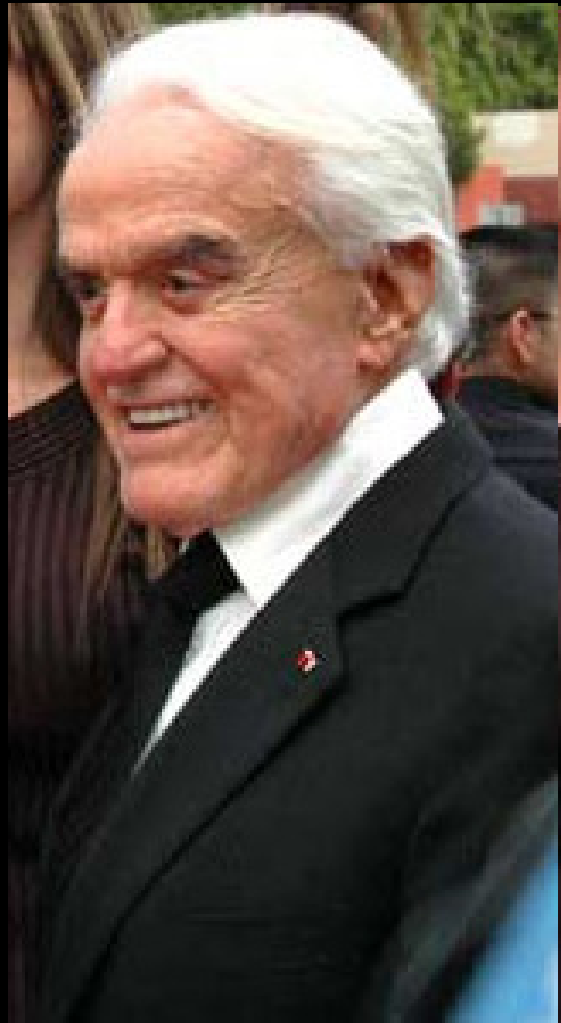


A new approach for the  
justification of  
copyright in the digital  
era?

James GH Griffin,  
University of Exeter

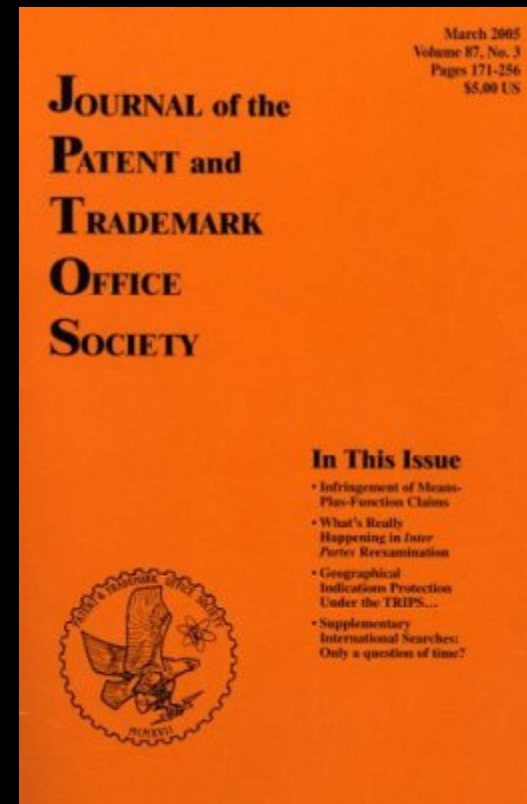


*“Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation”*

# “property”

Intellectual Property is  
a relatively new term!

**Prager, F.D.,** 'The Early  
Growth and Influence of  
Intellectual Property'  
34(2) Journal of the  
Patent Office Society  
106 (1952).



Statutes:

Copyright, Designs and Patents  
Act 1988 s1

Patents Act 1977 s30

Trade Marks Act 1994 s22

## The Philosophy of Intellectual Property

JUSTIN HUGHES\*

I. WHAT COUNTS AS INTELLECTUAL PROPERTY? .....	290
II. A. LOCKEAN JUSTIFICATION .....	296
A. LOCKE'S PROPERTY THEORY .....	297
B. LABOR AND THE PRODUCTION OF IDEAS .....	300
1. The "Avoidance" View of Labor .....	302
2. The "Value-Added" Labor Theory .....	305
3. Labor and the Idea/Expression Distinction .....	310
C. IDEAS AND THE COMMON .....	315
1. The Common and Tempered Property Rights .....	315
2. The Common and Ideas That Cannot Be Granted Property Status .....	319
3. Augmenting the Common Through Expiration of Property Rights .....	323
D. THE NON-WASTE CONDITION AND INTELLECTUAL PROPERTY .....	325
1. Intellectual Property and the Money Economy .....	325
2. The Non-Waste of Intellectual Property .....	327
E. FINAL COMMENTS ON A LOCKEAN JUSTIFICATION .....	329
III. A HEGELIAN JUSTIFICATION .....	330
A. HEGELIAN INTELLECTUAL PROPERTY .....	331
1. The General Hegelian Philosophy .....	331
2. The Property/Person Connection .....	332
3. Intellectual Property Under Hegel .....	337
B. PROBLEMS IN APPLYING THE PERSONALITY JUSTIFICATION TO INTELLECTUAL PROPERTY .....	339
1. Varying Degrees of Personality in Intellectual Property .....	339
2. Alienation and the Personality Justification .....	344
C. THE PERSONALITY JUSTIFICATION IN U.S. LAW .....	350
D. CIVIL RIGHTS SUPPORT FOR A PERSONALITY JUSTIFICATION .....	355
1. The Privacy Right Argument .....	355
2. The Freedom of Expression Argument .....	358
IV. CONCLUSION .....	365

\* Luce Scholar and Mellon Fellow in the Humanities, 1988. B.A. 1982, Oberlin College; J.D. 1986, Harvard University.

Hughes, J., 'The Philosophy of Intellectual Property', 77 *Georgetown Law Review* 287 (1988-1989)

clined it. Mr. Roberts, being himself unacquainted with the city laws, demanded counsel, that justice might be done him in the course of the scrutiny. This reasonable demand, contrary to the usage of the city of London, and unprecedented in the general conduct of elections, was denied him; and therefore he chose rather to have recourse to the impartiality of a parliamentary scrutiny, than to trust himself in the hands of such partial scrutinizers. And no man, surely, can have a juster claim to prefer a petition, and to have it fairly heard.

*Sir Joseph Mawbey.* The hon. gentleman who has now told the House that Mr. Roberts was refused counsel, appears to have been misinformed. Mr. Roberts began his scrutiny without counsel, and did not give notice to the lord mayor of his intention until a day or two before the sheriffs were obliged to make their return of a member. By this artful method of demanding counsel at such a time, it was thought, when no other hope was left, to have prolonged the time, and to have defeated the election by protracting the return. He can therefore have no right to petition on this ground.

The motion was then agreed to.

Feb. 28. The Speaker informed the House, that he had received a letter from Mr. Roberts, acquainting him that he desired to withdraw his petition.

Mr. Alderman *Hopkins* then made an apology for the trouble he had given the House on Mr. Roberts's account; he said, he was averse, from the first, to any petition being presented, as he was confident the present sitting member was a gentleman of such honour, that he would not make use of any unfair means to gain a seat; that he could wish the lord mayor was present, as he was sure he would entirely acquit him of any partiality in the business; and he wished to acquaint the House, that he only presented the petition as a member, by the desire of Mr. Roberts, who, he said, had not acquainted him with any intention of withdrawing it. He concluded, wishing the lord mayor health and prosperity to enjoy his seat for life.

The Petition was then withdrawn.

*Proceedings in the Lords on the Question of Literary Property.\** February 4.

\* The House of Lords this session, in its judicial capacity, determined the great ques-

The order of the day being read, for hearing counsel in the cause wherein Alexander Donaldson and John Donaldson are appellants, and Thomas Beckett and others are respondents; and for the judges to attend; counsel were accordingly called in;

Mr. Attorney General *Thurlow* opened as counsel for the appellants. He first entered into a minute investigation of the idea inculcated by what is called a publication; he then dwelt much upon the sense of the word 'property,' defining it philosophically, and in the separate lights of being corporeal and spiritual; the term Literary Property, he in a manner laughed at, as signifying nothing but what was of too abstruse and chimerical a nature to be defined. The booksellers, he observed, (exemplifying his observations by several cases) had not, till lately, ever concerned themselves about authors, but had generally confined the substance of their prayers to the legislature, to the security of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of exclusively multiplying copies, had not they found it necessary to give a colourable face to their monopoly. He was very diffusive upon grants, charters, licences, and patents from the crown, both to corporate bodies and individuals, tracing them far back, and asserting, that they all specifically proved, that, if there had been any inherent right of exclusively multiplying copies, such instances of exerting the royal prerogative would have been unnecessary. He particularly adverted to the statute of the 8th of queen Anne, maintaining that it was not merely an accumulative act declaratory of the common law, and giving additional penalties, but that it was a new law to give learned men a property which they had not before, and that it was an incontrovertible proof that there previously existed no common law right, as contended for by the respondents. He cited many cases to prove his arguments; some before the 8th of queen Anne, and others immediately upon that statute, generally inferring that the grand question touching the common law right had never been decisively determined by any chancellor.

He concluded his speech with a compliment to his learned coadjutor, and a hope, that as the lords of session in Scotland had freed that country from a mono-

tion of literary property, which was brought before them by an appeal from a decree in



angle, and never pretend to decide upon a claim of property, without attending to the old black letter of our law, without founding their judgment upon some solid written authority, preserved in their books, or in judicial records. In this case I know there is none such to be produced.

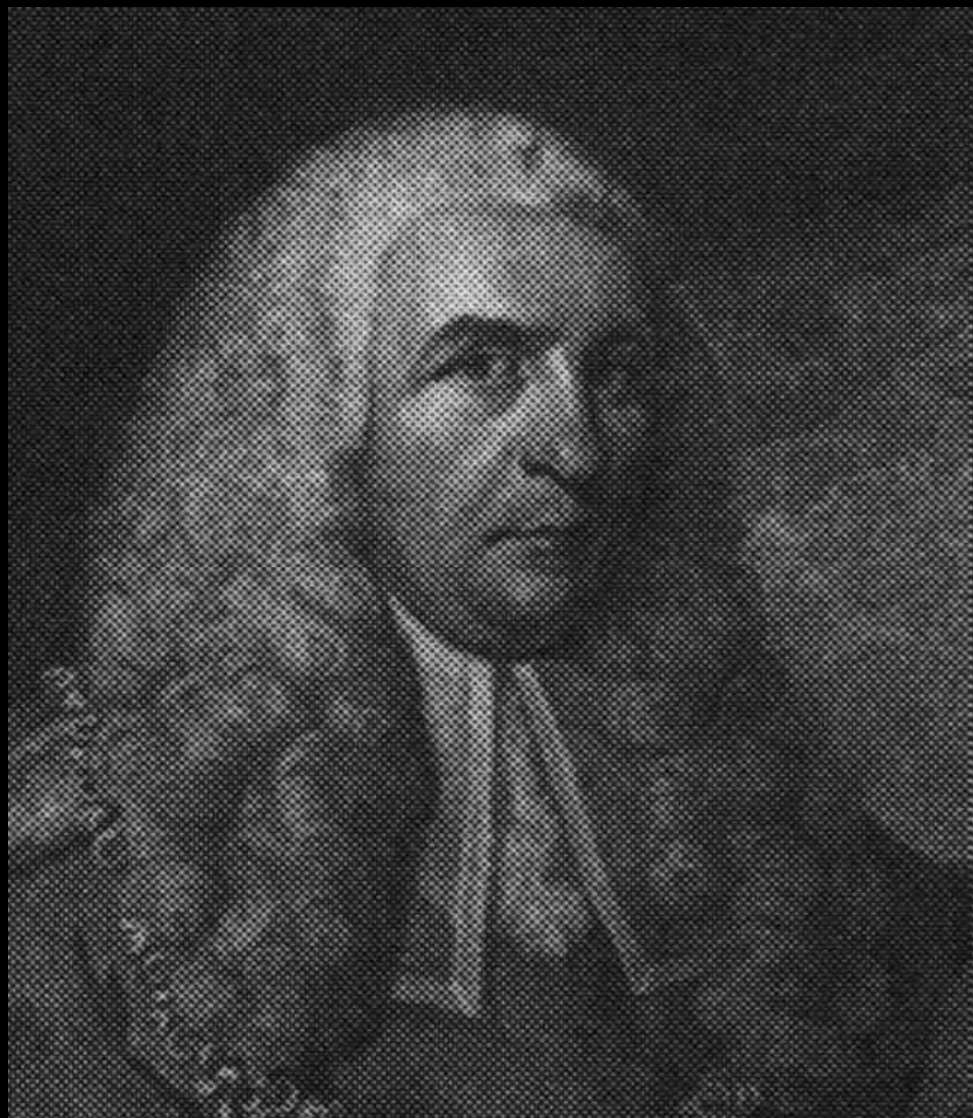
With respect to inventors, I can see no real and equal difference between them and authors; their merit is equal, they are equally beneficial to society, or perhaps the inventor of some of those master pieces of art which have been mentioned have there the advantage. All the judges who have been of a different opinion, conscious of the force of the objection from the similarity of the claim, have told your lordships they did not know but that an action would lie for the exclusive property in a machine at common law, and chose to resort to the patents. It is, indeed, extraordinary that they should think so, that a right that never was heard of could be supported by an action that never yet was brought. If there be such a right at common law, the crown is an usurper; but there is no such right at common law, which declares it a monopoly; no such action lies; resort must be had to the crown in all such cases.

If, then, there be no foundation of right for this perpetuity by the positive laws of the land, it will I believe find as little claim to encouragement upon public principles of sound policy, or good sense. If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries

which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. 'Scire tuum nihil est, nisi te scire hoc sciat alter.' Glory is the reward of science, and those who deserve it, scorn all meaner views: I speak not of the scribbles far broad, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pounds for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it, and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.

Instead of salesmen, the booksellers of late years have forestalled the market, and become engravers. If, therefore, the monopoly is sanctified by your lordships' judgment, exorbitant price must be the consequence; for every valuable author will be as much monopolized by them as Shakespeare is at present, whose works, which he left carelessly behind him in town, when he retired from it, were surely given to the public if ever author's were; but two prompters or players behind the scenes had hold of them, and the present spectators pretend to derive that copy from them, for which the author himself never received a farthing.

I pass over the flimsy supposition of a coupled contract between the bookseller who sells, and the public which buys the printed copy; it is a notion as unnecessary in itself as it is void of a legal foundation. This perpetuity now commended for is as odious and as selfish as any other, it de-



*"Those great men, those favoured mortals, those sublime spirits, who share of that ray of divinity which we call genius, are intrusted by providence with the delegated power of imparting to their fellow creatures that instruction which heaven meant for universal benefit; that they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. Scire tuum nihil est, nisi te saire, hoc sciat alter [Your knowledge is nothing when no one else knows you know it]"*



*"Let us suppose that the Mind to be, as we say, white Paper, void of all Characters, without any Ideas; How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials Reason and Knowledge? To this I answer, in one word, From Experience: In that, all our Knowledge is founded; and from that it ultimately derives it self."*

*Locke, An Essay Concerning Human understanding, Book II, Chapter 1 at §2.*

*“Reading is for the improvement of the understanding. The improvement of the understanding is for two ends: first, for our own increase of knowledge; secondly, to enable us to deliver and make out that knowledge to others.”*

*Locke, J., Some thoughts on reading and study for a gentleman (a letter)*

## Napster

".. the district court concluded that Napster harms the market in 'at least' two ways: it reduces audio CD sales among college students and it 'raises barriers to plaintiffs' entry into the market for the digital downloading of music'. The district court relied on evidence plaintiffs submitted to show that Napster use harms the market for their copyrighted musical compositions and sound recordings."

A&M Records, Inc. v Napster, Inc 239  
F.3d 1004 (9th Cir., 2001) at 1016

Grokster

"MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering"

Metro-Golden-Meyer Studios, Inc v Grokster, Ltd. 125 S.Ct. 2764 at 2772

Reimerdes:

"Discussions among the studios with the goal of organizing a unified response to the piracy threat began in earnest in late 1995 or early 1996. They eventually came to include representatives of the consumer electronics and computer industries, as well as interested members of the public, and focused on both legislative proposals and technological solutions. In 1996, Matsushita Electric Industrial Co ('`MEI'') and Toshiba Corp., presented - and the studios adopted - CSS"

Universal City Studios, Inc. v Reimerdes  
82 F.Supp.2d 211 (S.D.N.Y. 2000) at 309

*A different approach?*

Sega v Accolade

"Accolade used a two-step process to render its video games compatible with the Genesis console. First, it "reverse engineered" Sega's video game programs in order to discover the requirements for compatibility with the Genesis console. As part of the reverse engineering process, Accolade transformed the machine-readable object code contained in commercially available copies of Sega's game cartridges into human-readable source code using a process called "disassembly" or "decompilation"."

Sega v Accolade, 977 F.2d 1510 (9th Cir. 1992) at 1514

*Why a different approach?*

Statutory amendments?

Wider reforms?

1) The "property" in  
"intellectual property" was not  
a given

2) Perhaps a different approach  
would be desirable?