Application Rule” is buttressed by the doctrines of independent discovery and reverse engineering, which potentially limit exclusive dominion over specific applications of abstract ideas and altogether prohibit the ownership of factual “ideas”, even

⁷² *Id.* at 724.

⁷³ *See, e.g.,* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974); UNIFORM TRADE SECRETS ACT § 1 cmt. at 5 (UNIF. LAW COMM’N); Defend Trade Secrets Act of 2016 § 2, 18 U.S.C. 1839 (2016).

⁷⁴ *Altavion*, *supra* note 67, at 724. . . *See also* *Chi. Lock Co. v. Fanberg*, 676 F. 2d 400, 402–03 (9th Cir. 1982). *See generally* Samuel J. LaRoque, *Reverse Engineering and Trade Secrets in the Post-Alice World*, 66 KAN. L. REV. 427, 435–38 (2017).

⁷⁵ *Altavion*, *supra* note 67, at 738. Accordingly, trade secret protection does not provide ownership over secret, commercially valuable information as such, but rather protects the effort and investment in obtaining, developing, or compiling same. *See, e.g.,* *Int’l News Serv. v. Associated Press.*, 248 U.S. 215, 240 (1918) (“[D]efendant . . . admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, . . . and that . . . in appropriating it and selling it as its own is endeavoring to reap where it has not sown.”).

⁷⁶ *Altavion*, *supra* note 67, at 738, citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 721 [misappropriation of “concept” for noise-producing toy railroad track]; *Contour Design, Inc. v. Chance Mold Steel Co.*, No. 09-cv-451-JL, 2010 WL 174315 (D.N.H., Jan. 14, 2010) [misappropriation of ergonomic mouse “concept”]. (“This is consistent with the proposition that ‘The sine qua non of a trade secret . . . is the plaintiff’s possession of information of a type that can, at the possessor’s option, be made known to others, or withheld from them, i.e., kept secret.’”).

when such knowledge or information is kept secret.

The Idea/Discrete Application Rule effectuates in trade secret protection what the analogous doctrines achieve in copyright and patent law. Like copyrights and patents, trade secrets incentivize a specific kind of action upon ideas, in this instance the development of discrete, commercially beneficial applications of ideas for use in business.⁷⁷ And similar to the Idea/Expression Dichotomy and the Abstract Idea Exemption, judicial implementation of the Idea/Discrete Application Rule ensures that ground-breaking applications do not come at the expense of further development of the ideas upon which they are based.

The delineation of a trade secret Idea/Discrete Application Rule confirms that the Idea Exclusions are prevalent throughout intellectual property law. Moreover, as explored in the next section, the prohibition against property rights in mere ideas is not only ubiquitous but is fundamental to a socially efficacious intellectual property regime.

III. The Idea Exclusions: Theoretical Perspectives

“Freedom in a commons brings ruin to us all.” – Garrett Hardin⁷⁸

Legal scholars have long debated theoretical justifications for intellectual property protection.⁷⁹ Proffered theories run the gamut from those rooted in applications of natural law⁸⁰ to interpretations of positivist edicts,⁸¹ and range from consequentialist⁸² to non-consequentialist rationales.⁸³ While the various theoretical per-

⁷⁷ See, e.g., *Brunswick Corp. v. Outboard Marine Corp.*, 79 Ill. 2d 475, 478 (Sup. Ct. Ill. 1980) (“The judicial application of trade secret law has advanced two doctrinal bases for trade secret protection: (1) encouragement of invention and (2) maintenance of commercial morality.”); 1 ROGER M. MILGRIM, *MILGRIM ON TRADE SECRETS* § 1.01 (2020); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–02 (1984); Vincent Chiappetta, *Myth, Chameleon, or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69 (2000).

⁷⁸ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

⁷⁹ See generally Peter S. Menell, *Intellectual Property: General Theories*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS: CIVIL LAW AND ECONOMICS 129 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Hughes, *supra* note 13; William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 168–98 (Stephen Munzer ed., 2001) (“[S]cholarly interest in the field [of intellectual property] has risen dramatically in recent years. . . . [One] reason why intellectual-property theory retains value is that it can catalyze useful conversations among the various people and institutions responsible for the shaping of the law.”); Claeys, *supra* note 44, at 251–275 (“In recent scholarship on intellectual property. . . philosophy is making a comeback. In the last decade, many different authors have applied to IP the property theories of John Locke, John Rawls, contemporary ‘capabilities’ theorists and other thinkers who ground personal rights on non-consequentialist normative foundations.”).

⁸⁰ See, e.g., Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Steven D. Jamar, *A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 289, 296–97 (2012).

⁸¹ See, e.g., Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Law to a Supranational Code?*, 47 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 265, 267 (2000).

⁸² See, e.g., Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1344

spectives can conflict and contradict, they also often overlap.⁸⁴

The confirmation of Ideas Exclusions as ubiquitous in intellectual property law suggests that the preclusion of property rights in mere ideas is an innate characteristic of an effective intellectual property ecosystem.⁸⁵ This proposition can be tested by examining some leading theoretical rationales of intellectual property and assessing the extent to which such theories require the Idea Exclusion principle. Accordingly, this part considers the Idea Exclusions in the context of four leading theoretical rationales of intellectual property: ecological commons theory, labor theory, consequentialism, and non-consequentialism. Finally, the Idea Exclusions will also be considered in the context of the developing perspective of Intellectual Property Social Justice.

A. The Idea Exclusions and the “Tragedy of the Commons”

The Theory of the Commons⁸⁶ is an ecological theory which identifies the social challenge of efficient management of commonly available natural resources, sometimes referred to as “common pool resources.”⁸⁷ Proponents of commons theory caution that in the absence of proper regulation, common pool resources are vulnerable to overuse and depletion, resulting in the “tragedy of the commons.”⁸⁸

The “tragedy of the commons” is a central concept in human ecology and the

(2015).

⁸³ See, e.g., Claeys, *supra* note 44, at 251–78; *Intellectual Property and Practical Reason*, JURISPRUDENCE, 9:2, 251–278; David McGowan, *Copyright Nonconsequentialism*, 69 Mo. L. Rev. 1, 3 (2004).

⁸⁴ See, e.g., Fisher, *supra* note 79, at 7 (analyzing four leading theories of intellectual property and noting how jurists sometimes blend “discreet” theoretical perspectives). Cf. David McGowan, *supra* note 83, at 3 with Justin Hughes, *supra* note 13, at 305–06 (respectively invoking labor theory to support non-consequentialist and consequentialist justifications for intellectual property protection). Similarly, some features of the intellectual property eco-system are often claimed as integral to competing theoretical perspectives of IP protection. Cf. Anne Flanagan and Maria Lilla Montagnani, *Intellectual Property Law: Economic and Social Justice Perspectives*, pp. x, xii Edward Elgar 2010 (“A law and economics approach would justify the public domain and advocate the “tragedy of the anti-commons” through the lens of efficiency.”); Claeys, *supra* note 44, at 254 (“Although non-rivalrousness and non-excludability are associated with economic analyses of IP, they can also inform nonconsequentialist arguments for assigning intellectual works to the public domain.”)

⁸⁵ Of course, similar observations have been made in connection with the public domain overall, which in addition to ideas, is comprised of additional unprotectible aspects of intellectual goods and ultimately intellectual goods in their entirety, upon the expiration of IP protection. See, e.g., Litman, *supra* note 14, at 969. The Idea Exclusions are merely one of various means by which the public domain is “stocked”.

⁸⁶ See, e.g., William Foster Lloyd, *Two Lectures on Checks to the Population*, https://en.wikisource.org/wiki/Two_Lectures_on_the_Checks_to_Population/Lecture_1.

⁸⁷ See ELINOR OSTROM ET AL., *THE DRAMA OF THE COMMONS*, 3, 17 (Paul C. Stern et al. eds., 2002) (“The preferred term for resources from which it is hard to exclude users is “common-pool” resource. The term “common-pool” focuses on the characteristics of the resource rather than on the human arrangements used to manage it. Such a resource could be left as open access without rules or could be managed by a government, as private property, or by a common property regime.”)

⁸⁸ Hardin, *supra* note 78, at 162 (1968).

study of the environment. The prototypical scenario is simple. There is a resource—usually referred to as a common-pool resource—to which a large number of people have access. The resource might be an oceanic ecosystem from which fish are harvested, the global atmosphere into which greenhouse gases are released, or a forest from which timber is harvested. Overuse of the resource creates problems, often destroying its sustainability. The fish population may collapse, climate change may ensue, or the forest might cease regrowing enough trees to replace those cut. Each user faces a decision about how much of the resource to use—how many fish to catch, how much greenhouse gases to emit, or how many trees to cut. If all users restrain themselves, then the resource can be sustained. But there is a dilemma. If you limit your use of the resources and your neighbors do not, then the resource still collapses and you have lost the short-term benefits of taking your share.⁸⁹

In the intellectual property eco-system, ideas possess many of the attributes of a common pool resource. Ideas are a valuable “non-excludable” resource - once an idea becomes known, it is extremely difficult if not impossible to restrict access to it.⁹⁰ Moreover, ideas provide the greatest social benefits when human beings act upon them. Indeed, the social value of most ideas remains largely inchoate until individuals act upon them to develop and harvest their potential.⁹¹

At the same time, however, when individuals act to develop ideas, a “tragedy of the commons” problem often arises. Although ideas are non-rivalous, and thus unlike traditional common pool resources, are not vulnerable to overuse or depletion, when individuals act upon ideas, the result is usually the production of a “public good”:

A public good is something to which everyone has access but, unlike a common-pool resource, one person’s use of the resource does not necessarily diminish the potential for use by another. Public radio stations, scientific knowledge, and world peace are public goods in that we all enjoy the benefits without reducing the quantity or quality of the good. The problem is that, in a large group, an individual will enjoy the benefits of the public good whether or not he or she contributes to producing it. You can listen to public radio whether or not you pledge and make a contribution. And in a large population, whether or not you contribute has no real impact on the quantity of the public good. So a person following the dictates of narrow self-interest will avoid the costs of contributing. Such a person can continue to enjoy the benefits from the contributions provided by others. But if everyone fol-

⁸⁹ Ostrom, *supra* note 87, at 3.

⁹⁰ See, e.g., Hughes, *supra* note 13, at 315–16.

⁹¹ See Litman, *supra* note 14, at 966–67 (“[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already ‘out there’ in some other form. This is not parasitism: it is the essence of authorship.”).

lows this logic, the public good will not be supplied, or will be supplied in less quantity or quality than is ideal.⁹²

While ideas have some of the attributes of common pool resources, they also have some of the attributes of public goods. Ideas are impervious to overuse or depletion by any one individual, but whereas public goods are susceptible to “under-contribution,” ideas are instead vulnerable to “under-utilization” - that is to say insufficiently widespread or diverse contribution to their socially productive development to produce intellectual public goods.⁹³ Accordingly, from the perspective of commons theory, ideas can be pragmatically considered a “quasi-common-pool resource.”⁹⁴

Much the same as with any other common resource, commons theory requires the efficient development of the quasi-common pool resource of human ideas. To satisfy this requirement, intellectual property protection must incentivize maximum intellectual action upon ideas, while at the same time avoiding the “tragedy of the commons” side-effects of under-utilization and “artificial depletion” of this common resource.⁹⁵

⁹² Ostrom, *supra* note 87, at 4–5, 20 “Common-pool resources share the problem of difficult exclusion with another important policy problem—the provision of public goods such as international peace, knowledge, and living in a just society. . . . Once these goods are provided by someone. . . no one living within the scope of their provision can be easily excluded from enjoying the benefits. Although common-pool resources and public goods share this one characteristic, they differ in regard to subtractability: one person’s use of a public good, such as the knowledge of a physical law, does not reduce the possibility for an infinite number of other persons to use the same knowledge.”

⁹³ See, e.g., Litman, *supra* note 14, at 970 (“According to a currently popular mode of analysis, property rights in intellectual works are necessary because intellectual creations pose a public goods problem: The cost of creating the works is often high, the cost of reproducing them is low, and once created, the works may be reproduced rapaciously without depleting the original.”)

⁹⁴ See, e.g., John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 440–41 (2004) (“[I]nnovation presents a classic common resource or ‘common pool’ problem: Because the right to innovate is a common right (it is not under exclusive control of any one firm), competition among firms will lead to inefficient races to invent that can dissipate any social surplus associated with an invention. . . [T]he prospect features of the patenting system (. . . the granting of broad rights early in time) help to solve the common pool problem ‘by awarding exclusive and publicly recorded ownership of a technological prospect shortly after its discovery.’”)

⁹⁵ I am indebted to Professor Margaret Chon for identifying the parallel problem which arises in connection with the development and use of knowledge as a social resource. Similar to the resource of ideas, knowledge typically combines characteristics of common pool resources and public goods to constitute a quasi-common pool resource. Much the same as a common pool resource, once created, it can be difficult to restrict access to knowledge and indeed, society benefits most from the widest possible action upon this resource; however, similar to a public good, knowledge is non-rivalous and invulnerable to depletion but is instead vulnerable to insufficiently widespread or diverse contribution to its development or exploitation. See generally GOVERNING KNOWLEDGE COMMONS 1 (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg, eds., 2014). Accordingly, the knowledge commons presents a similar social utility challenge, that is promoting the broadest possible participation in both its development and in its productive exploitation. See, e.g., Maja Larson and Margaret Chon, *The Greatest Generational Impact: The Open Neuroscience Movement as an Emerging Knowledge Commons*, in MEDICAL COMMONS (edited by Brett Frischmann, Michael Madison and Katherine Strandburg, Cambridge University Press, 2017) (“The gov-

The Idea Exclusions prevent a “tragedy of the commons” condition from occurring in the intellectual property ecosystem. If the property right incentives to undertake intellectual endeavors included ownership in ideas, the resource of ideas would be artificially depleted, in as much as the resource would no longer be available for others to develop.⁹⁶ By precluding protection for the ideas embodied within intellectual public goods, the Idea Exclusions counterbalance the grant of property right incentives to act upon ideas and thereby preserve access to this resource.⁹⁷ The Idea Exclusions thus ensure that individual intellectual property achievement does not come at the expense of further development of the ideas from which such accomplishment is derived. By preserving access to those aspects of intellectual public goods that constitute or are inseparable from ideas, the Idea Exclusions ensure that ideas are continuously revisited and developed in new or different ways, and thereby effectuate the efficient and socially equitable exploitation of this quasi-common pool resource.

B. The Idea Exclusions and Labor Theory

The labor theory of property is a theoretical rationale advanced by the seventeenth century philosopher John Locke.⁹⁸ Locke’s labor theory encompasses one of the manifold natural rights that Locke perceived as divine in origin. The labor theory of property is based upon the premise that in the state of nature, goods are held in

ernance of a commons addresses obstacles related to sustainable sharing and is based upon the foundational recognition that multiple uses do not always lead to depletion or scarcity of those resources. . . . To be sure, some intellectual resources can be affected negatively by those who free-ride on the ideas and efforts of others. . . . However [some] scholars see myriad consequences, not all of which are negative. . . . Tragic examples such as acid rain are counterbalanced by surprising examples such as neglected disease consortiums or Wikipedia.”) Where the generation of knowledge constitutes intellectual property output, the IP regime avoids the tragedy of the commons problem through the symbiotic combination of property right incentives and the Idea Exclusions.

⁹⁶ Ostrom, *supra* note 87, at 18 (“In general, humans using resources of this type face at least two underlying incentive problems. . . . The first is the problem of overuse, congestion, or even destruction because one person’s use subtracts from the benefits available to others. The second is the free-rider problem that stems from the cost or difficulty of excluding some individuals from the benefits generated by the resource. The benefits of maintaining and enforcing rules of access and exclusion go to all users, regardless of whether they have paid a fair share of the costs. The institutions that humans devise to regulate the use of common-pool resources must somehow try to cope with these two basic incentive problems. They struggle with how to prevent overuse and how to ensure contributions to the mechanisms used to maintain both the resource and the institution itself.”); Adam D. Moore, *Intellectual Property and the Prisoner’s Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets*, 28 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 831, 849 (2018) (demonstrating that the tragedy of the commons effect in the intellectual property eco-system is the loss of the opportunities and future and potential value that could be derived from proper regulation of intellectual public goods.).

⁹⁷ Litman, *supra* note 14, at 967–68 (“[T]he public domain is the law’s primary safeguard of the raw material that makes authorship possible. . . . The public domain should be understood . . . as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”).

⁹⁸ See generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, §§ 138–40, in *TWO TREATISES OF GOVERNMENT* (P. Laslett rev. ed. 1963) (3d ed. 1698).

common through a grant from God; however, in this natural state many goods cannot be enjoyed by human beings. Consequently, it is necessary that individuals exert their personal labor upon natural goods, and by doing so they add value to these goods and are thus entitled to private property rights therein.⁹⁹

Locke's labor theory is frequently relied upon to justify the legal recognition of intellectual property rights.¹⁰⁰ Intellectual property law and policy discourse is replete with references to the value added to society by the intellectual labors of inventors, writers, and artists.¹⁰¹ Accordingly, intellectual property adherents to the labor theory advance the proposition that individuals who apply their intellectual labor to develop and/or express ideas are entitled to property rights in the intellectual public goods that result from their efforts.¹⁰²

While the labor theory can be employed to support the recognition of intellectual property rights, Locke also devised various limiting principles which restrict the scope of the rights that individuals can claim thereunder. For example, the "Lockean Proviso" mandates that individuals have a right to act upon and thus appropriate natural goods "at least where there is enough, and as good, left in common for others".¹⁰³ In other words, the natural right to acquire property through one's labor extends only up to the point at which others are deprived of their rights to do the same. Accordingly, where a resource is scarce or unique, an individual cannot unilaterally acquire it through her labor, especially if that resource is essential to the

⁹⁹ See Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 867–68 (1932).

¹⁰⁰ See, e.g., Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 Hofstra L. Rev. 1179, 1180 (2008); Robert P. Merges, *Locke Remixed*, 40 U.C. Davis L. Rev. 1259, 1265 (2007); McGowan, *supra* note 83, at 68 ("Lockean theory looks good compared to consequentialist theories because it cannot be criticized for making predictions that might not be true. . . . If we secularize Locke, we have . . . the notion that one owns one's body, and thus one's labor, and thus the products of one's labor. This . . . argument is fairly well understood and widely accepted in American society."); Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 Ohio St. L.J. 517, 531 (1990) ("Even though economics became the ostensibly sole basis of copyright, modern copyright somehow evolved along lines similar to those suggested by the natural law. This can be seen most clearly by outlining the basic copyright doctrines of originality and the idea/expression dichotomy and then comparing them to the natural law of property through labor and possession. . . . [M]odern American copyright appears to vindicate an author's right to property in the fruits of her labor, but subject to the limits of what can be feasibly possessed.").

¹⁰¹ See, e.g., *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

¹⁰² See, e.g., Gordon, *supra* note 80, at 1540 ("[C]ourts have extended common law protection to intangibles on the Locke-like ground that no entity should 'reap where it has not sown.'"); Hughes, *supra* note 13, at 296–97 ("Locke's theory of property is itself subject to slightly different interpretations. One interpretation is that society rewards labor with property purely on the instrumental grounds that we *must* provide rewards to get labor. In contrast, a normative interpretation of this labor theory says that labor *should* be rewarded. . . . Locke's labor theory, under either interpretation, can be used to justify intellectual property. . . ."); McGowan, *supra* note 83, at 20 ("Injunctions [to protect IP rights] are consistent with the proposition that authors have rights in their work because they have produced it, and that consumers have no legitimate claim to use the work without the author's consent.").

¹⁰³ John Locke, *Second Treatise of Government*, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d ed. 1698).

well-being or survival of others.¹⁰⁴

The labor theory is also limited by Locke's strict prohibition against waste. Locke denounced individual waste of natural goods as an unjust diminution of the common stock. In Locke's view, the wasteful removal of natural goods from the common stock, whereas others could have applied their labor to such goods, is a violation of natural law.¹⁰⁵

Locke's labor theory would seem to require the Ideas Exclusions as an essential mechanism within the intellectual property ecosystem.¹⁰⁶ While the labor theory mandates that an individual's action upon an idea entitles her to a property right in the resulting intellectual public goods, pursuant to the Lockean Proviso, no individual has the right to unilaterally appropriate natural resources to the inequitable detriment of others. In their "natural state" ideas are non-rivalous and thus can be enjoyed and acted upon by everyone. To grant ownership of an idea to the first person to act upon it would not leave "enough or as good" for others and thus unfairly deprive them of their own natural rights to act upon ideas.

Moreover, granting ownership over ideas would result in at least two kinds of Lockean waste. As noted above, any single idea is non-rivalous and thus amenable to a potentially infinite number of development possibilities. To grant ownership rights to the first individual to apply her developmental labor to an idea would be to forfeit this prospective social bounty, in as much as that would reduce the incentives for other, second-comer developers to apply their labor to ideas already owned by others.¹⁰⁷

¹⁰⁴ See Gordon, *supra* note 80, at 1541–42 ("Locke tells us that in the state of nature there is no positive law parceling out ownership or giving any particular person the right to command anyone else. There are, however, moral duties that constrain persons' behavior toward each other. . . . First and foremost, all persons have a duty not to harm others, except in some cases of extreme need."). See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 178–82 (New York: Basic Books, 1974); Jorn Sonderholm, *Ethical Issues Surrounding Intellectual Property Rights*, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 110, 117 (Annabelle Lever ed., Cambridge Univ. Press 2012).

¹⁰⁵ See generally Henry Moulds, *Private Property in John Locke's State of Nature*, 23 THE AM. J. OF ECON. AND SOC., 179, 183 (1964) ("But waste would be robbery because the common stock would be depleted."); Hughes, *supra* note 13, at 298 ("What justly can be reduced to property in this primitive state also is limited by Locke's introduction of the *non-waste* condition. This condition prohibits the accumulation of so much property that some is destroyed without being used. Limited by this condition, Locke suggests that even after the primitive state there sometimes can be enough and as good left in the common to give those without property the opportunity to gain it.").

¹⁰⁶ McGowan, *supra* note 83, at 38–39 ("Because consumption of works is nonrivalous, an author who draws on ideas and expression in the public domain does not diminish that domain but leaves 'enough and as good' for others to use.")

¹⁰⁷ In cases where the commercial potential of a new application for a previously developed idea justifies the expense, some second-comers may be willing to pay a royalty to the first developer who has acquired ownership over an idea. Although society would receive the benefit of such subsequent development, such transactions still involve a quantum of waste in as much as the rent to the initial developer could otherwise be applied to other purposes, including further development of ideas.

Another kind of waste that would result from allowing ownership in ideas relates to the quality of the intellectual property output that can be derived from the application of intellectual labor toward the development ideas. For example, in the field of patents, the first inventor to patent an innovation obtains the exclusive rights to make, use or sell the invention. John Duffy explains how this “all-or-nothing-race” can sometimes lead to wasteful side-effects. Competing innovators sometimes expend development resources at an accelerated rate to rush development before the optimal time for making such expenditures. In addition, competing innovators are likely to engage in duplicative research and development, each hoping to cross the finish line first. And finally, the competitive race can sometimes result in “commercially premature” patenting; if the patent is obtained “before commercialization of the invention can occur. . . then the earlier grant of the patent will give the patentee less time for commercial exploitation of the invention under the protection of the patent.”¹⁰⁸

The dissipation of rents problem identified by Professor Duffy would be exacerbated in the absence of the Idea Exclusions. Potential inventors would be incentivized to identify the most elementary application for an idea that would support recognition of intellectual property rights, as this would also likely prove the fastest route to attendant ownership of the underlying idea. Consequently, much intellectual action would be targeted toward snagging the lowest hanging “developmental fruit”, while the more difficult to reach, and perhaps most socially beneficent, intellectual bounty would be left to rot on the conceptual vine.

C. The Idea Exclusions and Consequentialist Perspectives

Consequentialism is a philosophical school of thought that considers human action as neither inherently “good” nor “bad”; rather, an action’s characterization is determined by the affects that result therefrom, i.e., an action is “good” if that action produces beneficial results.¹⁰⁹ Consequentialist perspectives of intellectual property include utilitarian rationales¹¹⁰ and instrumentalist methodologies,¹¹¹ among which

¹⁰⁸ John Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 443–44 (2004).

¹⁰⁹ Walter Sinnott-Armstrong, *Consequentialism*, (2019) Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/consequentialism/>

¹¹⁰ See, e.g., Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1074–76 (1997); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 59–60 (2001); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 176 (2003) (“Ours is a self-consciously utilitarian, not moral, theory of (intellectual property) rights . . .”). The utilitarian rationale evaluates actions for their affect upon the greater good- an action that is beneficial to most of society is a good action. See generally Sinnott-Armstrong, *supra* note 109; McGowan, *supra* note 83, at 8 (“Utilitarianism is welfare consequentialism. This means utilitarian ethics evaluates acts, rules, or states of affairs by their consequences, and evaluates consequences using welfare as a measure.”).

¹¹¹ See, e.g., Lemley, *supra* note 82, at 1338, 1341 (“[O]nce one abandons utilitarianism it is hard to find a basis for a prepolitical right to IP. . . . A utilitarian IP framework has a metric for deciding whether we should give control over [intellectual goods] to the people who claim them. But if IP is a Right, granted to the first creator not for a purpose but simply because they are first, it is hard to

the most prominent perspective is the “law and economics” theoretical rationale of intellectual property law.¹¹²

Throughout the twentieth century, the law and economics perspective of intellectual property dominated IP law and policy scholarly discourse.¹¹³ In essence, the law and economics perspective asserts that economic incentives, such as legal recognition of exclusive property rights in intellectual outputs, are a necessary mechanism through which to stimulate sufficient production of intellectual property goods.¹¹⁴ Without the prospect of an economic reward, few potential innovators and creatives would devote their time and resources to the production of intellectual property, and would instead apply their energies toward other, pecuniary pursuits.¹¹⁵

The law and economics perspective further cautions, however, that intellectual property production incentives should be cost efficient. Incentives should be limited to that which is actually necessary to induce desirable intellectual activity, particularly where providing incentives will negatively affect the interests of other individuals and/or society as a whole.¹¹⁶ Consequently intellectual property law should strike an optimal balance between the provision of private property right incentives and the social benefits that can be derived from widespread public enjoyment of in-

find a similar limiting principle.”)

¹¹² See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Robert P. Merges, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (describing and critiquing the dominant utilitarian justification for IP rights).

¹¹³ See, e.g., William M. Landes and Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 5 (Harvard UP 2003); Stanley M. Besen and Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. OF ECON. PERSP., 3–27 (1991). See also Duffy, *supra* note 108, at 439 (“Traditionally, the economic rationale for granting intellectual property rights in innovations has been that the rights provide an incentive or reward for the sizeable investments needed to create the intellectual property disclosed in the patent document.”); Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L. J., 333, 335–36 (1997) (“The United States Constitution explicitly grants to Congress the power to pass laws governing copyright. The purpose behind this grant of authority is to encourage the creation of works of artistic and scientific value by providing the incentive of an exclusive monopoly over the benefits of that creation. . . . The congressional purpose. . . was purely utilitarian; it was not based upon the natural rights of authors in their works.”). Ward S. Bowman, Jr., *Patent and Antitrust Law: A Legal and Economic Appraisal* 2 (Chicago 1973) (“Invention, like other forms of productive activity, is not costless. Those who undertake it, therefore, must be rewarded.”); Samuel Oddi, *Unified Economic Theories of Patents—The Not-Quite-Holy Grail*, 71 NOTRE DAME L. REV. 267, 275–81 (1996).

¹¹⁴ See, e.g., Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 514 (2016) (“[T]he dominant methodological approach in the field emphasizes incentives for aggregate production of information goods. The primary aim of this utilitarian framework is to provide economic encouragement to creators while insuring maximum access to the works creators produce.”);

¹¹⁵ See, e.g., Mtima, *supra* note 9, at 396–98 (“By securing to authors property rights in connection with their works, the copyright law provides a means by which authors might profit financially from their efforts and thereby provides them with the necessary inducement to undertake and continue their creative labors.”).

¹¹⁶ Hughes & Merges, *supra* note 114, at 514 (“[T]he traditional utilitarian theory sees copyright incentives as the mechanism through which society regulates the reward to creators.”).

lectual property goods.¹¹⁷ “The goal is to set the incentives just right, so society receives the maximum number of works of the highest quality at the lowest possible overall social cost.”¹¹⁸

Similar to the mandates of Locke’s labor theory, law and economics utilitarianism requires the Idea Exclusions as a means by which to ensure that intellectual property production incentives are “set just right”. In the absence of the Idea Exclusions, ownership of the ideas embodied within intellectual property goods would cede disproportionate benefits to intellectual property producers, especially in as much as in most cases, the IP producer does not originate ideas but rather acts upon preexisting ideas.¹¹⁹ Restricting property rights and interests to the intellectual property producer’s individual expression, application, or implementation of an idea is thus commensurate with the producer’s actual contribution to society.¹²⁰

In addition, granting ownership of ideas to IP producers would unnecessarily deprive society of the benefits to be had from further development of those ideas. Whatever an idea’s origin, it is likely amenable to near-infinite development possibilities. Clearly it is in society’s best interest to provide incentives for further development subsequent to the initial action upon an idea. Moreover, preserving the rights of others to freely develop ideas is particularly important with respect to the interests of many marginalized members of society.¹²¹ For such groups, the opportunity to act upon preexisting ideas can be the principal means for both personal development and advancement, as well for making important contributions to society. Allowing ownership of ideas would needlessly add the waste of this human capital to the cost of production of rudimentary intellectual property goods.

The law and economics consequentialist perspective of intellectual property requires that the law’s private property production incentives be fashioned so as to maximize the social benefits derived from intellectual property protection. The Idea Exclusions serve this utilitarian function by regulating private property incentives to provide important, but not *disproportionate* secular inducement toward the production of intellectual property goods.

¹¹⁷ See Fisher, *supra* note 79, at 1.

¹¹⁸ Hughes & Merges, *supra* note 114, at 514. See also McGowan, *supra* note 83, at 13 (“[E]xpression maximization provides a plausible explanation for some fundamental copyright doctrines. The copyright term is one example. Limiting the term of the rights is consistent with expression maximization, and probably with utilitarianism.”)

¹¹⁹ Indeed, intellectual property scholars such as Glynn Lunney argue that it would be unconstitutional to afford producers rights and interests which outweigh the net public benefits. See Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 821, 909–10 (2001).

¹²⁰ Even in the rare case in which an individual can legitimately claim to have originated an idea, the principal benefit to society results from *individual action upon that idea*, be it that of the originator or others who are also inspired to act upon the idea. Accordingly, the incentive-reward should be measured against the resulting intellectual goods, and the abstract idea upon which such goods are based.

¹²¹ See *infra*. pp. 38.

D. The Idea Exclusions and Non-Consequentialism

As the label suggests, non-consequentialist social theories are somewhat juxtaposed to consequentialist perspectives toward human action. Proponents of non-consequentialism adhere to the notion that proper assessment of the rightness or wrongness of an act requires more than just evaluating the consequences that result from that act—other factors, such as the innate morality of or motivation for undertaking the act must also be considered.¹²² Thus for example, taking possession of under-utilized, arid land in order to irrigate it could lead to socially beneficial, “good” consequences, but it could nonetheless be a wrongful, “bad” act if done against the wishes of the rightful owner of the land, especially if done by someone whose primary motivation is self-gain. Deontological ethics, a system of moral reasoning which holds that acts can be considered good when undertaken out of a sense of moral duty or responsibility, is a non-consequentialist rationale which is often applied by non-consequential theorists in evaluating whether a particular act qualifies as morally good, irrespective of any positive consequences that may result from that act.¹²³

At the close of the twentieth century and beyond, intellectual property law and policy theorists increasingly questioned the consequentialist law and economics rationale of intellectual property in favor of deontological perspectives and other non-consequentialist assessments of the intellectual property system.¹²⁴ Some commen-

¹²² See generally F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*, Oxford University Press (2007).

The Bridge, *Consequentialism/Non-consequentialism*, <https://cyber.harvard.edu/bridge/Philosophy/essay4.htm>

¹²³ Wikibooks, *Introduction to Philosophy/Deontology*, https://en.wikibooks.org/wiki/Introduction_to_Philosophy/Deontology.

¹²⁴ In his seminal 2001 analysis of prevailing IP theories, William Fisher sought to delineate an emerging, “less well established and recognized” perspective he categorized as “Social Planning Theory”, which Professor Fisher described as a theory “rooted in the proposition that . . . intellectual-property rights . . . can and should be shaped so as to help foster the achievement of a just and attractive culture.” William Fisher, *supra* note 79, at 4. These perspectives toward intellectual property protection would coalesce into an extensive body of deontologically-focused IP scholarly discourse which continues to develop. See, e.g., Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717 (2007); Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls’s Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563 (2007); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009); Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y. L. SCH. REV. 77 (2010/11); Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275 (2011); Rita Heimes, *Trademarks, Identity, and Justice*, 11 J. MARSHALL REV. INTELL. PROP. L. 133 (2011); Lateef Mtima, *What’s Mine is Mine But What’s Yours Is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, 15 SMU SCI. & TECH. L. REV. 323, 332–36 (2012); Stephen R. Munzer, *Corrective Justice and Intellectual Property Rights in Traditional Knowledge*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 58 (Annabelle Lever ed., Cambridge Univ. Press 2012); Lateef Mtima,

tators challenged the then-prevailing premise that adequate production of intellectual property can only be attained through rigid economic incentives designed to compensate individual intellectual labors.¹²⁵ Among other things, many of these scholars argued that law and economics and similar utilitarian perspectives fail to account for the full spectrum of motivations which underlie creative and inventive endeavors.¹²⁶ But most significantly, many non-consequentialist intellectual property legal theorists advocated for recognition of the increasing importance of the role of intellectual property output in addressing social deficiencies in the global human condition, an issue which transcends the question of pecuniary compensation for individual contributions to cultural and scientific progress.¹²⁷

Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice, 53 HOUS. L. REV. 459 (2015); Peter S. Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 147 (2016). This discourse would expand to include arguments for the infusion of human rights values into the intellectual property regime. See, e.g., Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006); Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, 39 U. MICH. J. L. REFORM 433, 435–36 (2006); Anjali Vats and Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 776–777 (2018) (“A number of scholars have also undertaken consideration of the extent to which human rights regimes might be used to re-conceptualize and remake intellectual property law. . . . expanding the scope of intellectual property rights regimes for the benefit of those in the developing world. . . . The human rights approach is an example of a practical intervention into intellectual property law.”).

¹²⁵ ~~Id.~~; Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009). In the copyright context, Eric Priest argues that the law and economics incentive theory of copyright myopically regards authorship as a pseudo socio-economic phenomenon, when it might be more accurately respected as a form of entrepreneurship. “Authors typically exhibit the same traits that economists identify in entrepreneurs: the lack of a fixed income and a desire for autonomy, the ability and foresight to create something new through innovative combinations, and the pursuit of a project despite substantial market uncertainty and risk. Yet incentive theory, ignoring these similarities, treats authors as second-class innovators whose entitlements should be strictly limited to a level necessary to induce production. At the same time, law and economics theory treats ‘classic entrepreneurs’ unfettered rights to the spoils of their business innovations as beyond reproach. Since many author-entrepreneurs come from marginalized communities, treating them as non-entrepreneurs can exacerbate the structural disparities between them and their ‘classic’ entrepreneurial counterparts. See Eric Priest, *Why Don’t We Think About Authors the Way We Think About Entrepreneurs?*, 53 AKRON L. REV. (forthcoming 2020).

¹²⁶ See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (“Psychological and sociological concepts can do more to explain creative impulses than classical economics. . . . [A] copyright law that treats creative activity as a product of economic incentives can miss the mark and harm what it aims to promote.”); See Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L. J. 1693, 1701, 1718–19 (2008) (discussing how economic-incentive approaches can restrict IP access and consequently impede innovation in the pharmaceutical context).

¹²⁷ See generally MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* (Yale Press 2012); See Mtima, *supra* note 12, at 7–8; Anne Flanagan and Maria Lilla Montagnani, *Intellectual Property Law: and Social Justice Perspectives*, pp. x, xi Edward Elgar 2010) (“[I]ntellectual property in the form of literature, science, knowledge and its fair dissemination and access to knowledge has a broader role to play in the development of all individuals as well as the fabric of society and democracy. . . .”); Adam Moore, *Intellectual Property and the Prisoner’s Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 833 (2018) “Externally, as a moral theory, utili-

In the effort to identify a “moral compass” for intellectual property protection, many IP non-consequentialists invoke the theory of social justice advanced by twentieth century deontological philosopher John Rawls.¹²⁸ Rawls’ theory of social justice mandates that the rules that govern individuals in society must allocate rights and opportunities fairly, and tolerate inequities only to the extent that they serve a measure of distributive justice.¹²⁹ In applying Rawlsian precepts in support of the intellectual property regime, some scholars offer examples of the wealth redistribution and related social benefits society derives from intellectual property endeavor. For example, Justin Hughes and Robert Merges have argued that patent and copy-

tarianism has come under attack for failing to account for special obligations, claims of distributive and retributive justice, and undermining individual integrity or life-long project pursuit.”; Margaret Chon, *Global Intellectual Property Governance (Under Construction)*, 12 THEORETICAL INQ. L. 349, 358 (2011) (“Even if promoting creation and innovation is the premier value of intellectual property, the rights-maximizing agenda pursued by intellectual property-exporting states has resulted not only in power asymmetry but arguably in policies that are not welfare-maximizing even for domestic industries within those states. Access for the purpose of follow-on innovation—in other words, for maximizing returns on the public good of knowledge itself—is a critical policy component within the overall intellectual property regulatory framework. Moreover, access to knowledge for purposes of maximizing other global public goods such as basic education, food security and disease control implicates both fairness and growth.”); Hughes & Merges, *supra* note 114, at 513, 515 (“More recently, academic commentators have started to focus on the “distributive” aspects of copyright and, not surprisingly, this work has shadowed the incentive-based analyses by focusing on *information distribution*.”)

¹²⁸ See generally JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press 1971). In essence, Rawls’ theory of social justice is based on the premise of an “Original Position” whereat individuals come together to form a society in their common interest, and wherein all are unaware of their personal characteristics. Accordingly, every individual has an interest in supporting rules that are fair to all, in as much as to discriminate against any particular set of characteristics could be to discriminate against oneself. Individuals can then formulate fair and just rules guided by two fundamental principles, first, that “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all” and second, “Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged. . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.” In other words, conditions of inequality are permitted provided they inure to the benefit of those most disadvantaged and every person has fair and equal opportunity to advance her situation in society.

¹²⁹ See, e.g., Michael Lacewing, RAWLS AND NOZICK ON SOCIAL JUSTICE, <https://michaellacewing.files.wordpress.com/2017/12/4-rawls-and-nozick-on-social-justice.docx> (Dec. 2017) “John Rawls’ theory of distributive justice . . . is based on the idea that society is a system of cooperation for mutual advantage between individuals. . . . Principles of justice should ‘define the appropriate distribution of the benefits and burdens of social co-operation’ . . . and any inequalities in social positions must be justified. And so the principles of justice. . . must be ‘the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association’ . . . In the original position. . . we will only agree to an equal distribution . . . [though] we would agree to inequality if that will work to everyone’s advantage. . . for example . . . [by] provid[ing] incentives which will generate more wealth for everyone.”; Justin Hughes & Robert P. Merges, *supra* note 114, at 518. “Rawls’s great life project was to figure out moral principles for structuring a fair and just society. . . . Rawls’s system of thought begins with a Kantian focus on the rights of each individual, but then integrates this with an emphasis on the fair distribution of resources. This confluence of Kantian individualism and collective concerns, together with a highly analytical way of thinking, marks Rawls’s major contribution to the theory of social justice.”

right protection satisfy core distributive justice mandates, in as much as they lead to improvement in the material situation of some of society's most disadvantaged groups. The economic incentives provided by each of these forms of protection help to foster technological and artistic advances that improve living conditions for everyone, including those most disadvantaged, notwithstanding the fact that the intellectual property regime also causes some concentration of wealth among IP producers, including some who may otherwise already enjoy significant privilege.¹³⁰

Compliance with Rawls' distributive justice mandates requires recognition of the Idea Exclusions as a fundamental element of intellectual property protection. At Rawls' primordial "Original Position," all individuals enjoy equal access to ideas, in part because a single idea can occur to an infinite number of people, and in part because once any idea is expressed, it is virtually impossible to restrict its dissemination. The Idea Exclusions thus ensure that intellectual property production incentives do not eclipse such universal access, and that the IP legal framework thus satisfies Rawls' First Principle and the protection of equal basic liberties.

Perhaps even more germane, however, may be the relationship between the Idea Exclusions and the reality of persistent social inequalities in society. Inequities in wealth and education resources typically provide persons of privilege with superior access to ideas, as well as greater means and opportunities to act upon and develop them.¹³¹ Consistent with Rawls' Second Principle, the Idea Exclusions ensure that such inequities are arranged ultimately to the benefit of the most disadvantaged and are attached to "conditions of fair equality of opportunity". Although the privileged often get "first crack" at developing many ideas, the Idea Exclusions guarantee those less privileged the opportunity to also apply these resources toward their benefit. Moreover, while the intellectual property system can serve to concentrate

¹³⁰ Hughes & Merges, *supra* note 114, at 528. "While many technological innovations may address fundamental quality of life issues that go to the "basic liberties" of the First Principle (such as vaccines), many other technological innovations improve quality of life in ways that are best characterized as social and economic "primary goods" (for example, color television instead of black and white, improved wi-fi speeds, sturdier alloys for bicycles, cheaper lighting sources, and so on)." Professors Merges and Hughes also analyze in depth empirical evidence of the wealth redistribution benefits of intellectual property protection, which analysis is considered *infra* note 144, in the context of the broader theory of Intellectual Property Social Justice.

¹³¹ See, e.g., Rita S. Heimes, *Lawyers and Innovation*, in INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE 119, 129 (Lateef Mtima ed., 2015) ("The United States is a nation of vast inequality. Only the most fortunate have access to elite schools and high-paying jobs. . . . The potential prosperity of American children is more dependent on their parents' success than in most other developed countries. . . . In the case of African-Americans and other minority communities where generations may have routinely been denied access to educational and employment opportunities, there could be a community-wide lack of capacity with regard to legal services and . . . complex business and transactional expertise."); Valerie Rawlston Wilson, *Intellectual Property As An Essential 21st Century Business Asset*, in INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE 65 (Lateef Mtima ed., 2015) ("[D]espite the progress that has been made in the educational, social, and political arenas, large economic disparities persist along racial lines. . . . The average African American household holds only six cents for every dollar of wealth held by the average white household, and one-third of African American households have zero or negative net worth compared to 14 per cent of white households.").

some wealth in the hands of creators and inventors who already enjoy other socio-economic privileges and advantages, the intellectual property system does not materially alter their privileged status. However, as Professors Hughes and Merges note¹³², the advancements they contribute will benefit everyone, including those most disadvantaged. And of course, for creators and inventors from disadvantaged communities, the wealth redistribution benefits of intellectual property production are self-evident.¹³³

E. The Idea Exclusions and Intellectual Property Social Justice

Under Intellectual Property Social Justice theory intellectual property protection is a social ordering mechanism intended to advance society by nurturing beneficent intellectual activity.¹³⁴ Proponents of the theory argue, however, that this overarching social objective can only be fully attained when the intellectual property regime is structured and implemented to ensure the broadest and most inclusive participation therein.¹³⁵ To achieve its social utility purpose of human nourishing and flourishing, the intellectual property law must therefore adhere to inherent precepts of socially equitable access, inclusion, and empowerment.¹³⁶

¹³² Hughes & Merges, *supra* note 114.

¹³³ Heimes, *supra* note 131, at 121 (“[L]egal regimes . . . [can] foster personal and small-group efforts for economic gain through. . . a strong intellectual property rights regime with neutral application to all participants regardless of race, income, or social status.” Thus the Idea Exclusions preserve opportunities for second-comer alternative and follow-on innovation and development of ideas, to their personal and communal advantage.

¹³⁴ See Mtima, *supra* note 12, at 265 (“Intellectual property social justice provides a context through which to consider the role of intellectual property protection in the total political economy. . . intellectual property protection is but one function within a complex and organic social system designed to promote the well-being of the societal body as whole.”); Peter Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 PROP. RIGHTS CONF. J. 147, 156 (2016) (“Intellectual property seeks to balance the motivational pull of property rights with broad dissemination of knowledge and the cumulative creative push of building on the ideas and expression of others.”).

¹³⁵ Peter Menell, *supra* note 134, at 187–92 (“The interplay among IP, poverty, and inequality more generally is beginning to emerge as IP theory advances and the digital revolution matures . . . The concentration of wealth and economic leverage that intellectual property produces places vast power in the hands of a relatively small group of entrepreneurs . . . venture capitalists, corporate titans, Hollywood moguls, and technology and entertainment lawyers [who] reflect historical gender and race biases. . . . The so-called “brogrammer” culture in Silicon Valley discourages greater integration across gender and racial lines. . . . Inequality and under-representation can distort scientific research and public health policy. . . . Beyond the injustice of biased employment practices, these patterns have far reaching effects on cultural diversity and freedom of expression.”); Lateef Mtima and Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L. SCH. REV. 77, 83 (2010) (“Social justice includes not only access to, but also inclusion in, the social cultural, and economic life of the country. . . . These very same principles are echoed in the grant of power to Congress over copyrights and patents: the power is granted for the progress of all, not for the benefit of a few.”).

¹³⁶ See Mtima, *supra* note 12, at 266 (“Intellectual property social justice occupies a unique space in the IP social reform discourse. Whereas the predominating reformist rhetoric confronts the challenge as one of importing pertinent social values *into* the IP regime, intellectual property social justice eschews any implicit conceptualization of intellectual property protection as inherently devoid of non-economic/socially benign objectives. . . . Intellectual property social justice regards the val-

Socially equitable access to the intellectual property system and its outputs, irrespective of wealth, class, race, ethnicity, group, or gender status, ensures that the widest possible network of minds and hearts will find the inspiration to conceive, express, and invent. Socially just application and enforcement of intellectual property rights guarantees inclusion of marginalized and developing world artists, inventors, and IP entrepreneurs, and preserves their secular incentives to contribute and disseminate the fruits of their intellectual endeavors. And socially balanced exploitation of intellectual property product helps equalizes health and education standards, promotes socio-economic empowerment, and fosters universal respect for the intellectual property system.¹³⁷

To attain these social outcomes, the intellectual property regime employs a variety of legal mechanisms, including grants of economic property rights, that complement other, non-secular incentives to engage in intellectual endeavor.¹³⁸ While human instinct provides natural and powerful motivation to act upon ideas to create and invent, secular incentives and opportunities can augment the innate drive to achieve, especially for those whose socio-economic circumstances and options are such that dedication to artistic and innovative pursuits demands great personal and communal sacrifice. In these marginalized communities, such dedication is often justified both by economic drives attendant to the potential for individual and communal entrepreneurial empowerment, as well as by non-economic drives including politico-cultural self-determination.¹³⁹ Consequently, Intellectual Property Social Justice considers economic property rights as providing utilitarian inducements to act to upon ideas toward the achievement of broad deontological social objectives.¹⁴⁰

ues of equitable access, inclusion and empowerment as essential and indeed *intrinsic* to the enterprise.”); Steven D. Jamar, *supra* note 80, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. at 289.

¹³⁷ See generally MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE (2012); CHRISTOPHE GEIGER, RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY (2015).

¹³⁸ See e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (citing *Mazer v. Stein*, 347 U.S. 201 (1954)) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); Sony Corp. of Am. v. Universal Studios, Inc. 464 U.S. 417, 429 (1984) (“[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); Lateef Mtima, *Symposium Article: Digital Tools and Copyright Clay: Restoring the Artist/Audience Symbiosis*, 38 WHITTIER L. REV. 104, 105–6 (proposing that the purpose of copyright is to incentivize authors to embrace information dissemination technologies “and thus increase the quantity and diversity of ideas and expression available to society.”)

¹³⁹ See Hughes, *supra* note 13, at 291 (“Of limited duration and obtainable by anyone, intellectual property can be seen as a reward, an empowering instrument, for the talented. . .”); Lateef Mtima, *A Social Activist’s Guide to Intellectual Property*, in INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE xvii (Lateef Mtima ed., 2015) (“To gain control over your intellectual property – the products of your mind, talent, and cultural traditions – is to gain control over resources that can give you the leverage to do business in the national and global marketplace on a level playing field.”)

¹⁴⁰ See, e.g., Robert P. Merges, *Philosophical Foundations of IP Law: The Law and Economics Para-*

Justin Hughes and Robert Merges have demonstrated how economic property rights in copyright help to achieve important distributive justice impacts by providing efficacious economic upward mobility mechanisms for disadvantaged groups.¹⁴¹ Building upon the premise that copyright enables the “proertization of . . . “talent”,¹⁴² they analyze empirical evidence of copyright property rights as the principal source of the wealth of many of the most affluent African Americans.¹⁴³ Professors Hughes and Merges cogently argue that this evidence of concrete “IP Empowerment”¹⁴⁴ supports “the strong claim that the copyright system as it presently functions, *warts and all*, arguably provides the most robust mechanism for disadvantaged groups, particularly African Americans, to accumulate wealth in American society.”¹⁴⁵

digm, in *ECONOMICS OF INTELLECTUAL PROPERTY LAW* at 72, 92 (Ben Depoorter, Peter S. Menell, eds. Edward Elgar 2019) wherein Professor Merges explains how economic incentives to produce IP output function as the operational means for achieving the IP regime’s broader, “extra-economic” goals: “[D]ollars and cents considerations – efficiency – is to be seen here as a tool in the service of some other, ultimate criterion. Efficiency is an operational principle meant to best implement a decision made for other (non-efficiency) reasons.” Other commentators have offered similar perspectives that eschew impermeable boundaries between utilitarian and deontological attributes in the IP ecosystem. *See, e.g.*, Claeys, *supra* note 44, at 255 (“To a reader not attentive to context, ‘nonconsequentialist’ seems to suggest that ‘any reference to consequences in determining the moral quality of an act is logically inconsistent’ with the justification’s basic character, even though the term signifies only that ‘some choices cannot be justified by their effects’”); McGowan, *supra* note 83, at 71 (“Copyright law, like all law, is a social construct . . . [that] is at best partly utilitarian. Because true utilitarian analysis is too hard to perform rigorously, construction of the law begins with nonconsequentialist first principles, whose sails are trimmed until they can sustain a plausible consequentialist story.”).

¹⁴¹ Hughes & Merges, *supra* note 114, at 516 (“[W]e believe that the available empirical evidence points toward copyright being an institution that *does* serve Rawlsian distributive justice. The case is not perfect, and there is . . . much room for improvement. But overall, we think when contemporary copyright is subjected to the thorough standard of Rawlsian fairness, it passes muster.”)

¹⁴² Hughes, *supra* note 13, at 291.

¹⁴³ Hughes & Merges, *supra* note 114, at 556.

¹⁴⁴ *See* Lateef Mtima, *An Introduction to Intellectual Property Social Justice and Entrepreneurship: Civil Rights and Economic Empowerment for the 21st Century*, in *INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE* 5,8 (Lateef Mtima ed., 2015)(invoking the social engineering theories of Charles Hamilton Houston to construct “IP Empowerment” as a social movement which applies IP Social Justice theory to promote grassroots IP education and social entrepreneurship and thereby delineate a 21st century Civil Rights Economic Agenda.); *See generally* Roger A. Fairfax, Jr., *A Tribute to Charles Hamilton Houston: Wielding the Double-Edged Sword*, 14 *Harv. Blackletter J.* 17, 18 (1998) (“Charles Hamilton Houston, the chief architect of the legal assault on Jim Crow laws, sought a new method for pursuing Black equality before the law. Heavily influenced by sociological jurisprudence, but recognizing the inadequacy of Legal Realism and its philosophy of deference to the legislature for racial justice, Houston developed the philosophy of “social engineering.” This jurisprudence borrowed from sociological jurisprudence—an antecedent of Legal Realism—but prompted jurists to challenge statutes and state actions that denied full citizenship rights to Americans who were Black. . . . Charles Hamilton Houston’s wielding of the double-edged sword of judicial activism was antecedent to the Warren Court activism that brought about many of the civil rights gains of the second half of the twentieth century.”); Charles H. Houston, *An Interdisciplinary Study of Civil Rights Leadership* (James L. Conyers, Jr. Ed. Lexington Books 2012).

¹⁴⁵ Hughes & Merges, *supra* note 114, at 516, 549, 557. Other IP scholars have offered ground-

The recognition that the Idea Exclusions are endemic to intellectual property protection confirms the core Intellectual Property Social Justice thesis that within the intellectual property ecosystem the concepts of social utility and social justice are fundamentally and symbiotically intertwined. The Idea Exclusions manifest the Intellectual Property Social Justice perspective of economic property rights as (one of) the IP ecosystem's *means* toward achieving its broader social utility and justice *ends*.¹⁴⁶ The Idea Exclusions function as an essential check on economic property right incentives so as to preserve the larger social utility and social justice objectives of intellectual property protection.¹⁴⁷ As discussed above, although socio-economic and other advantages can provide certain members of society with a “head start” toward acting upon ideas, the Idea Exclusions guarantee everyone, including those most disadvantaged, access to the raw materials essential to participation in the intellectual property system and the attendant opportunities for socio-economic empowerment.¹⁴⁸ The Idea Exclusions thus facilitate the wealth redistribution outcomes identified by Professors Hughes and Merges, which are among the Intellectual Property Social Justice aspirations for any legitimate IP regime.

At the same time, however, the tenets of Intellectual Property Social Justice extend beyond Rawlsian wealth redistribution. Peter Menell cogently articulates a

breaking analyses that contend that Western intellectual property regimes can be *inherently inimical* to the cultural and economic interests of African American and other marginalized groups. *See, e.g.,* K.J. Greene, *Copyright, Culture, and Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L. J. 339, 375–76 (1999). However, as Professors Hughes and Merges and other commentators have noted “[m]uch of the criticism that has been leveled against copyright on behalf of African Americans has really been about business practices or, at best, the interaction of copyright, contract law, and unscrupulous (and racist) business people [including] down-right fraudulent contract practices to deprive African Americans of IP rights.” *Id.* at 557.

¹⁴⁶ *See* Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L.S. L. REV., 77, at 81–82 (2010) (“Together, the recognized rights and interests of authors and of the public are intended to form a synergistic framework to effectuate the social utility objectives of the Copyright Clause. . . . the aim of the copyright law is progress; the means is the granting of limited copyright property rights. . . . The ends sought are the protection of the public interest, progress, and the public good. . . . Copyright is therefore not about profit for the person—it is about ‘profit’ for society.”); *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

¹⁴⁷ Justin Hughes, *supra* note 13, at 316 (“Through [common] availability, one idea can lead to still more ideas. . . . once a ‘new’ idea has been put into intellectual commerce. . . it leads to an ‘expansion’ of the common [and] may be the key to a whole new range of ideas. . . .”); ANNE FLANAGAN & MARIA LILLA MONTAGNANI, *INTELLECTUAL PROPERTY LAW: ECONOMIC AND SOCIAL JUSTICE PERSPECTIVES* xiii (2010) (“[Consideration must be given. . . to the regulatory dimension [of IP law] in terms of the social goals that can be achieved through their construction. This approach is essential, if not the only one that can be employed . . . if IPRs are truly to be granted for the ultimate goal of welfare maximization.”)

¹⁴⁸ *See generally* Paul Belleflamme & Martin Peitz, *Digital Piracy: Theory*, in OXFORD HANDBOOK OF THE DIGITAL ECONOMY 489, 490–91 (Martin Peitz & Joel Waldfogel eds., Oxford Univ. Press 2012).

“macro cross-modal” ratiocination of the scope of the symbiotic relationship between intellectual property social utility and social justice. “The utilitarian purposes undergirding intellectual property protection directly address multiple social justice goals [and] serve a variety of economic, human, cultural, and social goals. Advances in technological knowledge increase productivity, enhance the quality and reduce the costs of goods, and improve standards of living. Technological innovation can also address climate change, cure disease, and expand what societies can accomplish with limited resources. With regard to expressive creativity, well-functioning intellectual property systems can spur investment into the production of knowledge and can entertain and inspire.”¹⁴⁹

In accordance with the aspirational objectives of the intellectual property regime, Intellectual Property Social Justice mandates the balanced assessment of the interests of IP producers, distributors, and users, including weighing of a broad range of cultural, deontological, technological, and social values, as well as economic values, in the cause of human flourishing and self-actualization. Intellectual Property Social Justice further requires that IP legal mechanisms be applied to effectuate the equitable treatment of all participants in actual practice and not merely in theory.¹⁵⁰ In short, Intellectual Property Social Justice is concerned with the role of intellectual property in the total political economy.¹⁵¹ Perceived from this perspective, the intended social benefits of the intellectual property regime extend well beyond socially equitable wealth distribution and enumerated artistic, scientific, and entrepreneurial advances and reach all of human culture and social and political development and power.¹⁵²

¹⁴⁹ Menell, *supra* note 45, at 161.

¹⁵⁰ See, e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014) (holding that digitization of books to increase accessibility for the blind is a fair use purpose consistent with the overarching social objectives of copyright law.)

¹⁵¹ Elizabeth Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEX. A&M J. PROP. L. 5, 11–12 (2020) (“I contend that promoting social justice among potential authors also promotes the creation and dissemination of works. We cannot be sure this is true, but it is hard to imagine otherwise. . . . [M]aking authorship economically feasible for a more diverse array of authors is likely to promote creation of more works and more appealing works. . . . Advancing potential authors’ socio-cultural, personal, emotional, and mental well-being is a way of making it feasible for them to create. Promoting diversity in authorship—that is, promoting the creation of works by the widest possible array of authors—doubtless promotes the creation of more works, not to mention more diverse works. And perhaps more importantly, if we think that promoting well-being and diversity among authors would not promote progress, we should rethink our concept of progress: A system that maximizes creation and dissemination of works by diminishing the well-being and diversity of those who might make them is hardly “progress.”); See Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: “Three Steps” Toward Intellectual Property Social Justice*, 53 HOUS. L. REV. 459, 480, 491–92 (2015); see generally Vincent Mosco, *THE POLITICAL ECONOMY OF COMMUNICATION* 24 (2d ed. 2009) (“One can think about political economy as the study of the social relations, particularly the power relations, that mutually constitute the production, distribution, and consumption of resources.”); John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1125 (2001) (“Each country’s principle of political economy. . . is a normative statement reflecting the conception that predominates within that country of what the appropriate relationship between the individual and the state should be.”)

¹⁵² See, e.g., Mtima & Jamar, *supra* note 146, 55 N.Y. L. REV. at 85–86 (“The constitutional principles

In this respect in particular, Intellectual Property Social Justice supersedes law and economics and similar consequentialist rationales which have long abided unjust traditions which persist throughout the IP ecosystem.¹⁵³ Unjust “utilitarian consequences” are indefensible under Intellectual Property Social Justice. In contrast, from a law and economics perspective, racist, misogynistic, and other socially pernicious practices arguably pass muster where they result in the broad commercial exploitation of marginalized community musical and athletic talent and the creation of a billion dollar entertainment enterprise.¹⁵⁴ For society’s disadvantaged and

of justice, progress, equality, and liberty are directly applicable when they arise in the intellectual property context: everyone is to be included; none should be excluded; the common welfare and progress are the foci; and, although the individual should be able to benefit from his or her own creation, societal advancement is the paramount goal.”); Menell, *supra* note 45, at 162. (“In analyzing the interplay of intellectual property regimes and social justice. . . it is also critical to assess the external effects of utilitarian intellectual property regimes. . . among the array of social justice considerations: human rights, civil rights, cultural interests, and distributive justice.”)

¹⁵³ See, e.g., Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213, 228–29 (2010) (“Almost without exception, the blues pioneers came from the hardscrabble existence known to millions of black sharecroppers during the first half of the twentieth century. . . . Muddy Waters, literally stepped off a tractor in Stovall, Mississippi, packed a bag and his guitar, and caught a ride to Chicago to seek a better life. . . . This was compounded by the sharecropper mentality peculiar to the blues pioneers, known as the ‘furnish.’ The furnish was a practice by which the white plantation owners literally furnished everything the black farmhand might need, such as food, clothing, housing, and equipment, in return for the farmhand’s services in the cotton fields. Indeed. . . the relationship that existed between Muddy Waters and [Chess Records] was nothing more than another furnish, whereby in return for Waters’ recordings, Chess saw to it that Waters had a new car in the drive, his bills paid in full, and food in his refrigerator. This was apparently the case with other independent labels as well; upon returning home from an extended tour, James Brown returned to find that King Records’ . . . had purchased Brown a new Cadillac, a new suit, and a case of wine to enjoy during Brown’s two-week holiday, only to charge the entirety of the cost for these items back to Brown’s account as against Brown’s sales royalties.”); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL. L. 365, 366 (2008) (“The treatment of blacks, women, and indigenous peoples in the IP system reflects the unfortunate narrative of exploitation, devaluation, and promotion of derogatory stereotypes that helped fuel oppression in the United States. . . and abroad. The treatment of women blues artists in the IP system illustrates the racial and gendered nature of IP rights, and that IP has been central to racial subordination from both an economic and cultural standpoint. However, examining inequality in the IP context is not merely a backwards-looking narrative. Racial and gender dynamics offer unique insights that can guide reforms to the IP system with a view toward benefiting, in Derrick Bell’s words, the least-advantaged “faces at the bottom” of our society.”); Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 754–55 (2018) (“[R]ace is an exceedingly important site for intellectual property analysis for which existing considerations of power, inequality, or distributive justice simply do not fully account.”) See generally Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists under the Copyright Act*, 19 YALE J. L. & TECH. 274, 305–20 (2017).

¹⁵⁴ See, e.g., O’ Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015) (applying antitrust “Rule of Reason” exception to sustain NCAA policies which deny compensation to student athletes); Claeys, *supra* note 44, at 255, n. 20 (“Consequentialisms’ critics wonder: on what grounds some consequences are classified as valuable and others as not valuable; whether and on what grounds ‘valuable consequences’ incorporate concerns about justice, fairness, or participating in a well-structured social life; how a consequentialist justification decides which beings’ consequences

marginalized members, however, these practices foster inequitable access to, exploitative inclusion in (or even exclusion from), and precious little empowerment through the intellectual property regime.¹⁵⁵ From only the most myopic view of intellectual property can such outcomes be considered socially productive. In truth, these systemic abuses only sap the vitality of the intellectual property protection ecosystem, and tolerance for these traditions only undermines the overarching purpose of intellectual property law: stimulating the widest possible participation in and concomitant respect for the intellectual property regime.¹⁵⁶

matter and which do not; how to make trade-offs when some beings benefit and others suffer from a given policy; and how to relate the consequences to particular individuals to consequences to the community generally.”)

¹⁵⁵ See, e.g., HANNIBAL TRAVIS, *COPYRIGHT CLASS STRUGGLE*, 17 (Cambridge 2018) (“In theory, the [copyright] law guarantees a right for anyone to protect, license out, and grow rich from ideas, images, and genre archetypes. Digital technology and legal gymnastics severely curtail this right in practice. . . . The dilemma is that individual creators are often frustrated when they invoke the generous rights that are advertised. Problems persist in remedying content theft by copyright conglomerates, ensuring impartial treatment of distinct types of creators, and guaranteeing due process to the poor or middle-class author.”); Mtima, *Digital Clay*, *supra* note 138, at 106–8 (“[E]ven the copyright property-rights typically afforded to creators can be vitiated such that they tend to undermine, rather than benefit, creator interests. . . . Creators typically use these rights to enter into collaborative enterprise with commercial distributors, who own or control fixation and dissemination technologies, such as publishing houses or record companies, with the hope of gaining wider public exposure and corollary financial returns. Unfortunately. . . . whereas the commercial distribution of expressive works should serve copyright social utility. . . . [u]nder the prevailing industry contractual mechanisms and corollary accounting practices, creators are often surprised to discover that the licensing of their copyrights and interests nets them little to no monetary compensation. . . . the result of an arcane business framework rooted in archaic music industry traditions, perpetuated by recording company oligopoly control and sustained through the general absence of artist bargaining power.”); see also Stacy F. McDonald, Comment, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 *HOW. L.J.* 541, 570–71 (2007).

¹⁵⁶ See, e.g., Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, in *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* 105, 110, 111–12 (Irene Calboli & Srividhya Ragavan eds., 2015) (“Recent psychological evidence demonstrated the negative effects associated with stereotypical and derogatory references to Native American people. . . . Besides this psychological harm, an additional and more symbolic harm occurs when someone’s cultural identity is literally, and legally, owned by another entity. . . . By trademarking a racial referent, the message is that the referent is owned, and the owner has the legal right to use the racial term; perhaps even the obligation to use it. . . . And by going into business under harmful words, the owner causes others—fans and consumers—to endlessly utter them.”); Menell, *supra* note 45, at 168 (“The patent system is built upon the granting of exclusive rights. . . . While this system may be justifiable to a strict utilitarian, it raises serious questions for those who use a broader justice framework. . . . [T]he rationing of access to treatments for life threatening diseases amounts to a death sentence to those who cannot afford the patented treatment. The discoveries of such life-saving treatments might not have come about absent the patent incentive, but such a utilitarian position must be considered in conjunction with other important justice considerations. . . . The answer to this philosophical bind is not necessarily binary. . . . Rather, this dilemma highlights the opportunity to recognize that other rules and institutions can potentially improve upon rigid exclusive rights.”); SHARON SANDEEN, *The Value of Irrationality in the IP Equation*, in *INTELLECTUAL PROPERTY LAW: ECONOMIC AND SOCIAL JUSTICE PERSPECTIVES* 63 (2010) (“The policy question that arises [where marginalized communities do not participate in the IP system] is whether people will value a system from which they are excluded. If a substantial number of peo-

Law and philosophy scholar Eric Claeys illustrates the pragmatic breadth of Intellectual Property Social Justice through his application of a “practical reasoning” approach to determining the scope and parameters of intellectual property rights. Professor Claeys describes the practical reasoning process as that which “guides decision makers as they reason from [theoretical] justifications to practice—taking into account context, experience, local opinions, empirical data and possible consequences of different policies.”¹⁵⁷ Through practical reasoning, Professor Claeys demonstrates how Intellectual Property Social Justice and other non-consequential assessment of intellectual property protection can help to determine and substantiate the relationship between the recognition of individual intellectual property rights and the resulting benefits to society as a whole.

Starting from the premise that when information exists and is publicly circulated it should be available to everyone, Professor Claeys acknowledges that when an individual uses such information to create an intellectual work, she becomes entitled to society’s recognition of attendant intellectual property rights in connection with that work. Conferring this right is appropriate because the work helps those exposed to it to flourish in ways they could not have done absent the creator’s intellectual action upon the information subsumed therein.¹⁵⁸

Professor Claeys next proceeds to show how the Idea Exclusions perform the Intellectual Property Social Justice balancing function through the Idea/Expression Dichotomy, which he explains “demonstrates how a non-consequentialist account of copyright IP can reconcile private IP and public rights.”¹⁵⁹ Professor Claeys explains how the Idea/Expression Dichotomy “reconciles use interests that justify IP with access interests that constrain IP [protection].” By precluding ownership of the ideas embodied within an expressive work, the Idea/Expression Dichotomy, together with the related doctrines of merger and scenes-a-faire, effectuates certain “trade-offs” which benefit authors and users alike. Through these Idea Exclusion mechanisms, authors are denied ownership over ideas, “stock elements”, and creative expression inseparable from these aspects of their work, but in exchange are assured access to other ideas and also the merger and scenes-a-faire material produced by

ple cannot benefit directly from a system of IPRs, how likely are they to engage in the inventive and creative endeavors that it is supposed to inspire? Of equal importance, how likely are they to respect the IPRs of others?”); *See also* Vats, *supra* note 125, at 784–87 (discussing the issues of protection for indigenous traditional knowledge and “community building”, and their relationship to intellectual property protection).

¹⁵⁷ Claeys, *supra* note 44 at 252 (“Theoretical reasoning covers. . .deliberations about basic rights and the values that justify them. People switch to practical reasoning when they apply those rights and justifications to specific recurring act-situations and interested parties. Thus, practical reason covers the reasoning. . .about the precise rights and duties that follow from general rights, about the precise obligations that rights generate in specific act-situations, and about how best to secure rights in practice.”). *Id.* at 257. *See generally*, Rosenblatt, *supra* note 151, at 16–18.

¹⁵⁸ *Id.* at 265. “[The creation of] a new intellectual work. . .entertains viewers, educates viewers or supplies the design for a new and useful product. . . . The improving character of such a work gives everyone a decisive reason to keep it separate from material already in the public domain and to recognise private property in it.”

¹⁵⁹ *Id.* at 272–73.

other authors.¹⁶⁰ And of course, society as a whole enjoys the benefit of an expanded storehouse of expressive works generated by a more diverse group of authors.¹⁶¹

The Idea Exclusions exemplify the Intellectual Property Social Justice perspective of the “symbiotic social utility/social justice equipoise” as an essential element of an effective IP ecosystem. The Idea Exclusions promote democratic and diverse participation in the intellectual property regime, and thereby adhere to the Intellectual Property Social Justice core mandates of access, inclusion, and empowerment.

F. IP Social Justice: A Unified Theory.

“At the heart of all social theory is the contrast between humans as motivated almost exclusively by narrow self-interest and humans as motivated by concern for others or for society as a whole.” – Thomas Dietz¹⁶²

The relationship between the Idea Exclusions and Intellectual Property Social Justice illustrates how the social justice perspective of intellectual property protection offers the most comprehensive (and satisfying) approach toward realizing the social purpose of IP protection through the structural constructs of intellectual property law. As a theory which accommodates both utilitarian and deontological rationales of intellectual property, Intellectual Property Social Justice eschews the unnecessarily polarized and constrictive theoretical debate which too often shapes intellectual property law and policy discourse.¹⁶³

Many utilitarian rationales of intellectual property prioritize the role of the individual in producing intellectual property with a concomitant focus on how society might best support that role through economic incentives encouraging intellectual property production and dissemination. The labor theory and economic perspectives of intellectual property fit into this characterization. In contrast, many deontological rationales of intellectual property prioritize the interests of society as a whole in the production and use of intellectual property, with a concomitant focus on how the

¹⁶⁰ *Id.*

¹⁶¹ See McGowan, *supra* note 83, at 2–3, 15–16 (“[E]xpression maximization. . .best explains. . .the rule that only expression may be copyrighted, not the idea that is expressed.”).

¹⁶² THOMAS DIETZ, *THE DRAMA OF THE COMMONS*, at 4 (National Academy Press 2002); see also Garrett Hardin, *The Tragedy of the Commons*, *SCIENCE*, Vol. 162, No. 3859 (Dec. 13 1968) 1243–48, 1244 (1968) (“Adam Smith . . . contributed to a dominant tendency of thought that has ever since interfered with positive action based on rational analysis, namely, the tendency to assume that decisions reached individually will, in fact be the best decisions for an entire society. . . . If the assumption is not correct, we need to reexamine our individual freedoms to see which ones are defensible.”).

¹⁶³ See, e.g., William Fisher, *supra* note 79, at 8 (“In contemporary philosophic debates, natural law, utilitarianism, and theories of the good are generally seen as incompatible perspectives.”). Various IP scholars have formulated perspectives toward the IP regime which would mitigate the tension between these competing theoretical rationales for IP protection. See e.g. ROBERT P. MERGES, *PHILOSOPHICAL FOUNDATIONS OF IP LAW: THE LAW AND ECONOMICS PARADIGM*, IN *ECONOMICS OF INTELLECTUAL PROPERTY LAW* 72, 91 (Ben Depoorter, Peter S. Menell, eds. Edward Elgar 2019). (“For many IP scholars the choice between deontology and consequentialism is difficult; each seems to capture something important about the field. Their instinct is to fight the binary choice, [to] compromise, to reconcile, to integrate.”)

law can most effectively regulate the activities of intellectual property producers toward the greatest societal good. Commons theory and Rawlsian distributive justice perspectives generally fall into this characterization.

Despite their divergent premises, both perspectives are ultimately concerned with identifying the most efficacious relationship between IP producers and society that will engender maximum intellectual property social utility. These differing perspectives can be reductively depicted as two simple equations:

Utilitarian Perspectives (Labor Theory, Law and Economics):

Production Incentives + Individual Intellectual Activity = Maximum IP

Deontological Perspectives (Commons Theory, Distributive Justice):

Social Regulation + Individual Intellectual Activity = Maximum IP

Both perspectives implicitly emphasize the conflict that can sometimes arise between the interests of IP producers and IP users. These perspectives needlessly pit the interests of the individual IP producer against that of the greater societal good, and too often lead to unhelpful “all or nothing” positions in many intellectual property law and policy controversies.¹⁶⁴

Professor Robert Merges has offered that the perceived tension between these alternative rationales can be resolved through an “operational integration” of these competing perspectives of IP protection. Professor Merges demonstrates how this can be achieved, either by relying chiefly upon one perspective (i.e., utilitarian consequentialist) and then employing an alternative perspective (Rawlsian deontologist) as a tempering restraint, or by “divid[ing] the methodological problem into two sharply delineated halves or levels”, which at the first level considers the societal need for IP protection and if such protection is warranted, at the second level the issue of how that protection might be best implemented is addressed.

The two-level approach is appealing because it recognizes the computational limits that the consequentialist argument for the existence of IP, yet preserves plenty of room for efficiency considerations. . . . Efficiency is an operational principle meant to best implement a decision made for other (non-efficiency) reasons. . . . It is a highly useful operational principle that can be deployed to help shape the precise contours of the IP system. It is not so powerful as to justify the system as a whole, but it is powerful enough to exert a strong influence on the way the system should be organized and administered.¹⁶⁵

¹⁶⁴ Cf. McGowan, *supra* note 83, at 70 (“Industry representatives make personal digital copying sound like Armageddon. User advocates make Congress and the industry sound like fascists or Javert-like monomaniacs. Both positions are exaggerated.”) with Lemley, *supra* note 82, at 1328 (effectively dismissing all deontological theories of IP protection). Wendy Gordon has similarly argued in support of balanced application of the natural rights rationale of intellectual property protection, explaining how “[n]atural rights theory. . . is necessarily concerned with the rights of the public as well as with the rights of those whose labors create intellectual products.” Gordon, *supra* note 80, at 1535.

¹⁶⁵ Merges, *supra* note 140, at 92.

Just as Professor Merges' approach reconciles these competing rationales, IP Social Justice transcends the polarized "IP producer vs. the Public" dialectic altogether. Under Intellectual Property Social Justice, individual property right incentives are not conceived of as being in conflict with broad IP social utility objectives, but rather are understood as one component, albeit a very significant one, of a larger apparatus designed to achieve these objectives.¹⁶⁶ This approach not only diffuses some of the contentiousness engendered by the bipolar winners/losers approach inherent in alternative theories, but also has the virtue of comporting better with the motivations of intellectual property producers. The potential for personal economic gain does not encompass the full range of a person's possible motivations in making and distributing intellectual property; artists and inventors are not necessarily driven exclusively by either economic greed or social altruism.¹⁶⁷ Moreover, even a person motivated by what can be viewed as predominantly pecuniary interests may well be motivated by more than a selfish focus on *personal* economic gain. People can be and are sometimes driven by goals and aspirations for communal economic "uplift" and empowerment writ large.¹⁶⁸

Accordingly, Intellectual Property Social Justice contemplates intellectual property protection as a balanced system of symbiotic incentives and constraints intended to maximize the social benefits, including economic benefits, of intellectual property endeavor:

Utilitarian Incentives + Individual Intellectual Activity + Deontological Regulations
= IP Social Utility and Social Justice

Intellectual Property Social Justice thus offers a unified theoretical underpinning for intellectual property protection, one which encompasses both utilitarian interest-based property rights and deontological moral obligations. The ubiquity of the Idea Exclusions across the entire IP ecosystem confirms the validity of this perspective toward the concepts of social utility and social justice as complimentary aspira-

¹⁶⁶ See DANIEL J. GERVAIS, *Intellectual Property and Human Rights: Learning to Live Together*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 14 (Paul Torremans ed., Kluwer L. Int'l 2008) ("[N]ow that intellectual property has entered the house of trade law, it may not be possible to [dethrone economic analysis]. Yet, in the very spirit of law & economics, it may be useful to question the *monopoly* of economic analysis on the theoretical discourse surrounding the foundations and evolution of copyright policy.")

¹⁶⁷ See, e.g., Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Intellectual Property*, 15 Harv. J.L. Tec. 454, 475 (2002) ("As long as some inventors respond to monetary rewards, the argument that intellectual property law spurs innovation still stands. [However] basing intellectual property on the policy of stimulating progress through monetary rewards fails to answer some basic questions and creates an impoverished copyright and patent law. . . . '[P]romoting progress' necessarily entails addressing some fundamental questions of redistributive justice.")

¹⁶⁸ See generally, John Sibley Butler, *Entrepreneurship and Self-Help Among Black Americans* (State University of New York Press, Albany 1991). See also Vats, *supra* note 125, at 777 ("A number of scholars have also undertaken consideration of the extent to which human rights regimes might be used to re-conceptualize and remake intellectual property law. . . . [and] expanding the scope of intellectual property rights regimes for the benefit of those in the developing world. . . . The human rights approach is an example of a practical intervention into intellectual property law.")

tions of a unified theory of an optimized intellectual property regime.

Conclusion

“Now there must be some rightful means by which the individual may appropriate for consumption from the common stock.”—Henry Moulds¹⁶⁹

Intellectual Property Social Justice provides an aspirational rationale for intellectual property protection which encompasses broad deontological goals of social progress and advancement, to be achieved in part through utilitarian mechanisms of property right production incentives. The acknowledgement of the Idea Exclusions as endemic to intellectual property protection confirms the core Intellectual Property Social Justice thesis that the concepts of social utility and social justice are fundamentally and symbiotically intertwined in the intellectual property ecosystem. A principal component of the IP social equipoise apparatus, the Idea Exclusions manifest the Intellectual Property Social Justice precepts of access, inclusion, and empowerment, which promote diverse and global participation in and respect for the intellectual property regime.

¹⁶⁹ Henry Moulds, *Private Property in John Lock's State of Nature*, 23 AM. J. OF ECON. & SOC. 179, 179 (1964).