

SEEKING TRUTH IN NONFICTION: QUANTITY VERSUS QUALITY IN PROMOTING THE “USEFUL ARTS”

*Roger Stronach**

“True ideas are those that we can assimilate, validate, corroborate, and verify. False ideas are those that we cannot.”

William James, *The Meaning of Truth*¹

INTRODUCTION

The story could have been made for television.² At 4:00 a.m., a knock and an announcement that it was the police with information about a traffic accident prompted Jane Mackle to open the motel door. Jane’s daughter Barbara had fallen ill during finals period at Emory University in Atlanta, and Jane had come to pick her up for winter break earlier than planned. Barbara’s boyfriend had stopped by earlier, and the two feared the worst about the supposed “accident.” But when Jane opened the door, she was confronted, not with a police officer, but with the barrel of a shotgun. As she stumbled back, Jane was swiftly chloroformed, and Barbara was taken away, buried alive in a box in the woods, and held for ransom. After Jane came to, bound and gagged alone in the hotel room, she stumbled out to her car, where she banged her head against the horn until somebody

* J.D. Candidate, 2015, University of Pennsylvania Law School; B.A., 2011, University of Pennsylvania. I owe serious gratitude to Gideon Parchomovsky for his feedback throughout this work in progress.

1 WILLIAM JAMES, *THE MEANING OF TRUTH: A SEQUEL TO PRAGMATISM*, at v–vi (1909), available at www.authorama.com/meaning-of-truth-1.html (last updated Jan. 2004).

2 The facts presented in this paragraph are derived from a story told in three weekly installments during May 2013 in the NORTH PORT SUN, a local Florida newspaper, to commemorate the 45-year anniversary of the kidnapping. See Diana Harris, *\$500,000 Ransom Paid to Mackle Kidnapper*, ENGLEWOOD SUN, May 25, 2013, at B7; Diana Harris, *Mackle Kidnapper Captured Near El Jobean*, NORTH PORT SUN, June 1, 2013, at B5; Diana Harris, *The Kidnapping of Barbara Mackle*, NORTH PORT SUN, May 18, 2013, at B15. Additional information can be found in Michael Thomas Barry, *Buried Alive – The Kidnapping of Barbara Jane Mackle – 1968*, CRIME MAGAZINE (Dec. 17, 2012), <http://www.crimemagazine.com/buried-alive-kidnapping-barbara-jane-mackle-1968>, and in CATHERINE COLE & CYNTHIA YOUNG, *TRUE CRIME: FLORIDA – THE STATE’S MOST NOTORIOUS CRIMINAL CASES 25–36* (2011).

came to help. Eventually, after over three days underground, twenty-year-old Barbara was rescued by the FBI.

As it turns out, the Barbara Mackle kidnapping was, in fact, made into a direct-to-television movie³—but not before a high-profile legal dispute had pit the co-author of Barbara’s memoir, *Miami Herald* reporter Gene Miller, against a film studio that had stolen much of Miller’s factual research.⁴ *Miller v. Universal City Studios, Inc.* was one in a series of 1980s courts of appeals cases that strictly applied the 1976 Copyright Act’s prohibition against granting copyright protection for ideas, concepts, principles, or discoveries.⁵ Although *Miller* held that copyright could not protect research itself,⁶ other prominent cases—most notably *Hoehling v. Universal City Studios, Inc.*⁷ and *Nash v. CBS, Inc.*⁸—ruled that even the theories proposed by authors to explain such ideas, concepts, or factual discoveries could not be copyrighted.⁹ Copyright scholars cried foul. How could such works of nonfiction, they protested, be granted so little protection relative to works of fiction or factual compilations?¹⁰ After all, works of nonfiction were es-

³ Several movies, actually. For an amusingly acted but nonetheless accurate (and free) motion picture account of the events, see InfamousCrimes, *FBI: The Untold Stories—Barbara Jane Mackle Kidnapping 1*, YOUTUBE (Mar. 19, 2011), http://www.youtube.com/watch?v=_fyxdcZuTdQ; InfamousCrimes, *FBI: The Untold Stories—Barbara Jane Mackle Kidnapping 2*, YOUTUBE (Mar. 19, 2011), <http://www.youtube.com/watch?v=AQWiW7Cuevo>; InfamousCrimes, *FBI: The Untold Stories—Barbara Jane Mackle Kidnapping 3*, YOUTUBE (Mar. 19, 2011), <http://www.youtube.com/watch?v=xpUnO8t3-8w>.

⁴ *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

⁵ See 17 U.S.C. § 102(b) (2012) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

⁶ *Miller*, 650 F.2d at 1367 (“[T]he verdict for plaintiff must be reversed and the cause remanded for a new trial because . . . the case was presented and argued to the jury on a false premise: that the labor of research by an author is protected by copyright.”).

⁷ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

⁸ *Nash v. CBS, Inc.*, 899 F.2d 1537 (7th Cir. 1990).

⁹ *Nash*, 899 F.2d at 1542 (holding that “historical facts” are “among the ‘ideas’ and ‘discoveries’” that the copyright statute does not protect); *Hoehling*, 618 F.2d at 974 (holding that interpretations of a historical event, even if purely investigative and not proven to be true, are not copyrightable as a matter of law).

¹⁰ See, e.g., Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 535 (1981) (“[T]o state that facts are simply not copyrightable is to ignore the entire thrust of the compilation cases . . .”); Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoehling v. Universal City Studios*, 29 J. COPYRIGHT SOC’Y U.S.A. 647, 697 (1982) (“An historical account is not a directory listing of every known event in a given time. Rather, it embodies the historian’s selection, from a mass of data, of facts which the author deems salient, and arrangement of these facts in a manner which supports the vision of the past the author wishes to portray. . . . Therefore, historical theories and narrations satisfy the threshold copyright requirement of originality.”)

pecially in need of production and dissemination to the public;¹¹ if anything, they should be especially incentivized by copyright protection. And in any event, as one scholar noted, resort to statutory interpretation notwithstanding, how could “[a] copyright system that has evolved for nearly three centuries . . . [fail to] offer, if not an intricate calculus, at least the broad outlines of a coherent response to such an ordinary quarrel” as was posed by the parties in the *Miller* case?¹² As such, these scholars devised various methods by which to increase the protection granted to works of nonfiction.¹³ The current system, they asserted, simply was not working.

It has been over thirty years since the *Miller* case was decided, and copyright scholarship has moved along to brighter undertakings. Protection has been granted to architectural works¹⁴ and computer programs.¹⁵ The merits and drawbacks of recognizing an artist’s moral rights regarding her works have been debated.¹⁶ Copyright

(footnote omitted)); Robert A. Gorman, *Fact or Fancy? The Implications for Copyright—The Twelfth Annual Donald C. Brace Memorial Lecture* 29 J. COPYRIGHT SOC’Y U.S.A. 560, 593 (1982) (“The *Hoehling* court, in its zeal to implement the dissemination of historical works, surely went further than it had to when it cautioned that ‘absent wholesale usurpation of another’s expression, claims of copyright infringement where works of history are at issue are rarely successful,’ and when it suggested that summary judgment for the defendant might be granted so long as his work is not ‘virtually identical’ in expression to that of the plaintiff.” (footnote omitted) (quoting *Hoehling*, 618 F.2d at 974, 980)).

¹¹ See *infra* notes 46–51 and accompanying text.

¹² Denicola, *supra* note 10, at 516. I should note that Professor Denicola similarly started his article with the *Miller* case.

¹³ See, e.g., Denicola, *supra* note 10, at 542 (advocating for the protection of the selection and arrangement of the facts used by authors of nonfiction, coupled with increased use of the fair use defense); Ginsburg, *supra* note 10, at 661–62, 665–66, 671–73 (suggesting that courts treat works of historical nonfiction as they do creative and artistic literary works, implementing a *scènes à faire* ideology and abstraction-filtration-comparison test introduced by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930)); Gorman, *supra* note 10, at 561–62, 579–80 (concluding that a broader grant of copyright, coupled with increased reliance on the fair use defense, would provide the best method for streamlining protection granted to works of nonfiction).

¹⁴ 17 U.S.C. § 102(a)(8) (2012).

¹⁵ *Id.* § 102(a)(1). Computer programs are considered “literary works.” See, e.g., *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (holding that object code is a literary work because such “expression” includes not just words “but also ‘numbers, or other . . . numerical symbols or indicia’” (omission in original) (quoting 17 U.S.C. § 101) (1982)).

¹⁶ *Compare* *Gilliam v. ABC, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”), *with* *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 47 (1st Cir. 2010) (applying “the Visual Artists Rights Act, . . . [which] . . . protects the ‘moral rights’ of certain visual artists in the works they create, consistent with Article 6bis of the Berne Convention” (citing 17 U.S.C. § 106A) (2006)).

scholars have found new sources for discussion, as the mod topics in copyright have shifted from fair use, to functional expression and computer software, to comparative law and moral rights.

Yet, the unique treatment of nonfiction within the American copyright scheme remains unexplained. Certain aspects of nonfiction such as facts, ideas, methods, systems, and concepts continue to be left unprotected;¹⁷ at the same time, nearly every aspect of a work of fiction garners strong protection.¹⁸ The natural consensus is still to approach the question from a numbers standpoint; we want more works of nonfiction, so we should bolster the protection that authors of nonfiction receive for their works. The old adage that copyright protection succeeds whenever a new work is created still controls. The more works we can incentivize, so it seems, the better. And as a result, works of nonfiction continue to appear under-protected.

In this Comment, I hope to redefine some of the underlying assumptions about the purpose of the American copyright system. The United States Constitution grants Congress the power to “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”¹⁹ The purpose of copyright, as defined by the Constitution, is to enhance the public body of knowledge.²⁰ Because the Constitution makes it clear that copyright is meant to promote the progress of science and useful arts, and because works of nonfiction have the primary purpose of informing the public of facts, theories, and ideas, such works of nonfiction can be especially “useful” to this constitutional purpose, but only if they are accurate. Once this purpose is properly understood, an alternative method for measuring the utility of a work of nonfiction likewise emerges—one that takes into account not just the *quantity* of nonfiction works being produced, but also the *quality* of such works.

This alternative—and I think more complete—view of nonfiction helps explain some of the intricacies of the modern copyright system, including our treatment of speculative works and statistical analyses. It also shifts some of the typical justifications and understandings at-

17 See, e.g., *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 110 (2d Cir. 2007) (holding that the New York Mercantile Exchange’s settlement prices, which are used to value its customers’ positions, were not copyrightable because “enforcing the copyright . . . would effectively accord protection to the idea itself”).

18 See, e.g., *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at *7–8 (C.D. Cal. Apr. 25, 1989) (upholding protection for the character “Rocky,” regardless of the background story).

19 U.S. CONST. art. I, § 8, cl. 8.

20 See *infra* text accompanying notes 24–45.

tributed to our system of copyright, adding another purpose to the idea-expression dichotomy and supplying another reason to support the fair use defense—the accuracy of an asserted fact can never be ascertained if that fact is locked away from critique for upwards of a century. More generally, this alternative view recalibrates the “balance” that courts have struggled to create between incentivizing new factual works by granting monopolies and permitting new factual works by leaving our limited supply of facts and ideas open for use.

To be clear, this Comment will not attempt to draw those lines or strike that balance; as Judge Frank Easterbrook said in *Nash v. CBS*, “[n]either Congress nor the courts has the information that would allow it to determine which [rule] is best. Both institutions must muddle through, using not a fixed rule[,] but a sense of the consequences of moving dramatically in either direction.”²¹ Nor will this Comment debate the constitutionality of the current copyright system. Instead, this Comment will describe the copyright system that we do have through the lens of a new understanding. How does the constitutional purpose driving our copyright system inform the “usefulness” of a particular work, and how might works of nonfiction turn out to be especially suitable for this purpose? Does our copyright system treat that measure of utility with uniformity? Does it only incentivize “useful” works, weeding out those works that are either preempted or detrimental, or does it incentivize all works in hopes that something useful is produced? Might this explain the different treatment that nonfiction has received vis-à-vis other copyrightable works? This Comment will primarily answer these questions with an eye for explanation, not proscription.

As such, the Comment will proceed as follows: In Part I, I will discuss the purpose given to the American copyright system in the United States Constitution, and how this purpose—to encourage learning and enhance the body of knowledge held in the public domain—is particularly well-served by the creation and dissemination of accurate works of nonfiction. In Part II, I will discuss the problems associated with ensuring, via copyright protection, that such accurate works of nonfiction are produced. In Part III, I will briefly illustrate the modified theory of copyright protection that results when these insights about nonfiction are added to the current copyright structure. In Part IV, I will apply this new theory descriptively, explaining how the question of copyright protection for certain works such as speculative accounts might be answered and addressing the inconsistent case law

²¹ 899 F.2d 1537, 1541 (7th Cir. 1990).

surrounding the copyrightability of various types of nonfiction works. Finally, I will summarize and conclude.

I. THE SPECIAL CONSTITUTIONAL UTILITY OF A WORK OF NONFICTION

Works of nonfiction hold a special position in the copyright scheme. They find and explain ideas and facts, often using particular theories or hypotheses.²² Their purpose, to generate knowledge and understanding, is aligned with the purpose that the Constitution's Framers assigned to the copyright system itself—to promote progress and “encourage[] . . . learning.”²³ If a work of nonfiction fulfills its explanatory purpose, it adds to the public body of knowledge and is therefore a highly useful²⁴ product of copyright. If the nonfictional work contributes no knowledge or shrouds understanding by being incorrect or misleading, it damages the public body of knowledge. Works of nonfiction are thus unique in their ability to both fulfill and compromise the Constitution's goals for the copyright system. As such, they should be treated with care.

A. The Constitution and Copyright as a Means to an End

This Comment, of course, proceeds from the standpoint that American copyright law is utilitarian; temporary monopolies entice individuals to share their “genius”²⁵ now, and this addition to intellectual progress benefits society in the long run.²⁶

²² Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1570 (1963) (explaining that “the three components of the intellectual product—the ideas, their patterning, and their ultimate expression—are generally all originated by the author” in artistic works, while “fact works” like “maps, news and historical accounts, [and] directories” are created with the more limited purpose of being “intelligible and useful to others.”).

²³ Act of May 31, 1790, ch. 15, 1 Stat. 124 [hereinafter Copyright Act of 1790] (repealed 1802).

²⁴ Nonfiction's usefulness for the copyright system exists independently of any definition of “useful Art,” which is debatable. Here, I use “useful” to mean “serviceable for an end or purpose.” See *Useful*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/useful> (last visited Apr. 08, 2015). The United States Constitution assigned copyright with the purpose of promoting progress in the fields of science and useful arts. Nonfiction shares this purpose with copyright; thus, a successful work of nonfiction that fulfills its explanatory purpose is—by definition—a useful product of copyright.

²⁵ See *infra* text accompanying note 28.

²⁶ See, e.g., Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 453 (2004) (“Throughout the history of copyright law, supporters of the natural law property right view and supporters of the public benefit view have competed to control the course of copyright protection.”).

This was the standpoint taken by the Framers of the Constitution. From its introduction in the American colonies, copyright was meant to encourage intellectual progression.²⁷ In 1783, Hugh Williamson of North Carolina urged the Continental Congress to form “a committee . . . to consider the most proper means of cherishing genius and useful arts through the United States by securing to authors or publishers of new books their property in such works”²⁸ This language was largely mirrored in the Constitution itself:²⁹ Article I, Section 8, Clause 8 grants Congress the power to “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.”³⁰

This rationale likewise pervaded the first Copyright Act. Within a year of the Constitution’s ratification in June 1788, Congress received several individual requests for grants of copyright protection for various works.³¹ President Washington urged Congress in his State of the Union that “nothing . . . [could] better deserve [their] patronage than the promotion of science and literature.”³² Soon thereafter, the first patent and copyright acts were passed—the patent act requiring

In the United States, the Constitution embraced the public benefit rationale.”). In support of that viewpoint, some scholars have pointed to the Intellectual Property Clause’s unique structure and wording within Section 8 of Article I; they view “[t]he Framers’ choice not to adopt the plenary proposals [forwarded by Madison and Pinckney], but rather to subject their exercise to specific ends . . . [as evidence] that the Progress Clause was added as a limitation.” Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1777 (2006). Others more tamely recognize that “[t]he objective of the copyright system is to create a social and economic climate which will encourage the creation and dissemination of [certain] material.” Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 35 (1983). Either way, these steps toward a national copyright scheme all indicate that copyright exists as a tool with the specific purpose of benefiting the public body of knowledge.

27 Indeed, this utilitarian view of copyright likely had its roots in England, where upon considering a bill supported by copyists to “change the term of copyright for all books, old and new, to twenty-one years” from a term of fourteen years, “one anonymous pamphleteer said: ‘I see no Reason for granting a further Term now . . . it will be a great Cramp to Trade[] [and] a Discouragement to Learning’” Tyler T. Ochoa and Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC’Y U.S.A. 675, 682 (2002) (footnote omitted).

28 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 19 (1994), (quoting 24 J. CONTINENTAL CONG. 180 (1783)) (internal quotation marks omitted), available at <http://digital-law-online.info/patry/>.

29 Arguably, “cherishing genius” could be read similarly to “promote the Progress of Science and useful Arts,” but the latter is certainly more clearly focused on public benefit than private natural property rights.

30 U.S. CONST. art. I, § 8, cl. 8.

31 See PATRY, *supra* note 28.

32 *Id.* (quoting S. JOURNAL, 1st Cong., 2d Sess. 93–94 (1790)).

full disclosure of methods and an ex ante screening for novelty,³³ and the preamble of the copyright act noting that the copyright act prefaced by a preamble noting that copyrights existed “for the encouragement of learning.”³⁴

Some theorists have argued that the purpose of the copyright system is to protect the “natural right” that a person has to her own intellectual creations.³⁵ Indeed, James Madison may have acknowledged such a right in *Federalist No. 43* when he noted that “[t]he public good fully coincides in both cases with the claims of individuals.”³⁶ But while such a viewpoint was acknowledged at the time the Framers first conceived of the copyright and patent systems, it was not the primary impetus driving the Framers to establish basic intellectual property protection.³⁷ In a letter to Thomas Jefferson addressing Jefferson’s contention that “the benefit even of limited monopolies is too doubtful to be opposed to . . . their . . . suppression,”³⁸ James Madison asserted that while “Monopolies . . . are justly classed among the greatest nuisances [sic] in Government . . . as encouragements to literary works and ingenious discoveries, they are . . . too valuable to be wholly renounced”³⁹ The focus of the federal copyright system was seen as different from some of the systems already being used by the colonies.⁴⁰ Indeed, the addition of a preamble to the be-

³³ Patent Act of April 10, 1790, ch. 7, 1 Stat. 124 [hereinafter Patent Act of 1790] (repealed 1793).

³⁴ Copyright Act of 1790, *supra* note 23.

³⁵ This viewpoint is typically rooted, at least in some sense, in John Locke’s Labor Theory, whereby one’s creations become one’s property. A modern interpretation is that regardless of whether a natural property right was used by the Framers to justify the copyright system, such a natural right theory could be implemented to justify intellectual property without forgetting about “the rights of the public as well as with the rights of those whose labors create intellectual products.” Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993). This modern interpretation links copyright with the First Amendment right to free expression. *See id.* at 1537–38.

³⁶ THE FEDERALIST NO. 43 (James Madison).

³⁷ Not only do period documents reject the notion of a natural property right, but so did the early courts. *See, e.g.,* *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 591 (1834) (“That a man is entitled to the fruits of his own labours must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.”).

³⁸ Letter from Thomas Jefferson to James Madison (July 31, 1788), in THE PAPERS OF THOMAS JEFFERSON 443 (Barbara B. Oberg & J. Jefferson Looney eds., Digital Edition 2015), available at <http://rotunda.upress.virginia.edu/founders/TSJN-01-13-02-0335>.

³⁹ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 21 (Julian P. Boyd et al. eds., 1958).

⁴⁰ As has been noted by William Patry, “the federal statute . . . seems to have appealed to a different class of authors than the colonial statutes. Under the previous regime of state laws, literary and musical works constituted the bulk of registrations. By contrast, under

ginning of the Intellectual Property Clause was unusual among other Article I, Section 8 powers,⁴¹ and was likely considered an ideological limitation on Congress's power.⁴² Moreover, the first copyright act actually encouraged the piracy of foreign works—seemingly completely renouncing a “natural right.”⁴³ So while the Framers acknowledged an individual's *claim* to her intellectual property, there was no universal *right* to such property. Rather, any property protection that was granted via copyright was a privilege bestowed as a means to an end.⁴⁴ This purpose still drives the copyright system today.⁴⁵

at least the early years of the federal statute, practical or commercially useful books, such as works of instruction, textbooks, manuals, geographical atlases, and commercial directories, constituted the bulk of the registrations.” PATRY, *supra* note 28, at 34.

41 See, e.g., Dotan Oliar, Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power, 94 GEO. L.J. 1771, 1775 (2006). The Clause received special attention from Framers who chose “not to adopt the plenary proposals [forwarded by Madison and Pinckney], but rather to subject their exercise to specific ends.” *Id.* at 1777.

42 The preamble eschewed proposals forwarded by nationalists like Madison and Pinckney. *Id.* at 1777. Cf. Edward C. Walterscheid, *The Remarkable—and Irrational—Disparity Between the Patent Term and the Copyright Term*, 83 J. PAT. & TRADEMARK OFFICE SOC'Y 233, 244 (2001) (“Early on in its history, the grant of power was frequently thought to reside in the phrase ‘To promote the Progress of Science and useful Arts,’ with the phrase ‘by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’ serving as a specific limitation on the general grant of power to only the specific mode of patents and copyrights. In more recent times, the interpretation has tended to be reversed . . .”). This viewpoint is certainly plausible; the court in *Wilson v. Rousseau*, for example, notes with clarity: “Congress shall have power. What power? Power to promote the progress of science and useful arts. How? By securing the exclusive right of property in writings and discoveries. To whom? To authors and inventors. For how long? For limited times.” *Wilson v. Rousseau*, 30 F. Cas. 162, 166 (C.C.N.D.N.Y. 1845). But no matter whether the first or the second half of the Intellectual Property Clause is viewed as operative, the clause “is in fact a substantive grant of power to Congress, and the introductory portion thereof may not be read out of it and rendered meaningless.” Walterscheid, *supra* at 248.

43 See Copyright Act of 1790, *supra* note 23, § 5 (“[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.”). Indeed, this lack of enforcement against piracy lasted until 1891. PATRY, *supra* note 28, at 33.

44 *Accord* Ochoa & Rose, *supra* note 27, at 692; see also COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 8 (1973) (cited by PATRY, *supra* note 28, at 21 n.64) (“As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind: Therefore, to encourage the publication of literary productions, honorary and beneficial to the public . . .”

B. The Special Ability of Works of Nonfiction to Uphold This Purpose

Given that the Framers saw copyright as a means by which to promote the progress of science and useful arts through the “encouragement of learning,” works of nonfiction are uniquely positioned to fulfill the copyright system’s constitutional purpose. Said copyright scholar Robert Gorman, “[t]he photographs of [a] model, although reproductions of a ‘fact,’ partake of an artistic conception; the photographs of the medical operation partake more of a representation of facts within the public domain, the free dissemination of which is of greater significance to society.”⁴⁶ Gorman was implying a distinction necessarily left undefined in the Constitution’s copyright scheme—that some works comprise “science” or “useful arts” while some do not.

Today, as copyright has expanded to cover more and more subject matters, its connection to the progress of science and useful arts has become increasingly tenuous.⁴⁷ Within this large body of copyrighta-

(footnote omitted)). This suggests that the acknowledgement of such property rights was a means to an end.

45 See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.” (internal quotation marks omitted)). Of course, the broad expansion of the copyright system and introduction of new doctrines such as VARA suggest that it may no longer be the *only* justification for copyright.

46 Gorman, *supra* note 22, at 1599–1600.

47 On the one hand, the expansion of copyright may just reflect the expansion of methods by which copyrightable material can be delivered. Said Congress in discussing the 1976 Act,

During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

H.R. REP. No. 94–1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660. In this sense, technologies increasingly made those entities originally intended for copyright—books, information, charts, maps—available via an increasing number of devices.

But on the other hand, this was only one of two of Congress’s reasons for expanding copyright protection: “Scientific discoveries and technological developments have made possible new forms of creative expression that never existed before . . . [i]n other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.” *Id.* at 5664. Thus, many new copyrightable subject matters have been introduced for no reason other than to expand the body of copyrightable works, perhaps beyond the bounds of those that “promote the progress of science and useful arts.” Indeed, pornographic films regularly attain copyright protection, and while they have utility in the hedonic, Benthamian sense, they hardly encourage learning.

ble works, works of nonfiction more clearly stand out as the most “useful” “works of genius” that can be given to the public body of knowledge. Creative works such as a painting or sculpture might induce reflection, encourage study, or refine thought—perhaps encouraging learning as a side effect. Even a blockbuster motion picture can generate thought.⁴⁸ But these influences only indirectly contribute to “learning,” if at all. By contrast, works of nonfiction take the Constitution’s goals as their own. A work of nonfiction seeks literally to progress our understanding of facts, ideas, and discoveries, or to encourage learning by making those facts and ideas easier to digest. So while the constitutional utility⁴⁹ of a creative work is typically just peripheral, the utility of a work of nonfiction is obvious.

Unfortunately, with great value comes great risk.⁵⁰ Just as works of nonfiction have the greatest potential to increase public knowledge and understanding, they also have the ability to mislead or taint public knowledge if they are incorrect. Even subtle misinterpretations can have lasting effects.⁵¹ So while works of nonfiction can be ex-

Whatever Congress’s motives, many courts such as the Supreme Court in *Bleistein v. Donaldson Lithographing Co.* have shirked this issue entirely by saying that the courts are not involved in judging what is or is not a proper subject for copyright protection in the first place—no matter what mode by which they are being displayed or delivered. 188 U.S. 239, 251 (1903). While a further discussion would be fun, it is beyond the scope of this Comment.

⁴⁸ See, e.g., Nico Lang, *25 Movies That Will Change Your Life (Vol. 1)*, THOUGHT CATALOG (June 19, 2013), <http://thoughtcatalog.com/nico-lang/2013/06/25-movies-that-will-change-your-life-vol-1/>; brantwilson, *39 Mind Blowing Videos for Your Inspiration*, DZINEBLOG (Jan. 13, 2011), <http://dzineblog.com/2011/01/39-mind-blowing-videos-for-your-inspiration.html>; *Movies That Changed My Life*, TUMBLR, <http://movies-that-changed-my-life.tumblr.com/> (last visited Feb. 20, 2015). Of course, nonfiction documentaries can do the same. See Sam Austin, *10 Mind Blowing Documentaries*, LIVE LEARN EVOLVE (Jan. 22, 2014), <http://livelearnevolve.com/10-mind-blowing-documentaries/>.

⁴⁹ See *Useful supra* note 24; here, *utility* measures how significantly a particular work forwards the goal of the copyright system.

⁵⁰ Of course, with great risk comes great reward—but if we had the chance to mitigate risk without reducing reward, we would take it.

⁵¹ See, e.g., countrycat, *Lies My Alabama History Book Told Me—Part 1 “Slavery as Social Security”*, LEFT IN ALABAMA (Jan. 24, 2011, 6:41 PM), <http://www.leftinalabama.com/diary/7621/lies-my-alabama-history-book-told-me-part-1-slavery-as-social-security> (quoting CHARLES GRAYSON SUMMERSELL, ALABAMA: HISTORY FOR SCHOOLS 229 (1960)). I should note that the blog post, *Lies My Alabama History Book Told Me* is likely influenced by JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG (1995). In one passage of ALABAMA: HISTORY FOR SCHOOLS, as recorded by countrycat, Summersell writes: “The master supervised both the driver and the overseer. Occasionally, a master had a pair of binoculars and watched distant workers from the upper story of his plantation house. Thus the stage was set for some lazy field hand who went to sleep beside his job to get the surprise of his life from the master who had been watching him with the field glasses!” Presumably, Summersell’s book was copyrighted. But how *much* of it is protected? Is the “fact” that slave drivers and overseers

tremely useful, they—more so than creative works—can also be destructive. As such, our copyright system must be cognizant about the true utility of the factual works it protects. If treated properly, works of nonfiction have a special ability to fulfill the task assigned to the American copyright system by the Constitution.

C. Accuracy as a Measure of a Nonfiction Work's Success

The easiest interpretation of copyright's utility is to assume that as more copyrightable works are produced, the public benefit increases.⁵² But when applied to works of nonfiction—arguably the most important works to the public good⁵³—this traditional rationale falls short of fully explaining what the “public good” requires. Unlike creative works, which generally seek to entertain, provoke, or amuse rather than to inform, these works of nonfiction only really contribute to the public good if they are correct. A creative work that falls flat does not detriment the body of public works, whereas an “informative” factual work that turns out to be incorrect is misleading and counterproductive, providing faulty foundations for future works or public understanding. Measuring the success of the copyright system in incentivizing works of nonfiction therefore requires something aside from “more is better.”

were supervised by a master protected? The “idea” that slaves were just lazy field hands? How about the “theory” that a lazy field hand would receive “the surprise of his life” if he fell asleep? Which of these “facts,” “ideas,” and “theories” *should* be protected by copyright? Are any of them “useful” contributions to the public body of knowledge? Does it matter? You bet it does. The Summersells were well-respected in Alabama. *See, e.g.,* Greg Retsinas, “Community Treasure” *Frances Summersell Dies*, TUSCALOOSANEWS.COM (Jan. 17, 2003, 03:30 AM), <http://www.tuscaloosaneews.com/article/20030117/NEWS/301170340>. Summersell's book was likely well-respected too. Thanks to Sara Arrow, Penn Law, J.D. 2015, for pointing me to Loewen's book.

52 With respect to our modern focus on artistic and creative works, this rationale makes sense. Since the “utility” we gain from artistic works is largely rooted in those works' entertainment value, such utility increases as more works are created. An unentertaining work does not deplete the body of entertaining works; it simply does not contribute much.

53 This assumes the societal preference for “learning” that was attributed by the Constitution. Of course, many individuals would find more entertainment value in watching a blockbuster movie than they would in reading a groundbreaking article. Likewise, American society as a whole may prefer the blockbuster movie because it generates more revenue and worldwide cultural prestige than an article. But to parse out individual preferences such as this is an exercise in behavioral economics, and again approaches the Benthamian hedonics that lie beyond the scope of this article. And in any event, such economic considerations are foreclosed here since we agreed to the goals expressed in the Constitution when we ratified it. In the aggregate, informational works of fact are more “useful” to realizing the goals stated in the Constitution than are artistic and creative works.

Another reason that works of nonfiction must be accurate is that they are not standalone. The societal “learning”⁵⁴ that our Framers wanted copyright to enhance should require not just *breadth* of knowledge, but also *depth* of understanding. Works of nonfiction certainly work to expand our breadth of knowledge by introducing facts, ideas, and discoveries, but at the same time, their aim is to enable our understanding of those facts and discoveries through theory, hypothesis, and explanation. Intellectual progression naturally follows a path; works of nonfiction build upon the insights provided by previous factual works. Increased but inaccurate information is not useful.⁵⁵ Of course, as the number of potential theories increases, the likelihood that any one of those theories propounds the correct interpretation of a set of facts also goes up.⁵⁶ But how could we ever figure out which of a multitude of theories is correct? In the end, the utility that the public derives from certain protected works therefore stems not just from the *quantity* of the production that is induced, but also from the *quality* of those particular works. And the production of *more* works of nonfiction is not useful unless we can identify the *accurate* information resulting from that production. This begs the question—given that nonfiction is simultaneously useful and dangerous, can the copyright system differentiate the various works of nonfiction by accuracy? And if so, has it?

II. TESTING THE UTILITY OF A WORK OF NONFICTION

A. *A Comparison of the Patent and Copyright Systems*

If the purpose of the copyright system is the encouragement of learning, the means is through incentivizing the progress of science and useful arts, and the measure of success—at least for a work of nonfiction—partially relies on that work’s accuracy then the copyright system should aim to incentivize factual works that are accurate. If this is the case, why is accuracy not a prerequisite for copyright protection like it is for patent protection? The answer is that while the

⁵⁴ Copyright Act of 1790, *supra* note 23.

⁵⁵ For example, one well-written and accurate history of Europe is more beneficial to the public body of knowledge than ten “unique” but poorly researched and implausible accounts.

⁵⁶ Aristotle said that “the whole is greater than the sum of its parts.” But his “whole” required more than sheer numbers; it required *synergy*. Of course, sometimes even synergies just do not occur as one might expect. For centuries, individual clues pointed to a heliocentric view of the solar system. But only after Copernicus finally did the math did the viewpoint become more widely studied and eventually accepted.

utility of patentable works can easily be tested *ex ante*, the utility of copyrightable works cannot.⁵⁷

Congress first exercised its Section 8, Clause 8 power when it established a patent system in the Act of April 10, 1790.⁵⁸ The act sought to protect any “invented or discovered . . . useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used”⁵⁹ A month later, it established the copyright system in the Act of May 21, 1790. This was “[a]n act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”⁶⁰ The temporal proximity of the acts indicates a similarity of purpose. Both systems clearly endorsed “progress”—patents through the protection of inventions and discoveries “not before known or used” and copyrights through “maps, charts, and books” that “encourage[] . . . learning.”⁶¹ But the acts’ proximity also suggests that any differences in design between the two were intentional.⁶²

⁵⁷ The idea that patent law and copyright law should be compared is not without its skeptics. Some theorists vehemently assert that the patent and copyright systems should not be considered in tandem. *See, e.g.*, Olson, *supra* note 26, at 34 (“The limited nature of copyright protection . . . requires an emphatic rejection of any comparison with patents . . .”). Of course, this view ignores the reality that the courts do oftentimes consider the copyright and patent systems together. *See, e.g.*, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (“One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property.”). But more importantly, there are in fact reasons that the systems *should* be compared.

Ultimately, the primary reason to compare the copyright and patent systems is to provide context. Since the shared purpose of the patent and copyright systems in the United States is to encourage learning and promote the progress of science and useful arts, comparing the two systems sheds light on the strengths and weaknesses of copyright as a tool to incentivize progress. Within the specific context of this Comment, a cursory examination of the patent system will provide: (1) an understanding that the Framers clearly established patents and copyrights with the purpose of expanding the public body of knowledge through incentivizing the creation of *useful* works; (2) the reasons why factual works are therefore so instrumental to the copyright system; and (3) the inherent limitations of the copyright system in measuring utility.

⁵⁸ Patent Act of 1790, *supra* note 33.

⁵⁹ *Id.* at 16.

⁶⁰ Copyright Act of 1790, *supra* note 23, at 125.

⁶¹ Of course, there are a number of clauses in the Constitution that contain multiple powers. But the Intellectual Property Clause is different because no single portion of the clause has been exclusively developed by a specific branch of the intellectual property system; design patents, for example, arguably protect useful arts while copyright protection might cover a scientific article.

⁶² Since the Patent Act of 1790 and Copyright Act of 1790 were only passed a month apart from each other, and seemingly in direct response to a singular directive from President Washington that the “promotion of science and literature” was a cause that “deserve[d

As such, juxtaposing and comparing the two systems reveals how the different types of works each system targets require different measures of utility.

Though the copyright and patent systems were always similar in purpose, they were established with obvious functional differences.⁶³ The Patent Act, which applied narrowly to inventions, discoveries, or improvements that were “not before known or used,” established a rigorous process by which to attain protection,⁶⁴ creating from the outset many of the requirements that make up the modern patent system—utility, novelty, and an assurance that all knowledge would be contributed to the public domain via “best methods” disclosure.⁶⁵ Notably, the Patent Act was passed first. The features it contained were the tools the Founding Fathers initially looked to in providing a public benefit through the progress of science and useful arts. By contrast, the copyright system never demanded such rigorous proof of utility. The first Copyright Act, while requiring announcement and registration⁶⁶ of the work by the author seeking the copyright protection, did not require any explanation as to the principles or methods being used in the work and therefore did not contain a method by which to test for usefulness or novelty. This exclusion could not have been arbitrary. While a patentable object—a corkscrew, for example, or a vaccine—can be observed and judged for its qualities, many abstract theories or ideas, while capable of being described, cannot be tested *ex ante*.⁶⁷ Presumably, the Framers foresaw

their] patronage,” PATRY, *supra* note 28, at 28 (citing S. JOURNAL, 1st Cong., 2d Sess. 93–94 (1790)), the differences between the two were presumably intentional.

⁶³ Today, the patent and copyright systems are even more divergent. A patent is difficult to attain while a copyright adheres almost automatically; a patent for an object can only be granted to one person while identical copyrighted items can be individually created; a patent lasts twenty years while a copyright can last six times as long; a patent owner must fully disclose her technology while a copyright owner bears no burden to disclose her ideas—the differences continue.

⁶⁴ See Patent Act of 1790, *supra* note 33, at § 2 (requiring submission of “explanations and models” that were “so exact, as not only to distinguish the invention or discovery, from other things before known and used, but also to enable a workman or other person, skilled in the art or manufacture, whereof it is a branch, or wherewith it may be nearest connected, to make, construct, or use the same, to the end that the public may have the full benefit thereof, after the expiration of the patent-term . . .”).

⁶⁵ 35 U.S.C. § 101–12 (2012). These also include the concept of the “PHOSITA” (person having ordinary skill in the art). *Id.* § 103.

⁶⁶ The “author or proprietor shall, within two months from the date [of registration with the clerk of court], cause a copy of the said record [including the title of the work] to be published in one or more of the newspapers printed in the United States, for the space of four weeks.” Copyright Act of 1790, *supra* note 23, § 3.

⁶⁷ Of course, nowadays, many copyrightable works have no utility whatsoever in the strict sense of the word, and bear no relation to any facts, theories, or ideas. Indeed, this de-

this key distinction between the “science” and “literature” for which George Washington urged support.

While the Framers were not arbitrary in their construction of the early copyright system, they nonetheless failed to articulate any rules regarding those works of literature whose “utility” was arguably tied to scientific or theoretical accuracy. No provision in the first Copyright Act or any act thereafter directly addressed the treatment of theories, hypotheses, and facts—arguably bits of “science”—whose development or discovery were recorded in an otherwise copyrightable writing. No provision addressed the copyrightability of works that purported, for example, to describe history or detail a new branch of physiology. Certainly, the patent and copyright systems were considered equally important to the progress of science and the useful arts; both systems provided a term of fourteen years.⁶⁸ But given that the copyright system should theoretically incentivize accurate factual works, its lack of a test for such accuracy leaves room for enfeeblement of copyright as a purpose-driven system.

B. Determining Accuracy Through Discussion, Verification, and Refutation

In fact, the Framers probably could not have devised a test for accuracy or utility of a work seeking copyright protection even if they wanted to. Individuals in a government office cannot be tasked with adjudging what is and is not factually “true,” especially when it comes to novel or evolving topics of study.⁶⁹ Indeed, this is the very problem

velopment has encouraged some scholars to draw a fundamental distinction between the utilitarian purposes of the patent and copyright systems. See, e.g., Lateef Mtima, *So Dark the Con(tu) of Man: The Quest for a Software Derivative Work Right in Section 117*, 69 U. PITT. L. REV. 23, 38 (2007) (“Whereas significant utilitarian achievement and advancement is the goal of the patent law, the social utility objectives of the copyright law are quite different. To begin with, unlike patent protection, copyright protection is not dependent upon the demonstration of any ‘revolutionary advance.’” (citation omitted)). Of course, this viewpoint discounts two things: The modern evolution of the copyright system beyond its original bounds, and the inability of the copyright system to test for such a “revolutionary advance.”

⁶⁸ Copyright Act of 1790, *supra* note 23, § 1; Patent Act of 1790, *supra* note 33, at § 1. An author’s and inventor’s labors “may be equally beneficial to society; and in their respective spheres, they may be alike distinguished for mental vigour. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.” *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 591 (1834). The Supreme Court Justices who decided *Wheaton v. Peters* would be astonished at the disparate courses of the patent and copyright systems.

⁶⁹ Indeed, society may not itself be able to determine an ultimate truth. Says Professor Jane C. Ginsburg, even if an “historical truth . . . exists, it can never be discovered, because the same diversity of understanding, approach, and predilection which makes every personal-

with granting copyright protection to facts or ideas—entities that are strictly barred from copyright protection in the United States.⁷⁰ The only way that the accuracy or “truth” of a particular theory or exposition can be tested is through questioning, testing, discourse, and eventual consensus. Said William James in *The Meaning of Truth*, “[t]rue ideas are those that we can assimilate, validate, corroborate, and verify. False ideas are those that we cannot.”⁷¹

Therefore, if we want to promote the progress of science and useful arts by incentivizing an accretion of accurate knowledge, we want to incentivize the verification, corroboration, and validation that help turn good ideas into facts and the enquiry, discourse, and refutation that weed out the false ideas too. We also want to incentivize continued discussion of those facts that are already accepted as “true” in recognition that an even better viewpoint may eventually come along. In any event, we want to incentivize the discourse needed to determine the veracity of a purported fact. Only then will the ideas forwarded in a work of nonfiction become “useful” additions to the public body of knowledge.

This need for discourse explains why facts, ideas, and factual accounts⁷² must not be foreclosed from adoption or discussion by way of copyright protection. Such facts and ideas must be left open so as to encourage the generation of opinions, debate, and eventual consensus regarding a particular purported fact or idea.⁷³ Only once that

ity unique precludes a unity of historical interpretation.” Ginsburg, *supra* note 10, at 658. But outside of historical interpretation, certain nonfiction topics *do* boil down to objective truths. And in any event, the existence of the platonic fact precept has nothing to do with whether works should or should not be discussed, refuted, or verified. Even if an objective truth could never be declared, that should not stop society from seeking such a truth for itself. And even if each person in society were to come to a different conclusion as to what the “truth” regarding a particular matter actually was, those individuals would still benefit from increased acuity of explanation and accuracy in interpretation of facts. The point is simple: Society, whether for itself or for the greater good, must bear the responsibility of determining what is “true”—not the courts.

⁷⁰ 17 U.S.C. § 102(b) (2012), commonly referred to as the “idea-expression dichotomy.” See *infra* note 89.

⁷¹ JAMES, *supra* note 1.

⁷² By “factual account” I do not mean the expression itself, which is perhaps protectable, but the specific interpretation of a fact. For example, an historical biography that presents a new story about a past figure might protect the literal telling of the story, but cannot protect the content of the story itself. That content is a factual account which other authors may want to adopt, research, refute, or verify. It cannot be foreclosed from such use.

⁷³ One other scholar has reached this conclusion. In *Copyright Protection for the Collection and Representation of Facts*, Robert Gorman noted that “[i]n theory, it might well be possible to give a monopoly over ideas; after all, the great creative contribution of the historian may be his theory of history and not so much the felicity of his style in expounding it. But our

consensus has been reached can a fact, theory, or account become more or less “true” or “untrue.” In the spirit of the Constitution, only society itself can determine what truths to follow. Facts, purported facts, and purportedly factual accounts cannot be copyrightable. Otherwise, truths are never discovered, accuracy is never determined, and the progress of science and useful arts stalls.

III. THE COPYRIGHT SYSTEM THAT RESULTS: AN ILLUSTRATION

At the most fundamental level, the Framers intended the copyright system to be a means by which to expand the public body of knowledge. Described as “an Act for the encouragement of learning,” the first copyright statute set out to “promote the progress of science and useful arts” alongside patents by incentivizing the production of works by those scholars, explorers, theorists, or other authors who might have something to contribute to the public good.⁷⁴ Explanatory works of nonfiction, the earliest works that Congress declared copyrightable,⁷⁵ can be especially useful in promoting the progress of science and useful arts *if* the information claimed in such works is accurate. But unlike a patentable invention, the utility—or the accuracy—of a work of nonfiction cannot be tested; it can only be declared more or less true after being thoroughly discussed and studied by others. Consequently, the facts, purported facts, theories of fact, and ideas presented in such works cannot be foreclosed from such discussion by a grant of copyright protection.

In his lecture *Fact or Fancy? The Implications for Copyright*, Robert Gorman likened the individual pieces of knowledge contributed by scientists, theorists, and other authors of nonfiction to the bricks that make up a building. “To promote the progress of science and the useful arts in the long run,” said Gorman, “we [initially] permit the author for a limited time . . . to stop others from copying or embellishing upon his work.”⁷⁶ Eventually, however, “[w]e permit, indeed encourage, later authors and artists to build upon the copyrighted works of their predecessors, while holding out the threat that if they

Constitution has granted Congress the power to protect ‘writings’ only. And even in the absence of constitutional stricture, it would no doubt be thought more beneficial to the arts and sciences to free ‘ideas’ for criticism, elaboration, improvement, or application by others; this is what has been done in England.” Gorman, *supra* note 22, at 1582–83. Gorman notes that part of the “public interest” is “to guarantee the accuracy of recorded facts by encouraging verification of earlier fact works.” *Id.* at 1585.

⁷⁴ Copyright Act of 1790, *supra* note 23.

⁷⁵ *Id.*

⁷⁶ Gorman, *supra* note 10, at 560.

use too many such ‘bricks’ in their building they may be branded infringers.”⁷⁷

Consider the facts or information at an author or artist’s disposal to be the “bricks” and the specific ideas or theories that binds those “bricks” together to be the mortar. Within this world of bricks and mortar, both the patent and copyright systems clearly incentivize the expansion and creation of new structures. But when it comes to ensuring structural integrity, the systems’ methods diverge entirely. The patent system tests for the structural soundness of its bricks by requiring proof of “usefulness” and “novelty” of patented objects *ex ante*. Its buildings must pass inspection, by satisfying strict construction codes, before they can be occupied. The bricks must be able to bear a certain weight, the mortar must be able to hold the bricks together sufficiently, and the building itself must be designed in a certain way so as to be usefully different from any building that has come before it. By contrast, the copyright system has no reliable method by which to test the integrity of ideas, hypotheses, theories, or purported facts. No code can readily determine *ex ante* whether the bricks are strong enough, whether the mortar is cohesive enough, or whether the building is designed properly. A copyright itself cannot signal to society that the work necessarily advances the progress of science or useful arts.⁷⁸

Elementary as it is, the bricks and mortar analogy properly describes the intermediate position of works of nonfiction within the modern intellectual property scheme. On one end of the spectrum are works of fiction. Although fiction does not constitute the core body of works targeted by the Constitution, they produce almost no risk to the public body of knowledge. Stories can never be “wrong” because they rest on their own invented facts, a piece of music cannot collapse upon untrue notes, and paintings—even if poorly executed or not depicting any particular scene at all—cannot be the product of “incorrect” brush strokes. Because there probably is at least some utility to fictional works,⁷⁹ we therefore incentivize them fully with complete copyright protection. And indeed, such works continue to

⁷⁷ *Id.*

⁷⁸ Of course, a work need not already be copyrighted to be protected.

⁷⁹ There is the obvious question of whether works of fiction serve the constitutional purpose at all. But here, we would have to quibble over the definition of “useful.” It is entirely plausible that numerous works of fiction find their utility in enriching our imaginations, and thus, I am not prepared to take that position. Likely, works of fiction have at least some utility. But relative to works of nonfiction, whose theories and hypotheses, if not correct, are entirely *un*-useful, works of fiction simply do not present the same issues.

grow and expand without too much outcry.⁸⁰ On the other end of the spectrum are patentable works. Patentable works generally expand scientific understanding. And although patented works differ from works of fiction in that they have the capacity to mislead the public, there is little risk of this happening in practice. The patent system imposes a set of criteria that must be satisfied before protection is granted. This is not a difficult undertaking when the things being examined are capable of being tested.

Lying squarely in between are works of nonfiction. Like patents, works of nonfiction must be correct to be useful. But unlike patents, and more like fiction, the “truth” or veracity of an asserted piece of nonfiction cannot always be tested *ex ante*. It is for this reason that the use of facts, hypotheses, and theories by all authors seeking to add to or improve any particular topic must be permitted to allow for a work’s accuracy to be determined. If we want to construct a “building” of knowledge for a particular field of study, we must allow different authors and artists to take a crack at the facts so that later authors and artists can add their bricks onto the ones they think are the most precisely laid.

IV. DESCRIPTIVE APPLICATIONS: HOW A UTILITARIAN MEASURE OF NONFICTION EXPLAINS INTRICACIES OF THE MODERN AMERICAN COPYRIGHT SYSTEM

A utilitarian measure of nonfiction that takes into account not only the volume of factual works, but also the quality of such works, results naturally from copyright’s endowed utilitarian purpose. But our copyright system has changed since its 1790 inception.⁸¹ Works of

⁸⁰ Of course, there has been some outcry. *See, e.g.*, Dallan, *supra* note 26, at 436–37 (arguing that the modern expansion of the copyright term limit, and especially the 1998 Sonny Bono Copyright Term Extension Act, clearly violates the public interest purpose of copyright); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC’Y U.S.A. 19, 19–20 (2001) (asserting that even a moderate interpretation of Congress’s power to expand the copyright term would not permit the twenty-year extension provided for by the Sonny Bono Copyright Term Extension Act). *But see* Craig W. Dallan, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. 307, 309, 357–59 (2006) (concluding that, ultimately, the Supreme Court was correct in holding that Congress had the ability to pass the Sonny Bono Copyright Term Extension Act).

⁸¹ Discussing the expansion of the copyright system is beyond the scope of this comment. Suffice it to say that where copyright once protected useful maps, charts, and books, it now protects music, artwork, sculpture, architectural design, and other aesthetic creations. Creativity has become increasingly engrained as part of our conception of personal “property,” and the copyright system reflects that shift not only in the breadth of works it protects, but also in the strength of the protection afforded to those works. Indeed, the

nonfiction are now a small part of a vast expanse of copyrightable subject matter,⁸² and the protections granted to such factual works have grown less uniform.⁸³ At the most general level, it is easy to understand why protection for nonfiction has become relatively less forceful as compared to other copyrightable works: For the most part, artistic and creative works—which have been increasingly granted copyright protection over the past century⁸⁴—do not have the same ability to promote the progress of science and useful arts as works of nonfiction, and do not require discussion and verification to ensure accuracy.⁸⁵ But even among factual works, differences in scope of protection exist.⁸⁶ Given that the modern copyright system has expanded so far beyond its original bounds, can a utilitarian purpose still explain our treatment of various copyrightable works, particularly nonfiction?

The short answer is yes. A fair use defense, for example, now explicitly permits “criticism, comment, . . . reporting, teaching . . . , scholarship or research” by allowing scholars to use a portion of a preexisting work for one of those purposes.⁸⁷ And many of our sys-

Copyright Act allows for damages that may exceed the true economic harm caused by an infringer! In this sense, an objective observer might conclude that the American system views copyright as even more important than patents, infringement of which will not result in such overcompensation to the patent holder. See generally Rachel L. Emsley, Note, *Copying Copyright’s Willful Infringement Standard: A Comparison of Enhanced Damages in Patent Law and Copyright Law*, 42 SUFFOLK U. L. REV. 157, 172–73 (2008).

82 As the harbinger for copyright protection gradually shifted from maps, charts, and books, Copyright Act of 1790, to “works of an author,” Act of March 4, 1909, Pub. L. No. 60–349, 60th Cong., 2d Sess., 35 Stat. 1075 (repealed 1976), to “original,” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), and “creative,” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340 (1991), works, the spectrum of copyrightable materials has likewise broadened. Whereas the American copyright system originally protected maps, charts, and books for a period of 14 years, Copyright Act of 1790, *supra* note 23, the modern system protects—and this is an open list—“(1) literary works; (2) musical works [and lyrics]; (3) dramatic works [and] accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works,” 17 U.S.C. § 102(a) (2012), for, generally, the rest of the author’s life plus seventy years after death. *Id.* § 302.

83 See, e.g., Gorman, *supra* note 22, at 1570 (discussing the various outcomes that result from applying the same copyright law to a wide variety of types of factual works).

84 The 1909 Copyright Act protected the “writings of an author.” By 1976, the definition of “writings” had been vastly expanded to include, amongst other things, choreographic works and pantomimes, motion pictures, and sculpture. By the 1990s, the Act was modified to include architectural design as well. See *supra* note 82.

85 See *supra* note 53 and accompanying text.

86 See generally Denicola, *supra* note 10 (discussing, more specifically, the difference in protection granted to factual compilations and more “literary” works of nonfiction); Gorman, *supra* note 22 (discussing the differences in copyright protection granted to various types of factual works).

87 17 U.S.C. § 107 (2014).

tem's more obscure intricacies—the disparate protections granted to works of fiction, factual compilations, and literary works of nonfiction, the treatment of highly speculative works as factual works, and the broader protections granted to “soft fact” works like pricing guides—similarly point to a copyright system that incentivizes quality works. The very existence of these particularities in our system suggests a judicial understanding, perhaps implicit but nonetheless real, that nonfiction must be left open for discussion, verification, and refutation by others.

A. *The Divergent Protection Granted to Factual Compilations and Literary Works of Nonfiction*

In our modern copyright system, factual works garner less copyright protection than creative and artistic works. Given the principle that one's copyright only extends to the pieces of the work that the author herself has created, this difference in protection makes sense; works of fact are necessarily comprised of more pieces that are not “original” to the author of the work, but are instead the product of the universe itself.⁸⁸ At the same time, the gap in protection does not make sense from a utilitarian standpoint, and has been roundly criticized. Because the “idea-expression dichotomy”⁸⁹ stated above—barring copyright protection from “any idea, procedure, process, sys-

88 Robert Gorman describes this nicely. See Gorman, *supra* note 22, at 1570 (“In literary or artistic works, the three components of the intellectual product—the ideas, their patterning, and their ultimate expression—are generally all originated by the author. While the author's broad ideas must be left in the public domain free for all to use, his patterning of those ideas and mode of expression are copyrightable. As distinguished from literary or artistic works, there is a class of publication which involves only the gathering of facts or their representation in language or picture In these works the author's raw materials are objective data, and his unique contribution is to gather these facts and to express them in language or visual images so ordered as to be intelligible and useful to others.”).

89 The idea-expression dichotomy, codified in 17 U.S.C. § 102(b), states that “[i]n no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [a] work.” The dichotomy was developed in the common law before it was codified. See, e.g., *Baker v. Selden*, 101 U.S. 99, 100–01, 103 (1879) (“Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain the use of the other, in his own way. . . . The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”); *Clayton v. Stone*, 5 F. Cas. 999, 1000–03 (C.C.S.D.N.Y. 1829) (denying copyright protection for a daily price-current).

tem, method of operation, concept, principle, or discovery”⁹⁰—prevents a comparatively larger percentage of factual works from being copyrightable,⁹¹ factual works therefore will be dis-incentivized in relation to creative works.

And given that works of nonfiction are the types of works that should be particularly incentivized,⁹² the idea-expression dichotomy, and its broad application by the courts,⁹³ runs afoul of copyright’s underlying purpose.

At the broadest level, this critique is sound. Works of nonfiction are more “useful” in amassing a body of public knowledge than are works of fiction,⁹⁴ so if we want to maximize the benefits of copyright protection promised by the Constitution, we ought to especially incentivize works of nonfiction.

⁹⁰ 17 U.S.C. § 102(b) (2014).

⁹¹ In *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), Judge Hand applied the idea-expression dichotomy to artistic and creative works through what has since been termed the *scènes à faire* doctrine, withholding copyright protection from commonplace “ideas” that one might come to expect to be used in a particular genre. Even still, a threshold must be reached before the *scènes à faire* doctrine applies; by contrast, the facts used in a factual work are *never* copyrightable. Indeed, Rocky Balboa and Sylvester Stallone might both be characters, but only one of them can be protected as such in court. See *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *5 (C.D. Cal. Apr. 25, 1989) (rejecting an infringement claim brought by a fan of the *Rocky* movies whose manuscript for a *Rocky* sequel was purportedly used by Stallone in his actual *Rocky* sequel; the U.S. district court ruled that the fan himself was the infringer, since Stallone held a copyright over the character “Rocky.” All this despite the fact that the character Rocky is probably not too far removed from the real-life human Sylvester Stallone).

⁹² See, e.g., Gorman, *supra* note 22, at 1583, 1599–1600 (discussing the “social concern for the free use and circulation of facts” that fluctuates depending on the topic and type of underlying work, and noting by way of example that while “[t]he photographs of the model, although reproductions of a ‘fact,’ partake of an artistic conception[,] the photographs of the medical operation partake more of a representation of facts within the public domain, the free dissemination of which is of greater significance to society”).

⁹³ Some courts—particularly when dealing with news, historical works of nonfiction, or biographies—have applied the doctrine broadly. See, e.g., *Nash v. CBS, Inc.*, 899 F.2d 1537, 1542 (7th Cir. 1990) (“Decisions such as *Hoehling* do not come straight from first principles. They depend, rather, on the language of what is now 17 U.S.C. § 102(b) Long before the 1976 revision of the statute, courts had decided that historical facts [were] among the ‘ideas’ and ‘discoveries’ that the statute does not cover.”); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980) (“[W]here, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law.”).

⁹⁴ Works of fiction have utility. They can spark imagination, induce introspection, broaden assumptions, brighten the mood, and teach lessons, among other things. But if we accept the expansion of human knowledge as the goal of the copyright system, factual works have more specific “utility” than works of fiction. Although we may have accepted a broader purpose into our copyright system since 1790, that discussion is beyond the scope of this Comment.

But neither this broader critique nor the idea-expression dichotomy itself explains the secondary gap in protection that exists between pure compilations of fact and literary explanations of fact.⁹⁵ Assuming a quantity-based rationale, and under the guidance of the idea-expression dichotomy, one might expect works of history or biography to contain more copyrightable substance—such as the authors' unique embellishments and style—than compilations of facts, which often contain no such stylistic additions. But in reality, literary works of nonfiction receive even less protection than pure compilations of facts.⁹⁶ The “selection and arrangement” of a particular set of facts is considered an “original” contribution by an author-compiler⁹⁷ that is not recognized in literary works of nonfiction.⁹⁸ Although this

⁹⁵ See Denicola, *supra* note 10, at 535 (noting that despite the presence of the idea-expression dichotomy, factual compilations are consistently granted protection for selection and arrangement of facts while literary works of nonfiction are, paradoxically, not granted such protection). Indeed, some scholars point to simple prevention “of wasted effort” as the primary design of the idea-expression dichotomy. Gorman, *supra* note 22, at 1584 (“[I]t is just this sort of wasted effort which the proscription against the copyright of ideas and facts was designed to prevent.”).

⁹⁶ See *infra* note 97; see also Denicola, *supra* note 10, at 535 (“A most remarkable feature of the judicial response to copyright in factual works is the stubbornly maintained distinction between pure compilations, such as directories, and writings that present facts through textual discussion, such as news reports, treatises, and biographies. The facts appearing in the former, primarily through protection attached to the particular arrangement of data, have consistently enjoyed a significant degree of protection. Authors intent on producing similar compilations have been forced to return to the original sources and compile the data anew. The copyright in works adopting a textual format, however, has been notably less effective. The addition of the requisite number of prepositions, conjunctions, and verbs has had the paradoxical effect of decreasing the scope of protection.”). Denicola’s assertion includes a minor error: the addition of new words and explanation probably enables an author to inject more originality into a written work than she could into a pure compilation. But his broader point—that factual analyses necessarily must follow only a few possible narratives—should not be lost. There are countless ways to list or organize pure facts, but there are less ways to string them into a coherent theory. At any rate, “[t]he law of copyright thus yields the paradoxical result that one defendant is rebuked for copying the information contained in a compilation of civil war battles and casualties, while another can freely appropriate the results of eighteen years of research on the death of President Lincoln, which had been published by the plaintiff in two copyrighted books.” *Id.* at 536 (citations omitted).

⁹⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (“These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.” (citations omitted)).

⁹⁸ Surely, authors of expository works of nonfiction must select and compile facts to support their positions. However, these authors, who generally seek to present a viable theory of history, function, biography, or other explanation, typically seek the most *credible* selections and arrangements rather than the most *original* or creative selections and arrangements. Therefore, even though some theorists have argued that nonfiction authors should receive protection for selection and arrangement, see Denicola, *supra* note 10, at

judicially created “selection and arrangement” principle does not go against the statutory idea-expression dichotomy, the result that it creates—less protection for literary works of nonfiction—does.

So why do courts accept this paradox? The answer is that a second consideration—quality, not quantity—influences the amount of protection a work will receive. As was noted in Part I.B, nonfiction explanations that are accurate are especially useful to the public body of knowledge and the progress of science and useful arts, while nonfiction explanations that are inaccurate are especially detrimental. Compilations of fact, while certainly having some influence on public knowledge, do not have the special utility (or disutility) of *explanation*.⁹⁹ These pure compilations do not need to be left open for refutation or verification because even if they are copyrighted, another compiler can simply rearrange or reconstitute the facts to form a new work.¹⁰⁰ Although an incorrect *listing* in a phonebook, for example,¹⁰¹ would be inconvenient for its users, an incorrect *explanation* of the principles of electromagnetism, frequency and amplitude of sound waves, or circuitry, on the other hand, would produce not merely an inconvenience, but a faulty understanding of the telephone network—a notable setback from the progress of science that copyright is supposed to promote.¹⁰²

535, 542, courts have not granted such protection. Finally, in some cases, factual compilations are similarly limited under the merger doctrine. But while the merger doctrine assures that those compilations with a similarly limited array of possible arrangements are not copyrighted away from public use, its application is relatively uncommon.

99 It is important here to maintain a distinction between pure fact, such as a census count, and a factual compilation. Pure facts are of the utmost importance to our public knowledge because they provide the basis for works of nonfiction. But such facts are not copyrightable anyways. Here, I focus on copyrightable factual compilations, such as phone book listings (in some cases), nutrition charts, or a fact book. Of course, many of these examples also include embellishments aside from the pure choice of facts presented. In this sense, they also include aspects of nonfiction aside from just factual compilation.

100 See *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 66 (2d Cir. 1994) (“The grant of . . . monopoly protection to the original elements of a compilation . . . imposes little cost or disadvantage to society. The facts set forth in the compilation are not protected and may be freely copied . . .”).

101 See *Feist*, 499 U.S. at 340.

102 Of course, accurate explanations of a telephone’s functionality already exist, and this is why multiple explanations about the same sets of facts and discoveries ought to be encouraged. But this was merely a thematic example. The more important point is that a faulty explanation at the outset of any scientific breakthrough could set the particular industry or field back by years.

There is no bright line dividing compilations of fact from nonfiction explanations.¹⁰³ A timeline, for example, could include incorrect facts and a faulty arrangement of data, which would be just as damaging to public understanding as an incorrect explanation of facts. But such substantive arrangements of fact blur the lines between “pure compilations”¹⁰⁴ and written nonfiction. Once a “selection and arrangement” of facts is imbued with explanation of those facts, it takes on the role of a teaching tool, seeking the encouragement of learning for which the American copyright system was established. Having assumed the special utility of a written work of nonfiction, the work must then be left open for refutation, verification, or discussion by other scholars so that accuracy can be determined and the public body of knowledge can advance. It is for this reason that “texts, treatises, and biographies” receive less protection than “directories” and other “pure compilations.”¹⁰⁵

As of yet, no court has acknowledged the special utility of works of nonfiction or justified the de facto divide in protection that exists between the “selection and arrangement” of factual compilations and the written explanations of nonfiction.¹⁰⁶ Even still, the decisions and doctrine issued by the courts can be explained by the theory. Pure compilations of fact are important to the expansion of the public body of knowledge because they both add to our volume of information and fuel the generation of theories, explanations, and hypotheses. But works of nonfiction are essential both to transforming this information into knowledge and understanding and to dispersing it to the public. If a work of nonfiction truly seeks to explain, then its content cannot simply be rearranged without altering its import; as a result, the selection and arrangement of a work of nonfiction becomes an important component that cannot be locked away from discussion by copyright protection. In the pursuit of both quantity and accuracy, not only are works of fact granted less protection than works of fiction, but explanatory works of nonfiction are granted less protection than pure compilations of fact.

103 See, e.g., *Maclean*, 44 F.3d at 65–66 (“The protection of compilations is consistent with the objectives of the copyright law, which are, as dictated by the Constitution, to promote the advancement of knowledge and learning by giving authors economic incentives . . . to labor on creative, knowledge-enriching works Compilations that devise new and useful selections and arrangements of information unquestionably contribute to public knowledge by providing cheaper, easier, and better organized access to information.”).

104 See Denicola, *supra* note 10, at 535.

105 *Id.* (referring to judicial treatment of nonfiction copyright law as a “stubbornly maintained distinction”).

106 See *infra* Part IV.C.

B. The Treatment of Highly Speculative Works As Factual Works

Regardless of the selection and arrangement of the pieces of fact that they use, works of nonfiction still contain stylistic devices that do not exist in pure compilations. For that reason, a theory of copyright based solely on the idea-expression dichotomy would also predict that expository works garner increased protection, even without the added layer given to the “selection and arrangement” of facts. Many courts, however, have eschewed this result, withholding copyright protection from the theories, accounts, or hypotheses that authors have generated to explain particular facts, even if those theories or hypotheses are novel.¹⁰⁷ Such “speculative” works, as at least one court has termed them, are treated as an extension of the “facts” that they seek to explain.¹⁰⁸ This treatment of speculative works provides the strongest evidence of an underlying need for discussion, verification, and refutation, and the accurate works of nonfiction that result. Likewise, it lends credence to the alternative theory of copyright utility presented in this Comment.

The notion that the speculative aspects of nonfiction cannot be copyrighted has developed gradually over the past century just as copyrightable subject matter has expanded. In 1918, the Supreme Court ruled in *International News Service v. Associated Press*¹⁰⁹ that “the news element . . . is not the creation of the writer,” and therefore cannot be copyrighted.¹¹⁰ Twenty years later in *Oxford Book Co. v. College Entrance Book Co.*,¹¹¹ the Second Circuit rejected copyright protection for historical information—even if that information was inaccurate—noting that “historical facts are not copyrightable per se nor are errors in fact.”¹¹² Modern courts have denied protection not only to facts, discoveries, and ideas, but also to purported facts, hypotheses,

¹⁰⁷ See *infra* text accompanying notes 110–116; see also *Denicola*, *supra* note 10, at 535 (discussing the courts’ limited granting of copyright protection to works of historical nonfiction); Ginsburg, *supra* note 10, at 647 (also noting the weak protections granted by the *Hoehling* court); Gorman, *supra* note 10, at 588 (noting the relative weakness in protection afforded to the work in question in *Hoehling*, discussed *infra* text accompanying notes 118–119).

¹⁰⁸ This conclusion has largely resulted from a broad interpretation of 17 U.S.C. § 102(b). See *infra* text accompanying notes 126–127.

¹⁰⁹ 248 U.S. 215 (1918). Justice Louis Brandeis, of course, dissented and quipped that “[n]o question of statutory copyright is involved.” *Id.* at 249 (Brandeis, J., dissenting).

¹¹⁰ *Id.* at 234.

¹¹¹ 98 F.2d 688, 691 (2d Cir. 1938).

¹¹² *Id.* at 691. The court continued to state, “The plaintiff’s book was designed to convey information to the reader. The defendant authors were as free to read it . . . and to acquire from it such information as they could . . . [or] such *misinformation* as it contained.” *Id.* (emphasis added).

and theories.¹¹³ In *Hoehling v. Universal City Studios, Inc.*,¹¹⁴ the Second Circuit held that “the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis.”¹¹⁵ In *Nash v. CBS, Inc.*,¹¹⁶ the Seventh Circuit likewise found that “speculative works representing themselves as fact” were subject to the same copyright limitations as purely factual works.¹¹⁷

These decisions fall neatly in line with the pursuit of accuracy in nonfiction works. “Speculative works” are precisely those works that could be valuable or detrimental to the “progress of science [or] useful arts,” but the accuracy of which is unknown. As such, they are the types of works whose propositions should be left uncovered by copyright protection so that other scholars or theorists can discuss the merits of the claims made and explanations given. In her article *The Marketplace of Ideas and the Idea-Expression Distinction of Copyright Law*, Patricia Loughlan discussed the inadequacy of the “idea-expression distinction,” Australia’s version of the idea-expression dichotomy, as a stimulant for the “marketplace of ideas.”¹¹⁸ Loughlan pointed out

113 See, e.g., *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (“[Plaintiff] could not acquire by copyright a monopoly in the narration of historical events.”). Cf. *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664, 666 (7th Cir. 1950) (finding copyright infringement where defendant largely appropriated the historical biographical facts concerning Hans Christian Andersen’s life that plaintiff had amassed through years of research).

114 618 F.2d 972 (2d Cir. 1980).

115 *Id.* at 974; see also *id.* (“Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author’s original expression of particular facts and theories already in the public domain.”).

116 899 F.2d 1537 (7th Cir. 1990).

117 *Id.* at 1541–42. The court refused to bar the defendant from using the plaintiff’s unique interpretation of a historical event in creating a television show adopting that interpretation. *Id.* But while the *Nash* court largely cited *Hoehling* throughout its opinion, it was cautious not to accept the *Hoehling* ruling outright:

Hoehling rejected [our opinion in] *Toksvig* . . . concluding that ‘[k]nowledge is expanded . . . by granting new authors of historical works a relatively free hand to build upon the work of their predecessors.’ . . . With respect for our colleagues of the east, we think this goes to the extreme of looking at incentives only *ex post*. The authors in *Hoehling* and *Toksvig* spent years tracking down leads. If all of their work, right down to their words, may be used without compensation, there will be too few original investigations, and facts will not be available on which to build.

Id. at 1542 (emphasis in original) (citation of *Hoehling* omitted). Of course, *Toksvig* was a Seventh Circuit decision, and the *Nash* court still emphasizes that the end sought is incentivizing the production of knowledge.

118 Patricia Loughlan, *The Marketplace of Ideas and the Idea-Expression Distinction of Copyright Law*, 23 ADEL. L. REV. 29, 30 (2002). I should note that Loughlan most likely ascribes to the “democratic paradigm” justification of copyright, eloquently described by Neil Weinstock Netanel, whereby copyright serves as “an ‘engine of free expression’” that “foster[s] a vibrant and participatory civil society.” Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341 (1996) (citations omitted). It is beyond the scope of this Comment to discuss the underlying justification for having a copyright system at

that “the social discovery of truth” required more than simply a free flow of facts; it required a free flow of theories too.¹¹⁹ Although Loughlan took issue with the breadth of interpretation given to the idea-expression dichotomy itself, her insights largely mirror those that have been, at least in passing, touched upon by courts in the United States. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, for example, the Supreme Court noted that the dichotomy “strike[s] a definitional balance between the First Amendment and the Copyright Act”¹²⁰ That observation is consistent with the notion that society has an interest in discussing, verifying, or refuting works of nonfiction.

Of course, the *Nash* and *Hoehling* courts shirked any such explanation, blaming Congress for their decisions. Pointing to the 1976 Copyright Act, the Seventh Circuit stated in *Nash* that “[d]ecisions such as *Hoehling* do not come straight from first principles. They depend, rather, on the language of what is now 17 U.S.C. § 102(b) Long before the 1976 revision . . . , courts had decided that historical facts [were] among the ‘ideas’ and ‘discoveries’ that the statute does not cover.”¹²¹ For its part, the Second Circuit in *Hoehling* had declared that “where, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law.”¹²² Rather than explaining *why* such interpretations or other “speculative works representing themselves as

all. And in any event, no matter what justification is best, the system ascribed by the Framers of the Constitution is bolstered by a view of copyright utility that considers accuracy alongside quantity.

119 Loughlan’s article focused on three aspects of “freedom of speech,” one of which was a “marketplace of ideas” within which “truth is discovered and disseminated.” Loughlan, *supra* note 118, at 29. Said Loughlan, “Copyright law, in current theory and doctrine, protects against considerably more than just literal copying and the extent to which it goes beyond protecting literal copying is the exact extent to which it encroaches upon the sphere of ideas and takes them out of free public circulation.” *Id.* at 31. While Loughlan does not explicitly advocate for the expansion of the idea-expression dichotomy beyond the realm of an “idea,” she does advocate for a more expansive interpretation of what an “idea” is. Nevertheless, Loughlan’s premise that “the discovery or possibly the construction of truth is dependent upon the free creation, dissemination, and competition of ideas,” *id.*, supports the conclusion that theories should also be kept free for discussion by other scholars.

120 471 U.S. 539, 556 (1985) (alterations in original) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)) (quoted in Loughlan, *supra* note 118, at 33).

121 *Nash*, 899 F.2d at 1542.

122 *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980).

fact”¹²³ should not be copyrighted, the courts found it easier to point to a strict interpretation of 17 U.S.C. § 102(b).¹²⁴

It is likely that these courts were simply deflecting attention away from the substantive judgments that they were making about the respective works in question. Courts have long since shed any role as “final judges of the worth of” an authored work¹²⁵—a maxim still followed today.¹²⁶ At the same time, barring copyright protection to an explanation of fact because it is “speculative” necessarily requires a judgment of that work’s value to the progress of science or useful arts; indeed, the term “speculative work” implies such a judgment.¹²⁷ Moreover, both courts made it clear that the respective works’ presentation as works of “fact” were an important factor in determining the scope of copyright protection.¹²⁸ The courts were careful not

123 *Nash*, 899 F.2d at 1541.

124 See 17 U.S.C. § 102(b) (2012) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form in which it is described, explained, illustrated, or embodied* in such work.” (emphasis added)).

125 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

126 See, e.g., *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 186 (2d Cir. 2012) (“The district court apparently was of the view that, because the drawings were architectural, something more was required for their copyright protection. It is black-letter law, however, that courts accept as protected ‘any work which by the most generous standard may arguably be said to evince creativity.’ Justice Holmes explained more than a century ago that ‘[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of pictorial illustrations.’” (citations omitted)). *But see* *Cariou v. Prince*, 714 F.3d 694, 698–99 (2d Cir. 2013) (concluding, after an extensive analysis of each painting’s “transformative” nature, that twenty-five out of the defendant’s thirty appropriation pieces were exempted from infringement by the fair use defense). Of course, a fair use analysis requires somewhat extensive judicial judgment by necessity. See 17 U.S.C. § 107 (requiring that any judicial fair use analysis consider four separate factors as laid out by statute).

127 Just because a value judgment is required to categorize a work as “speculative,” however, does not mean that such value judgments are necessary to uphold the alternative understanding proposed by this Comment on a larger scale. For example, whether the particular theory at hand was or was not “speculative” was not a discussion that the *Hoehling* court ever reached. Rather, that court barred protection for *any* hypothesis or theory of history. *Hoehling*, 618 F.2d at 978. And while the *Nash* court characterized the work at hand as “speculative,” it too imposed what it considered to be a blanket prohibition against the copyrighting of theories and explanations. *Nash*, 899 F.2d at 1541–43. Likewise, the theory that I have proposed in this paper requires no categorizations either. Any theory should always be open to refutation by a new explanation. So by treating “speculative” or unverified explanations as “facts,” these courts have effectively imposed the blanket bar on copyright of theories and hypotheses that the special utility of nonfiction recommends. They have lent credence to the idea that accuracy, and not just quantity in and of itself, is a factor that makes works of nonfiction useful for the purpose given to the copyright system by the Constitution.

128 Both the *Nash* and the *Hoehling* decisions touched upon the importance of knowledge and truth as goals that could be realized with the development of multiple different non-

to admit to any value judgments, and since the *Nash* case, courts have continued to remain vague in explaining why copyright cannot extend to facts and ideas.¹²⁹ But want for clear explanations notwithstanding, these cases have continued to bar copyright protection for ideas, hypotheses, or other speculative works.¹³⁰

C. Addressing the Inconsistencies in Case Law

While many “speculative” works have been treated like facts by various courts—and left open for discussion, verification, or refutation—not *all* theories and hypotheses have been withheld copyright protection. For example, copyrights for some types of statistical calculations and estimates have been held enforceable, even though they are essentially speculative in nature. In *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,¹³¹ the Second Circuit ruled that the *Red Book*, a used car pricing compendium published by Maclean Hunter, was not the sort of compilation of informational matter subject to the thin “selection and arrangement” protection granted in *Feist Publications v. Rural Telephone Service Co.*¹³² And in *Kregos v. Associated Press (Kregos IV)*,¹³³ the Second Circuit accorded limited copyright protection to a set of baseball statistics, though it declined to find that

fiction theories regarding a particular fact. The *Hoehling* court, identifying “knowledge” as the “cause” that the copyright system embraces, acknowledged that learning was not being enhanced if one author controlled the explanation and presentation of a given fact, *Hoehling*, 618 F.2d at 974; “[t]o avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.” *Id.* at 978. And the *Nash* court understood the special utility cloaking any work claiming to be informative: Though the plaintiff’s “reconstruction of the . . . story has not won adherents among historians,” *Nash*, 899 F.2d at 1538, because the plaintiff did “not portray [his work] and its companion works as fiction . . . which makes all the difference,” his ideas and historical conclusions are not copyrightable.” *Id.* at 1541 (emphasis added). However, though these courts supported the notion of a higher volume of nonfiction works, they never explicitly took the extra step in supporting a higher quality of nonfiction works.

¹²⁹ Typical is *New York Mercantile Exchange, Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 110–13 (2d Cir. 2007), in which the Second Circuit, while citing the intellectual property clause of the Constitution, ruled that the New York Mercantile Exchange’s settlement prices, which are used to value its customers’ positions, were not copyrightable because “enforcing the copyright . . . would effectively accord protection to the idea itself.”

¹³⁰ *Id.*

¹³¹ 44 F.3d 61 (2d Cir. 1994).

¹³² See *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 348 (1991). The *Maclean* court overruled the district court, which had held that the book was “nothing more than a compilation of unprotected facts, selected and organized without originality and creativity.” *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 64–65 (2d Cir. 1994).

¹³³ 3 F.3d 656 (2d Cir. 1993).

the defendant had infringed on those statistics.¹³⁴ These cases seemingly contradict the idea that explanations and interpretations of fact must be foreclosed from copyright protection.

But in both of these cases—and taking *Maclean* as an example—the Second Circuit distinguished between “those ideas that undertake to advance the understanding of phenomena or the solution of problems . . . and those . . . that do not undertake to explain phenomena or furnish solutions, but are infused with the author’s taste or opinion.”¹³⁵ In *Maclean*, the court found that because the estimates contained in the *Red Book* were of the latter “soft type” of idea, they were excepted from the idea-expression dichotomy and the merger doctrine as a matter of policy.¹³⁶ Because “[t]he valuation figures given in the *Red Book* [were] not historical market prices, quotations, or averages[, and were] not derived by mathematical formulas from available statistics”¹³⁷—facts of the essential “building-block[] category”¹³⁸—but were instead merely “editors’ predictions,” it was not necessary to foreclose them from copyright protection.

In distinguishing between theories and “soft” ideas, the *Maclean* court was making a constitutional statement. “[I]deas,” said the court, “are too important to the advancement of knowledge to permit them to be under private ownership, and . . . open public debate, which is essential to a free democratic society, requires free access to the ideas to be debated.”¹³⁹ But the *Red Book* was just a book of pricing *estimates*. It was not a compilation of facts or ideas, or a work of explanatory nonfiction, and did not need to be copied to be discussed, verified, or refuted. By identifying an inherent difference in “usefulness” between works that seek to explain phenomena and works that seemingly produce their own “facts” that are “infused with the author’s taste and opinion,”¹⁴⁰ the court recognized that some works can still be discussed and verified while being copyrighted. The *Red Book* itself cautioned in its introduction that “[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle,” foregoing any assertion that its contents were authoritative as

134 *Id.* at 663 (holding that a factual compilation capable of being expressed only in a limited number of ways is afforded only limited protection (citing *Feist*, 499 U.S. at 349)).

135 *Maclean*, 44 F.3d at 71 (citing *Kregos v. Associated Press (Kregos II)*, 937 F.2d 700, 707 (2d Cir. 1991)).

136 *Id.* at 63.

137 *Id.*

138 *Id.* at 71.

139 *Id.* at 69 (citing MELVILLE NIMMER, 4-13 NIMMER ON COPYRIGHT § 13.03[B]).

140 *Id.* at 72.

to automobile pricing.¹⁴¹ And any competing automobile pricing guides would likely employ varied computational equations anyways, rendering them distinguishable from the *Red Book*.

Of course, this reasoning cannot apply to *all* pricing guides or statistical calculations, many of which surely use data in a manner that would foreclose a determination of accuracy by other scholars if given copyright protection.¹⁴² Nonetheless, cases like *Maclean*, which have granted protection to pricing and statistical estimates that are certainly “speculative” works, do not damage the distinctive utility of nonfiction works. The Second Circuit recognized the importance of discussion, verification, and refutation to the process of developing an accurate body of knowledge. Its decision in *Maclean* to withhold application of that maxim to works that do not need to be copied to be studied by others does not undercut this understanding.

CONCLUSION

Although works of nonfiction are especially important to the goals of knowledge, science, and useful art envisioned by our country’s Founding Fathers, they garner less protection under copyright than do creative and artistic works. In his 1963 article *Copyright Protection for the Compilation and Representation of Facts*, Robert Gorman took note of this paradox, observing that “courts ha[d] put into practice, without articulation, the distinction between works of literary or artistic merit and fact works,” recognizing a distinction in utility and need for public dissemination between the two.¹⁴³ Since then, opinions such as *Hoehling* and *Nash*, as well as an increased prominence of the fair use defense, have indicated that the courts are “put[ting] into practice, without articulation,” another distinction between various types of copyrighted works. In accordance with the need to produce accurate, and not just numerous, works, courts are differentiating between works which require discussion, verification, and refutation to attain accuracy and works that do not.

Although such a distinction might skew the simple incentive structure we typically ascribe to copyright—the more works that are incentivized, the better—it actually upholds a key purpose outlined by the

141 *Id.* at 63 (citation omitted) (internal quotations omitted).

142 *See, e.g.*, *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 110 (2d Cir. 2007) (holding that the New York Mercantile Exchange’s settlement prices, which are used to value its customers’ positions, were not copyrightable because “enforcing the copyright . . . would effectively accord protection to the idea itself”).

143 Gorman, *supra* note 22, at 1599.

Constitution. The American copyright system is tasked with promoting the “Progress of Science and useful Arts.”¹⁴⁴ Copyright does not exist to protect one’s natural right in her intellectual creations; rather, it serves as a tool to incentivize the creation and expansion of societal knowledge and understanding.¹⁴⁵ The first Congress saw copyright as a means by which to encourage learning,¹⁴⁶ and this public benefit rationale continues to be cited by courts today.¹⁴⁷

The intricacies that exist in today’s copyright system indicate that the courts, even as they have given Congress broad deference as to the extent of its Section 8 Clause 8 powers, have not lost sight of this purpose. That expository works of nonfiction have oftentimes garnered less copyright protection than mere compilations of facts, even though such expository works often require significantly more time and rigorous thought to complete, that so-called “speculative” works may get lesser protection than other works, and that works that are more clearly the product of opinion and subjective categorization—such as used car price estimates—may get more protection are all pieces of our copyright system that begin to make sense under a multidimensional understanding of utility.

Works of nonfiction—originally targeted, not merely coincidentally, for copyright protection—have a special ability to contribute to the copyright system. Because they are created with the intent of producing information or understanding, works of nonfiction are unquestionably useful in contributing towards the public body of knowledge—but only if they are accurate. While accurate works bring society closer to discovering the truth regarding various phenomena and human questions such as history, inaccurate works of nonfiction can be especially *harmful* to the public body of knowledge. Our copyright system must therefore encourage not just a greater quantity of nonfiction works, but also a higher quality of nonfiction works. Nonfiction explanations and hypotheses—the accuracy of which matters to our public body of knowledge—must be left open for verification, refutation, and inclusion in scholarly discourse.

144 U.S. CONST. art. I, § 8, cl. 8.

145 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 21 (Julian P. Boyd et al. eds. 1958) (“[A]s encouragements to literary works and ingenious discoveries, [copyrights] are . . . too valuable to be wholly renounced.”).

146 Copyright Act of 1790, *supra* note 23.

147 See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (analyzing an infringement’s fair use in terms of its “transformative use” and “benefit to the public”).

Questions, of course, remain unanswered. How can a new understanding of copyright utility be more uniformly incorporated into the copyright system? If the answer is that hypotheses and theories be left without copyright protection—as has been suggested here—how can such a ban be squared with a system that is meant, at bottom, to incentivize the production of those very works?

Copyright scholars have addressed this issue, coming to various conclusions. One solution, offered by Robert Gorman and supported by others, calls for increasing the breadth of copyright protection granted to such works of nonfiction while also allowing scholars to more easily claim fair use when discussing, critiquing, or verifying such works.¹⁴⁸ This solution is attractive because it keeps the incentive structure in place and forces judges reviewing cases of infringement into a relatively extensive analysis of the works. Its detracting factor is that increased judicial involvement in infringement analyses may lead to conflicting results, and increased reliance on fair use will lead to increased litigation (though it could fall again once best practices are developed). Another solution, offered by Jane Ginsburg, also calls for permitting broad protection of literary works of nonfiction, with the extent of that protection determined by a court-imposed abstraction-filtration-comparison test. This “test”¹⁴⁹ also keeps the incentive structure in place, and acknowledges that society can gradually come to a consensus regarding a particular phenomenon or fact pattern, allowing a contraction of the “levels” of abstraction regarding a particular topic. But it also makes way for broad judicial discretion in determining when a consensus has been reached—when the “truth” has been found—and how a particular topic ought to be defined, which is dangerous if we want judges to remain neutral regarding the accuracy or veracity of a particular work.

Particular factors make it difficult to support one solution over another.¹⁵⁰ But no matter which course is eventually chosen, it seems

¹⁴⁸ Gorman, *supra* note 22, at 1603 (advocating that courts grant copyright protection by “find[ing] ‘originality’ in the social contribution made by the accurate gathering, verification, and tangible representation of useful information” in factual works, and then permitting extensive use of such works by “compel[ling] courts to resolve the problems . . . under the rubric of infringement and fair use . . .”).

¹⁴⁹ To be clear, “[Judge] Hand’s insight is not a ‘test’ at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality,” *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990), upon which the framing of a topic or issue can fall.

¹⁵⁰ Broadly speaking, it is unclear whether stronger copyright protection will result in an increased production of nonfiction works. Other factors, such as economic first-mover advantage, prestige, the possibility of career advancement and recognition, and personal motives, surely influence the decision to author an explanatory work of nonfiction. At

as though the courts will have to continue balancing both incentive against dissemination and quantity against quality. The status quo use of the idea-expression dichotomy does not guarantee that the accuracy of nonfiction will be considered by courts when determining how to construe the protection of such works. Instead, courts must take care in how broadly or narrowly they define the underlying idea or fact being excluded from protection—and this is precisely what the courts have done in cases like *Hoehling* and *Nash*. In the end, no matter what standards the courts use, they ought to make these factors known. In striking a balance between incentive and dissemination, courts must bear in mind that a third consideration exists—the accuracy of the explanatory works being submitted to the public body of knowledge. If we are to support the Constitution’s goals of progress in science and useful arts, such works must be subject to discussion, verification, and refutation so as to ensure accuracy of understanding. And even if a judicial hand in constructing our public body of knowledge is inevitable, judges ought to at least be aware of—and ultimately acknowledge—all the cards on the table.

the same time, it is unclear whether a bar to protecting theories and hypotheses would depress incentives enough to result in fewer works. Judge Easterbrook feared as much in *Nash*: “If all of [an author’s] work, right down to [her] words, may be used without compensation, there will be too few original investigations, and facts will not be available on which to build.” *Id.* at 1542. Likewise, it is unclear if such a bar would actually result in the increased dialogue needed to determine a work’s accuracy.

In any event, it seems as if judicial involvement in making those determinations is inevitable. Said Judge Easterbrook in *Nash*, the copyright system, as a legal institution, must be able to find the right balance between incentivizing new works through strong copyright protection and enablement of discourse about nonfiction works through more limited protection.

After 200 years of wrestling with copyright questions, it is unlikely that courts will come up with the answer any time soon, if indeed there is ‘an’ answer, which we doubt [O]pposing forces . . . make the formulation of a single approach [very] difficult. . . . Before the first work is published, broad protection . . . seems best; after it is published, narrow protection seems best. At each instant some new works are in progress, and every author is simultaneously a creator in part and a borrower in part. In these roles, the same person has different objectives. Yet only one rule can be in force. *Id.* at 1540–41.