

## The Philosophy of Intellectual Property

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77 *Geo. L.J.* 287

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As a slogan, "property" does not have the siren's call of words like "freedom," "equality," or "rights." The Declaration of Independence speaks boldly of liberty, but only obliquely of property -- through the imagery of the "pursuit of Happiness."<sup>n1</sup> This, however, should not obscure the fact that ideas about property have played a central role in shaping the American legal order. For every Pilgrim who came to the New World in search of religious freedom, there was at least one colonist who came on the promise of a royal land grant or one slave compelled to come as someone else's property.

In the centuries since our founding, the concept of property has changed dramatically in the United States. One repeatedly mentioned change is the trend towards treating new things as property, such as job

security and income from social programs.<sup>n2</sup> A less frequently discussed trend is that historically recognized but nonetheless atypical forms of property, such as intellectual property, are becoming increasingly important relative to the old paradigms of property, such as farms, factories, and furnishings. As our attention continues to shift from tangible to intangible forms of property, we can expect a growing jurisprudence of intellectual property.

The foundation for such a jurisprudence must be built from an understanding of the philosophical justifications for property rights to ideas -- a subject that has never been addressed systematically in American legal literature. Rights in our society cannot depend for their justification solely upon statutory or constitutional provisions. As Justice Stewart said in *Board of Regents v. Roth*, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules and understandings that stem from an independent source. . . ." <sup>n3</sup> This article analyzes the "independent sources" that apply to intellectual property by testing whether

traditional theories of property are applicable to the very untraditional field of intellectual goods.

Part I of this Article maps out this field by describing intellectual property. It then explores and explains the justifications for ascribing ownership of such property. The first justification it presents is the Lockean "labor theory," which informed our Constitution's vision of property. This labor justification can be expressed either as a normative claim or as a purely incentive-based, instrumental theory. Both of these aspects of the labor theory are examined in Part II.

The main alternative to a labor justification is a "personality theory" that describes property as an expression of the self. This theory, the subject of [\*289] Part III, is relatively foreign to Anglo-Saxon jurisprudence. Instead, its origins lie in continental philosophy, especially the work of Georg Wilhelm Friedrich Hegel. n4 Part III argues, however, that more familiar civil rights doctrines, specifically rights of expression and privacy, also can provide a foundation for personality theory in intellectual property. This civil rights justification serves, in large part, as a bridge from American legal doctrines to the more abstract personality justification.

When I say "justification," I do not mean that every aspect of our system of intellectual property be tortured on some rack of theoretical validity. Instead, I hope to show that the existing law supports, to varying degrees, the credibility of different theories of property and that these theories support, to varying degrees, the validity of existing laws. Some might call this a funhouse epistemology: two things becoming more acceptable by mirroring one another. In fact, this metaphor

of "mirroring" is a powerful one that recently has inspired both philosophers and legal thinkers. n5 The latter usually have been concerned with the *normative* question of when and how the law *should* mirror reality. This article's concern differs in two respects. First, its reflection is between law and philosophical theory, not between law and pragmatic reality. Second, this article is intended mainly to be descriptive and not prescriptive. It is concerned primarily with answering one question: Does the law of intellectual property reflect general theories of property? In answering this question, however, I invariably fall into discussions motivated by an image of what the theory should be and, reflecting from that image, of what the law should be.

In the end, I suspect that many people who think about property rights are propelled by the same forces that provoked Proudhon to proclaim that "all Property is theft." n6 His slogan, however, is incoherent if taken literally: the idea of theft presupposes that someone else holds legitimate title. n7 If Proudhon [\*290] meant to exempt certain property from his indictment, then the original dilemma is merely pushed back to the question of defining and justifying the exemption. One of this article's fundamental propositions is that property can be justified on either the labor or personality theories and that it should be justified with both. Properly elaborated, the labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property. In short, intellectual property is either labor or personality, *or* it is theft.

## I. WHAT COUNTS AS INTELLECTUAL PROPERTY?

In many quarters, property is viewed as an inherently conservative concept -- a social

device for the maintenance of the status quo. In the eighteenth century, Edmund Burke argued that property stabilized society and prevented political and social turmoil that, he believed, would result from a purely meritocratic order. n8 Property served as a counterweight protecting the class of persons who possessed it against competition from nonpropertied people of natural ability and talent. To Burke, the French National Assembly -- dominated by upstart lawyers from the provinces -- exemplified the risk of disorder and inexperience of an unpropertied leadership. n9 In contrast, the British parliament, a proper mix of talented commoners and propertied Lords, ruled successfully. n10

The conservative influence of property does not, however, depend on primogeniture or even inheritance -- features that gave property a valuable role in Burke's political system as well as in the political theories advanced by Hegel and Plato. n11 Within a single lifetime, property tends to make the property owner more risk-averse. This aversion applies both to public decisions [\*291] affecting property, such as taxes, and to personal decisions that might diminish one's property, such as investment strategies and career choices. Inheritance and capital appreciation are only additional characteristics of traditional notions of property that tend to stabilize social stratification.

Intellectual property is far more egalitarian. Of limited duration and obtainable by anyone, intellectual property can be seen as a reward, an empowering instrument, for the talented upstarts Burke sought to restrain. Intellectual property is often the propertization of what we call "talent." It tends to shift the balance toward the talented newcomers whom Burke mistrusted by giving them some insurance

against the predilections of the propertied class that had been their patrons.

But this is only part of the truth. Much intellectual property is produced only after considerable financial investment, whether it be in the research laboratory or in the graduate education of the scientist using the facility. It would not be surprising if historical studies showed that most holders of copyrights and patents come from at least middle-class backgrounds. For every Abraham Lincoln n12 or Edmonia Lewis n13 who lifted him or herself from a simple background, there is a Wittgenstein or Welty who enjoyed comfort during his or her formative years. One cannot call the history of intellectual property a purely proletarian struggle. While ancient Roman laws afforded a form of copyright protection to authors, n14 the rise of Anglo-Saxon copyright was a saga of publishing interests attempting to protect a concentrated market and a central government attempting to apply a subtle form of censorship to the new technology of the printing press. n15

In the final analysis, intellectual property shares much of the origins and orientation of all forms of property. At the same time, however, it is a more neutral institution than other forms of property: its limited scope and duration tend to prevent the very accumulation of wealth that Burke championed. n16 Because such accumulation is less typical, the realm of intellectual property has less of the laborer/capitalist hierarchy of Marxist theory. The breakthrough patent that produces a Polaroid company is more the exception than the rule. The rule is the modestly successful novelist, the minor [\*292] poet, and the university researcher -- all of whom may profit by licensing or selling their creations. Furthermore, intellectual property may be a liberal influence on society

inasmuch as coming to own intellectual property is often tied to being well-educated. If people become increasingly progressive with increasing education, intellectual property confers economic power on men and women of talent who generally tend to reform society, not because they are haphazard Burkian goblins, but because they have well-informed convictions.

At the most practical level, intellectual property is the property created or recognized by the existing legal regimes of copyright, patent, trademark, and trade secret. n17 We also must include property recognized by similar legal regimes. For example, federal law now protect original semiconductor masks. n18 "Gathered information" is another genre of intellectual property. Copyright law protects the particular arrangement of the contents of telephone directories and reference works, n19 while other forms of gathered information may have quasi-property status under *International News Service v. Associated Press*. n20 Like most subjects, intellectual property has grey zones on the periphery, such as the right to publicity -- whether, in property style, someone can control his public image. n21

While this article is devoted to American intellectual property, a positivist's definition of intellectual property need not be limited to citations to the United States Code. First, several well-subscribed international treaties create international standards for what counts as intellectual property. n22 At the [\*293] level of national laws, even socialist economies either have recognized roughly similar parameters to intellectual property or at least have averred their subscription to the general idea of legal regimes for copyright, trademark, and patent. n23 This does not mean that there is international uniformity in the protection granted to intellectual property, only that there

are generally accepted baselines of protection. Some countries extend protection well beyond these baselines, while others benignly ignore enforcing or intentionally cut back these general principles.

There is good reason to think that these differences among national legal systems do not represent profound differences in the underlying notions of what intellectual property is all about. Developing countries may fail to promulgate or enforce intellectual property laws simply because these laws are not critical to maintaining immediate social order. Other developing countries intentionally deny protection to intellectual property as part of their official development strategy. Taiwan's longstanding refusal to honor copyrights is an infamous case, n24 but usually the failure to protect intellectual property rights has been more limited and tailored to particular fears of foreign economic domination. n25 Such elimination of intellectual property protection [\*294] does not reflect a different conception of intellectual property so much as it does a countervailing social policy. In the final tally, there is at least as much continuity in different societies' understandings of intellectual property as in their respective conceptions of freedom of expression, equality, and property in general.

A universal definition of intellectual property might begin by identifying it as nonphysical property which stems from, is identified as, and whose value is based upon some idea or ideas. Furthermore, there must be some additional element of novelty. Indeed, the object, or res, of intellectual property may be so new that it is unknown to anyone else. The novelty, however, does not have to be absolute. What is important is that at the time of propertization the idea is thought to be *generally* unknown. The res

cannot be common currency in the intellectual life of the society at the time of propertization.

The *res* is a product of cognitive processes and can exist privately, known only to its creator. This private origin is a reasonable means to distinguish the *res* of intellectual property from the *res* of other intangible properties such as stock or stock options. Although the "inputs" for the *res* of intellectual property are social -- the education and nurture of the creator -- the assembling of the idea occurs within the mind of the creator which produces something beyond those inputs. Sometimes the addition is more effort than creativity, as in compilations of information or number-crunching. Some people disfavor describing such efforts as "ideas," but I will use "idea" to refer to this broad notion of the *res*, understanding "idea" to be shorthand for the unique product of cognitive effort.

Intellectual property also may be thought of as the use or the value of an idea. Where *X* is the idea, intellectual property is defined by the external *functions* of *X*. The creator introduces the idea into society and, like Henry Higgins, he seeks to control the social calendar of his creation. This Pygmalion story is more apropos than first meets the eye. The creator's control is never complete and he may find himself -- like Pygmalion, Higgins, or Dr. Frankenstein -- fighting to control that which he has introduced into the world. The most interesting areas of intellectual property law tend to be just those places in which people are trying to hold on to their creations against those who want the creation unfettered from its master. For example, in 1985, Samuel Beckett challenged the Harvard American Repertory Theatre's [\*295] controversial production of Beckett's *Endgame*. n26 The playwright screamed about the integrity of his

art; the actors screamed about the freedom of their art, and there was much public debate about constitutional protection of speech, theatre versus film, and the evilness of publishing houses. n27

Even without such debates, intellectual property -- like all property -- remains an amorphous bundle of rights. However, there are some clear limits to the bundle of rights we will drape around an idea. First, these rights invariably focus on physical manifestations of the *res*. In the words of one commentator, "[a] fundamental principle common to all genres of intellectual property is that they do not carry any exclusive right in mere abstract ideas. Rather, their exclusivity touches only the concrete, tangible, or physical embodiments of an abstraction." n28

Even regarding physical embodiments, there are limitations on intellectual property rights. Copyrighted materials may be copied within the broad limits of statutorily recognized "fair use." n29 "Fair use" focuses on personal use or use which is *not* directly for profit. Yet such uses can be public, such as quoting another's work. Although patents do not have a similar exemption for personal use, patent protection is subject to a judicially created exception: the patent holder has no right against the person whose "use is for experiments for the sole purposes of gratifying a philosophical taste or curiosity or for instruction and amusement." n30 Such limitations are motivated, in part, by pragmatic considerations as to the difficulty of policing such infringements. These limitations, however, also serve the perhaps primary objective of intellectual property: to "promote the Progress of Science and useful Arts" n31 by increasing society's stock of knowledge. Both concerns are best served by limiting property rights over ideas.

Yet even these limited rights are not draped over all ideas. Everyday ideas, like thinking to walk the dog on a shorter leash or to go to the top of the Eiffel Tower on a first date, are not the subject of intellectual property rights. At the opposite extreme, the most extraordinary ideas or discoveries are also beyond the ken of legal protection: the calculus, the Pythagorean [\*296] theorem, the idea of a fictional two-person romance, the cylindrical architectural column, or a simple algorithm. These extraordinary ideas usually are broadly applicable concepts, but they can be very specific -- as in the case of accurate details on a navigation map. I will show how justifications of intellectual property can account for denying the creators of these sorts of ideas property rights over them.

These limits might lead one to conclude that intellectual property is especially positivist in origin, at least compared to property rights over land and chattels. That conclusion may be myopic. Many physical objects also are beyond appropriation, like navigable rivers, beaches, and the airspace in congested urban areas. The use of physical property is circumscribed by laws on easements, zoning, and nuisance. Even the apparent ability to enforce exclusivity over physical property may pose less of a difference than one would think. It is certainly easier for me to enforce my exclusivity over my apartment than over my short story, but what about my ability to exclude others from a ten-thousand-acre Colorado ranch? Is the patent holder worse off than the holder of distant and extensive real estate parcels?

Perhaps the greatest difference between the bundles of intellectual property rights and the bundles of rights over other types of property is that intellectual property always has a self-defined expiration, a built-in sunset. Imagine

how different Western society would be if it had developed on the basis of a one-hundred-percent inheritance tax. This difference powerfully distinguishes intellectual property from other property. The remainder of the article explains, at various junctures, how this sunset enhances the social *neutrality* of intellectual property rights and improves the fit between these laws and the theories by which they can be justified.

## II. A LOCKEAN JUSTIFICATION

Reference to Locke's *Two Treatises of Government* is almost obligatory in essays on the constitutional aspects of property. For Locke, property was a foundation for an elaborate vision that opposed an absolute and irresponsible monarchy. n32 For the Founding Fathers, Locke was a foundation for an elaborate vision opposed to a monarchy that was less absolute, but seemed no less irresponsible.

Locke's theory of property is itself subject to slightly different interpretations. One interpretation is that society rewards labor with property purely on the instrumental grounds that we *must* provide rewards to get labor. In contrast, a normative interpretation of this labor theory says that labor *should* be rewarded. This part of the article argues that Locke's labor theory, [\*297] under either interpretation, can be used to justify intellectual property without many of the problems that attend its application to physical property.

### A. LOCKE'S PROPERTY THEORY

The general outline of Locke's property theory is familiar to generations of students. In Chapter V of the *Second Treatise of Government*, Locke begins the discussion by describing a state of nature in which goods are held in common through a grant from God. n33 God

grants this bounty to humanity for its enjoyment but these goods cannot be enjoyed in their natural state. n34 The individual must convert these goods into private property by exerting labor upon them. This labor adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being.

Locke proposes that in this primitive state there are enough unclaimed goods so that everyone can appropriate the objects of his labors without infringing upon goods that have been appropriated by someone else. n35 Although normally understood as descriptive of the common, the *enough and as good* condition n36 also is conceptually descriptive of human beings. In other words, this condition is possible because the limited capacities of humans put a natural ceiling on how much each individual may appropriate through labor.

The enough and as good condition protects Locke's labor justification from any attacks asserting that property introduces immoral inequalities. Essentially the enough and as good condition is an equal opportunity provision [\*298] leading to a desert-based, but *noncompetitive* allocation of goods: each person can get as much as he is willing to work for without creating meritocratic competition against others.

What justly can be reduced to property in this primitive state also is limited by Locke's introduction of the *non-waste* condition. This condition prohibits the accumulation of so much property that some is destroyed without being used. n37 Limited by this condition, Locke suggests that even after the primitive state there sometimes can be enough and as good left in the common to give those without property the opportunity to gain it. Spain and

America, he says, illustrate the continuing applicability of this justification of property. n38

Until this point in his exposition, Locke does not explore the notion of labor and the desert it creates. His theory is largely a justification by negation: under his two conditions there are no good reasons for not granting property rights in possessions. This has led scholars such as Richard Epstein to a possession-based interpretation of Locke. Epstein argues that "first possession" forms the basis for legal title and believes that this is the heart of Locke's position. n39 For Epstein, the talk of labor is a smokescreen hiding the fundamental premise of Locke's argument that a person possesses his own body:

Yet if that possession is good enough to establish ownership of self, then why is not possession of external things, unclaimed by others, sufficient as well? The irony of the point should be manifest. The labor theory is called upon to aid the theory that possession is the root of title; yet it depends for its own success upon the proposition that the possession of self is the root of title to self. n40

It is unclear why Epstein should reach this conclusion. Locke never mentions one's *possession* of one's body as the basis for one's *property* in one's body; he begins simply by asserting one's body is one's property. n41 Yet Epstein connects property to possession by saying, "[t]he obvious line for justification is that each person is in possession of himself, if not by choice or [\*299] conscious act, then by a kind of natural necessity." n42

Epstein directly, albeit unknowingly, points out a critical difference: we are not in possession of any particular external objects by a kind of natural necessity. If we were, the need for property laws would be greatly

diminished. Each person, like a tree, would be rooted to his own parcel of external objects; this would be "of natural necessity," and no one would try to displace another from his natural and necessary attachments. Precisely because "natural necessity" goes no further than the mind/body link, reliance upon the "possession" of body as a foundation for a possession-based justification of property is a bit disingenuous. n43

Epstein's possession-based theory also seems inaccurate because Locke offers a positive justification for property that buttresses his labor theory. He suggests that granting people property rights in goods procured through their labor "increase[s] the common stock of mankind," n44 a utilitarian argument grounded in increasing mankind's collective wealth.

This justification is called into question by an obvious problem. If the new wealth remains the private property of the laborer, it does not increase the common stock. If it can be wantonly appropriated by the social mob, the laborer will realize quickly that he has no motivation to produce property and increase the common stock. One solution would be to rely upon the laborer's donations to the common, but increasing the common stock cannot be made to depend on supererogatory acts. The better solution -- one that Locke in fact advocated -- is to make this added value *potentially* part of the common stock by introducing the money economy. n45

In depicting the transition to a money economy, Locke assumes that: (1) the individual is capable of appropriating more than she can use; (2) the individual will be motivated to do so; and (3) nothing is wrong with this other than waste. Locke condemned waste as an unjustified diminution of the

common stock of potential property. To allow goods to perish after appropriating them -- and thereby removing them from a state in which others could have made use of them -- violates "the Law of Nature." n46 Stripped of its Lockean vestments, this non-waste principle can also be understood as an [\*300] impulse to avoid labor when it produces no benefits. The waste is not just spoiled food, but the energy used gathering it. The non-waste condition, however, allows the individual to barter for things which he can enjoy, which may be more durable, and which have been gathered as surplus by other individuals similarly motivated.

Finally, Locke justifies the allocation of property in this more advanced money economy by tacit consent. For Locke, positive laws that manifest "disproportionate and unequal possession of the Earth" derive their authority from the tacit consent that people have given to be governed. n47 Modern writers have debated how much importance should be put on this hypothetical consent. n48 In the final analysis, Locke's overall scheme for property can be viewed as an alloy of the labor and tacit consent theories. n49 Yet it is the labor justification that has always been considered uniquely Lockean. Accordingly, when I refer to a "Lockean" theory of property, I will be referring to his labor justification.

We can justify propertizing ideas under Locke's approach with three propositions: first, that the production of ideas requires a person's labor; second, that these ideas are appropriated from a "common" which is not significantly devalued by the idea's removal; and third, that ideas can be made property without breaching the non-waste condition. Many people implicitly accept these propositions. Indeed, the Lockean explanation of intellectual property has immediate, intuitive appeal: it

seems as though people *do* work to produce ideas and that the value of these ideas -- especially since there is no physical component -- depends solely upon the individual's mental "work." The following sections of this article test the strength of such a vision.

## B. LABOR AND THE PRODUCTION OF IDEAS

A society that believes ideas come to people as manna from heaven must look somewhere other than Locke to justify the establishment of intellectual property. The labor theory of property does not work if one subscribes to a pure "eureka" theory of ideas. Therefore, the initial question might be framed in two different ways. First, one would want to determine if society [\*301] believes that the production of ideas requires labor. Second, one might want to know whether or not, regardless of society's beliefs, the production of ideas *actually does* require labor. This second question is the metaphysical one; in its shadow, society's belief may appear superficial. It is not. We are concerned with a justification of intellectual property, and social attitudes -- "understandings" as Justice Stewart said -- may be the only place to start.

Some writers begin with the assumption that ideas always or usually are the product of labor. n50 For example, Professor Douglas Baird assumes that although one cannot physically possess or occupy ideas, property in ideas is justified because people "have the right to enjoy the fruits of their labor, even when the labors are intellectual." n51 He believes the great weakness in this justification is that others also need free access to our ideas. n52 In Lockean terms, this is an "enough and as good" problem. Baird, however, never considers the prospect that idea-making may not involve labor.

Of course, there are clear instances in which ideas seem to be the result of labor: the complete plans to a new suspension bridge, the stage set for a Broadway show, a scholar's finished dissertation involving extensive research, or an omnibus orchestration of some composer's concertos. The peripheral realms of intellectual property also provide examples in which the object immediately seems to be the product of tremendous work: news stories gathered and disseminated by wire services, or stock indexes calculated by a financial house. The images of Thomas Edison inventing the light bulb and George Washington Carver researching the peanut come to mind as examples of laborious idea-making. As society has moved toward more complicated technologies, the huge scales of activity required by most research, involving time, money, and expertise, have made the autonomous inventor a rarity. This trend strengthens the image of idea-making as labor akin to the mechanical labor that operates industrial assembly lines.

Yet as we move toward increasingly large research laboratories that produce patentable ideas daily, we should not be so entranced by the image of a factory that we immediately assume there is labor in Silicon Valley. Locke, after all, begins his justification of property with the premise that initially [\*302] only our bodies are our property. n53 Our handiwork becomes our property because our hands -- and the energy, consciousness, and control that fuel their labor -- are our property. n54 The point here is not validation of Epstein's link of property with bodily self-possession but rather the more general observation that Locke linked property to the product of the individual person's labor. We must examine the production of ideas more fully if we expect to

show that their creation involves Lockean labor.

### 1. The "Avoidance" View of Labor

If we surveyed people on their attitudes toward idea-making, what might we find? First, we would probably find that many people who spend time producing ideas prefer this activity to manual labor. It probably also is true that many manual laborers would rather spend time producing ideas than performing manual labor. That an idea-maker prefers idea-making to farming, roofing, or putting screws in widgets suggests that idea-making may not be viewed as labor in the same way that the latter activities are. It may share this distinction with such professions as competitive sports. Yet at least at some level of desires, the idea-maker probably prefers to be on vacation than to be in his office or laboratory. For most people creation is less fun than recreation. Although "idea work" is often exhilarating and wonderful, it is something we generally have to discipline ourselves to do, like forcing oneself to till the fields or work the assembly lines.

This discussion depicts labor in one particular way: something which people avoid or want to avoid, something they don't like, an activity they engage in because they must. Lawrence Becker aptly has described Locke's view of labor as a "proposal that labor is something unpleasant enough so that people do it only in the expectation of benefits." n55 In fact, Locke himself refers to labor as "pains." n56

One commentator has observed that this concept of labor is more likely the product of experience than logical rigor:

[Comparing labor and property] is complicated by an equivocation about the idea of labor, which is dominated by the metaphor

of sweat on the brow. Hence it is that the least imaginative work counts most securely as labor. The squires and merchants of the seventeenth century were far from idle men, but administration and entrepreneurship do not so obviously qualify for the title of labor as the felling of trees and the planting of corn. n57

[\*303] In an understanding of labor based on the notion of "avoidance," labor is defined as an unpleasant activity not desirable in and of itself and even painful to some degree.

At this point we can separate the normative proposition of the labor theory from the instrumental argument with which it is usually identified. n58 The normative proposition states: *the unpleasantness of labor should be rewarded with property*. In this proposition, the "should" is a moral or ethical imperative, which is not based on any consideration of the *effects* of creating property rights. In comparison, the instrumental argument is directly concerned with those effects. It proposes that the unpleasantness of labor should be rewarded with property *because people must be motivated to perform labor*. In principle, the two propositions can coexist but neither requires acceptance of the other. In practice, however, the two not only coexist, but the instrumental argument often seems to be treated as a "proof" of the normative argument. The instrumental claim has a utilitarian foundation: we want to promote labor because labor promotes the public good. Once we recognize that property is needed to motivate work for the public good, we may transform the reward into a right just as we often convert systematically granted benefits into rights *deserved* by the recipients. Perhaps we do this because it would be inconsistent and disconcerting to say that some systematically granted benefit is not deserved. Perhaps we

just make the transition from instrumental to normative propositions through lack of attention. For example, in the 1954 case *Mazer v. Stein*, n59 the Court said:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that *encouragement* of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . . Sacrificial days devoted to such creative activities *deserve* rewards commensurate with the services rendered." n60

As *Mazer* demonstrates, it is strikingly easy to move from an instrumental discussion of consequences to an assumption of just rewards.

Indeed, when the normative proposition emerges in court opinions it is usually used as an adjunct to the instrumental argument. The instrumental argument clearly has dominated official pronouncements on American copyrights and patents. Even the Constitution's copyright and patent clause is [\*304] cast in instrumental terms. Congress is granted the power to create intellectual property rights in order "[T]o promote the Progress of Science and useful Arts." n61 As President Lincoln remarked, "the inventor had no special advantage from his invention [under English law prior to 1624]. The patent system changed this . . . . [I]t added the fuel of interest to the fire of genius in discovery and production of new and useful things." n62 In almost all of its decisions on patents, the Supreme Court has opined that property rights are needed to motivate idea-makers. n63 This instrumental justification is the heart of what Judge Easterbrook has called the Supreme Court's "Ex Ante Perspective on Intellectual Property." n64

The wide acceptance of the instrumental argument suggests wide acceptance of the premise that idea-making is a sufficiently unpleasant activity to count as labor that requires the inducement of reward. Admittedly, this hardly is a tight argument. Idea-making just as easily could be a neutral activity or even a pleasant activity whose pursuit individuals covet.

The issue is not whether idea-making is an absolutely unpleasant activity, but whether it is comparatively less pleasant and less desirable than other activities. n65 As Peter Rosenberg writes in his treatise on patent law, "[w]hile necessity may be the mother of invention, the quest for new products and technologies must fiercely compete against the demands for current consumption." n66 The judgments we make about most forms of labor are not that they are absolutely unpleasant, but that they are *relatively* unpleasant. For most people, raking leaves is relatively unpleasant compared to sitting and watching them fall. Similarly, there is a widespread attitude that idea-making is not such a pleasant activity that people will choose it, by itself, over recreation. At least, people will not choose it in sufficient numbers to [\*305] meet our collective needs. This same characterization applies to labor in the fields, the forests, and the factories. That is our best grounds for assuming that idea-making is a form of labor.

If we believe that an avoidance theory of labor justifies intellectual property, we are left with two categories of ideas: those whose production required unpleasant labor and those produced by enjoyable labor. Are the latter to be denied protection? This strange result applies to all fruits of labor, not just intellectual property.

## 2. The "Value-Added" Labor Theory

Another interpretation of Locke's labor justification can be called the "labor-desert" or "value-added" theory. This position "holds that when labor produces something of value to others -- something beyond what morality requires the laborer to produce -- then the laborer deserves some benefit for it." n67 This understanding of property does not require an analysis of the idea of labor. Labor is not necessarily a process that produces value to others. It is counterintuitive to say labor exists only when others value the thing produced. It also would be counter to Locke's example of the individual laboring and appropriating goods for himself *alone*. The "labor-desert" theory asserts that labor often creates *social* value, and it is this production of social value that "deserves" reward, not the labor that produced it.

The legal history of intellectual property contains many allusions to the value-added theory. The legislative histories of intellectual property statutes refer repeatedly to the value added to society by investors, writers, and artists. Indeed those judicial or legislative statements that appear to fuse the normative and instrumental propositions of the labor justification are perhaps based, unknowingly, on the value-added theory. In *Mazer v. Stein* n68 the Court appeared to be saying that the enhancement of the public good through the efforts of intellectual laborers made the creators of intellectual property *worthy* of reward. n69 In other words, their contribution to the public good justified the reward of property rights. Earlier I noted that the Constitution's copyright and patent clause is an instrumental provision. More precisely, it is an instrumentalist provision aimed at rewarding people who bring added value to the society. Little else could have been meant by giving people "the exclusive Right to their

respective Writing and Discoveries" in order "[t]o promote the Progress of Science and useful arts." n70

The value-added theory usually is understood as an instrumentalist or consequentialist [\*306] argument that people will add value to the common if some of the added value accrues to them personally. Paralleling the discussion of the avoidance theory of labor, it is possible also to treat the value-added theory as a normative proposition: people *should* be rewarded for how much value they add to other people's lives, regardless of whether they are motivated by such rewards.

Some kinds of intellectual property have appeared only in contexts in which the property represents a value added to the society. *International News Service v. Associated Press* n71 inaugurated "quasi-property" protection for gathered information. The opinion merged unfair competition doctrine and property arguments to prohibit one party's appropriation of the product of another party's labor. n72 Such appropriations occur only when the party taking the product believes it to have some value. To state the proposition differently, one could not argue that it is *unfair competition* to take away someone's *worthless* labor.

Unfair competition is the purloining of another's competitive edge -- an "edge" that has social value. Insofar as protection of gathered information rests on an unfair competition model, it necessarily relies on the value-added justification. If the fruits of labor have no prospective value, stealing those fruits may be socially unkind, but not competitively unfair. Similarly, trade secret infringement cases result from claimed losses of social value by the petitioner. No court has ever had to

face a test case of a vigorously defended but worthless trade secret.

There is a very simple reason why the legal doctrines of unfair competition and trade secret protection are inherently oriented toward the value-added theory: they are court-created doctrines and people rarely go to court unless something valuable is at stake. When intellectual property is created more systematically, such as through legislation, the resulting property doctrines seem less singularly oriented toward rewarding social value.

Indeed, patents provide a vexing example of conflicting reliance on the value-added theory. To receive patent protection, a new invention must meet a standard of "usefulness" or "utility,"<sup>n73</sup> a criterion which suggests that the invention must manifest some value added to society. On closer inspection, the meaning of this criterion is not so clear. At one extreme, it has been expressed as being devoid of a "value-added" requirement and as only mandating that the invention not be, on its face, wholly valueless. In *Lowell v. Lewis*<sup>n74</sup> Justice Story eloquently expressed this position:

**[\*307]** All that the law requires is, that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society. The word "useful", therefore, is incorporated into the act in contradistinction to mischievous or immoral. . . . But if the invention steers wide of these objections, whether it be more or less useful is a circumstance very material to the interests of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt and disregard.<sup>n75</sup>

While this standard was incorporated into nineteenth-century American patent

jurisprudence,<sup>n76</sup> modern tests for the utility criterion support a value-added interpretation.<sup>n77</sup> Most courts now hold that a "step forward"<sup>n78</sup> or an "advance over prior art"<sup>n79</sup> is a critical part of the utility requirement. But these tests seem to blur the utility criterion with the "novelty," "obviousness," and "operability" requirements of patent grants.

It is not necessary to separate these modern standards in order to appreciate how they generally bear on the value-added question. Stated succinctly, they require that an invention be enough of an advance over the previous art so that the average person schooled in the art would not consider the advance immediately obvious, but also would understand how the invention improves upon previously available technology.<sup>n80</sup> The invention need not function perfectly, but it must operate effectively enough that a person schooled in the art could make it perform the tasks described in the patent application.<sup>n81</sup>

To require that something be an "advance" over existing technology clearly demands that there be new value in this item; that the invention be "nonobvious" raises the threshold of the additional value requirement. Obvious improvements add some value to existing art, but it is only modest value because anyone trained in the art can see the improvement almost as a matter of intuition. The patent law requires that the new value be greater than that derived from "tinkering" with known technology.<sup>n82</sup>

Those standards seem conclusively to manifest a value-added requirement. There **[\*308]** are, however, some complexities. In discussing the operability criteria, Peter Rosenberg aptly describes a well-accepted patent doctrine which seems to pose a strong

counterargument to the value-added requirement:

To satisfy the operability standard, an inventor need not establish that his invention is better than, or that it is even as good as, existing means for accomplishing the same result. . . . [T]he law does not ask *how* useful is the invention. A device that may not operate well may nevertheless be operative. n83

An invention that is not as effective or efficient as the existing means for accomplishing the same result does not add value to society -- at least not in a direct and straightforward way. n84 Nonetheless, the patent law covers such inventions. For example, one could patent an advance in vacuum tube computers although it is hard to imagine a technology so completely replaced by its successor. Usually a succeeding technology leaves the older technology with peripheral or special area applications, but chip technologies have replaced vacuum tubes so thoroughly in computer applications that any value added by a vacuum tube advance would be minimal or nonexistent.

Similarly, patent scholars have not agreed with the presumed patentability of items that are technological "advances" without any *imaginable* value. A good hypothetical is a new vote counting machine which errs by up to ten percent in any vote tabulation. Not only is this worse than existing technology, but its operation has absolutely *no value*. People will count votes by hand before they will entrust it to a machine erring ten percent. If this kind of "operable" machine is not patentable, it is evidence of the value-added justification. If it is patentable, that patent clearly is granted without any consideration of added value. n85

A patentee is not required to exploit his patent; indeed, there is universal recognition that the patentee may shelve his invention and use his patent only to prevent others from utilizing the patented process or invention. n86 This hardly seems to mesh with the requirement that there be value delivered to the society as a prerequisite for granting property rights.

Copyright law also seems to defy value-added reasoning. As with patents, one can register a writing for copyright protection without ever planning to [\*309] publish the work. n87 For copyrighted works, no statutory provision demands "value." Indeed, thousands of worthless works are probably copyrighted every month. Bad poetry, box office failures, and redundant scholarly articles are not denied copyright protection because they are worthless or, arguably, a net loss to society.

The interesting issue of proportional contributions further evinces the degree to which the value-added justification underpins intellectual property law. Modern industry depends on equipment and machines utilizing multiple patents to carry out a single activity. Through patent-licensing schemes, patent owners share proportionally in the aggregate value of the intellectual property in such machines. However, the same ability to distribute value has eluded the copyright system.

A modest copyright apportionment doctrine was established in *Sheldon v. Metro-Goldwyn Pictures*. n88 In *Sheldon*, both Judge Hand and Justice Hughes upheld the apportionment of only twenty percent of the profits to the plaintiff when the defendant's infringing film used only a small part of the plaintiff's play and expert testimony attributed

the movie's success to its popular stars, not the script. n89 But even while making the award, Hand wrote of apportionment that, "[s]trictly and literally, it is true that the problem is insoluble." n90 The common wisdom, with some scholarly debate, n91 has been to follow the *Sheldon* dictum instead of attempting its result.

That the apportionment system has appeared as an ideal in copyright is homage to people's belief in the value-added theory as a normative standard: social value contributed *should* be rewarded. The fact that an apportionment system in copyright has remained only an ideal is explicable for several reasons. Certainly apportionment could produce uncertain shifts in incentives. It might encourage infringements and discourage originality by lowering the awards against infringers. On the other hand, it might strengthen enforcement by tempting judges to find infringements more often. n92

[\*310] Apportionment may remain impractical in copyright for the same reason it would be impractical to have any value-added requirement in copyright law. The "insoluble" problem for apportionment is measuring the value of a copyrighted work when it forms part of a larger work whose value can be measured by objective criteria, such as box office receipts or number of copies sold. The corresponding problem for a preliminary value requirement in copyright is that it is much harder to predict whether a writing will have value than to do so for an invention. It is often startling to see what copyrighted works are ultimately judged valuable by society. Before the precocious judgment of history, a "step forward" in literature or in the arts is easily confused with a step sideways or backwards.

A value-added interpretation of intellectual property laws is easier to support by moving away from particular legal doctrines. Probably the best support for the value-added theory is an argument based upon "net gain." This rule-utilitarian argument for granting intellectual property rights finds it unnecessary that individual cases of copyright or patents be of social value. A very high percentage of protected works could be worthless so long as the system of property protection results in a net increase in social value beyond what would be produced without the system.

### 3. Labor and the Idea/Expression Distinction

The avoidance and value-added interpretations of the labor theory have very different foci. The avoidance theory argues that labor, by its nature, is unpleasant. The value-added theory places no limits on the general nature of labor; it can be pleasant or unpleasant, stupefying or invigorating. The value-added theory may explain why labor justifies property at the *social* level, while the avoidance theory makes the *individual* feel justified in receiving something for his "pains." But this still leaves unresolved the nettlesome question of whether or not producing intellectual property actually requires labor.

For the moment, let us treat the creation of a finished intellectual product as a two-step process. One step is thinking up the "idea," used here in the usual sense of the creative element or unique notion. The second step is the work necessary to employ the idea as the core of a finished product. In the case of an innovative suspension bridge, the engineer has an original idea and then spends months doing all the drawings and calculations necessary to produce the finished plans. Edison had the idea of a light source produced by electrons

travelling through a filament within a vacuum. He and his workers then spent weeks finding the proper filament material, the proper vacuum, and the proper electrical charge. n93

[\*311] These two steps represent the difference between idea and execution. Sometimes this difference is not readily visible or, when it does exist, the part we identify as the idea may seem the *less* important of the two components. *Sartoris* n94 and *Absalom, Absalom!* n95 have the "same" idea: the not too original notion of the saga of a Southern family. The difference, the uniqueness, and the importance to society is in the execution. The idea of orchestrating *Pictures at an Exhibition*, Moussorgsky's 1874 composition for solo piano, is not worth much in itself, nor is the thought of doing a painting of the front of the Rouen Cathedral basked in sunlight. But each idea has proved to be a foundation for more than one significant execution.

In these examples the distinction between idea and execution is drawn at a gross level. Although the distinction may seem intuitively right, it can be blurred and redrawn by focusing on different levels of detail. There is not just the idea of orchestrating a piano piece, but the more detailed idea of using a particular motif in the third movement, and the even more detailed idea of using a particular percussion instrument in the forty-seventh stanza of that movement. The achievement in writing fiction or in composing may be in the execution precisely because each turn of phrase, musical or literally, is the result of a creative event.

The creativity we perceive in an intellectual product may be either in the core idea or in the core idea's execution. I suggest that when we readily can separate the two, execution *always* seems to involve labor, but it is not always

clear that the creation of the idea involves labor. Ideas often seem to arrive like Athena -- suddenly they are here, full and complete. Like Zeus, we may have a headache in the process, but it is some unseen Minerva who puts in the labor.

Yet our inability to formulate any clear separation between idea and execution suggests that we should treat them as one. This apparent inability is reinforced by occasions in which the "execution" step begins before the idea. n96 In many fields, one has to do extensive research to create a necessary launching pad for a new idea. A graduate law student writing his doctoral paper made the telling comment, "If I had six more months to work on this paper, it would be an original idea." n97

The Lockean conception of idea-making provides another ground for [\*312] treating idea and execution as a single event. Viewing new ideas as plucked from some platonic common may be reification in the extreme. Yet in that view, the ideas already exist and the chief labor is transporting them from the ethereal reaches of the idea world to the real world where humanity can use them. n98 If ideas are thought of as such preexistent platonic forms, the *only* activity possible is execution, which consists of transporting, translating, and communicating the idea into a form and a location in which humans have access to it.

Existing intellectual property regimes favor granting property rights only to those ideas which have received substantial execution. Patents are not granted for formulae disembodied from any technical applications; in some sense, such unapplied formulae may be thought of as unexecuted ideas. A book or dissertation receives copyright protection, not

its underlying thesis statement. One might even point to the fact that federal copyright protection applies only to work put into some permanent, tangible form<sup>n99</sup> -- which suggests a requirement of execution.

With products such as phone directories or some news stories, execution -- a product of labor -- is all that realistically can be required because there is *no* original idea. *Time, Inc. v. Bernard Geis Associates*,<sup>n100</sup> in which the Zapruder film of the Kennedy assassination was recognized as copyrightable property, provides an interesting application of this same standard.<sup>n101</sup> Clearly, Zapruder had no original idea -- most people in his position and equipped with a camera would have filmed that tragic event. Zapruder's case is a dramatic example of copyright protection in the category of nonartistic photos and films of public events and places. It demonstrates that a unique *product* of one's labor can receive property protection even if there is no unique underlying *idea*.

The case law of section 102 of the 1976 Copyright Act<sup>n102</sup> has developed what has been called "the idea/expression dichotomy."<sup>n103</sup> Under this doctrine, "expressions" are protected but the underlying "ideas" are not.<sup>n104</sup> Not [\*313] surprisingly, the courts have never developed a clear distinction between the two, relying instead on comparisons such as between the idea of a male nude and the expression of *The David*.<sup>n105</sup> When one replicates a series of *scenes a faire*<sup>n106</sup> to make a story, there is no copyright problem;<sup>n107</sup> when one reproduces sets and production techniques, there is. Illicit copying is copying an expression, "the total concept and feel" of a work,<sup>n108</sup> not just the idea.

The idea/expression dichotomy is frequently explained in terms of balancing the

need to reward artists with the need for free access to ideas, or as a tension between the copyright clause and the first amendment. Although this theory has never been explicitly considered by the Supreme Court, Justice Douglas was one of its adherents.<sup>n109</sup> In a 1980 opinion, the Ninth Circuit also confidently stated this rationale: "[T]he impact, if any, of the first amendment on copyright has not been discussed by the Court. We believe this silence stems not from neglect but from the fact that the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment."<sup>n110</sup> While not abandoning this view, Professor Melville Nimmer showed that there are occasions in which the idea/expression distinction does not ensure access to all the expressions we might want freely available from a first amendment perspective.<sup>n111</sup> In a society which relies on freedom of expression, there is a constant demand that many "expressions" be part of the public domain, such as photographs and films of [\*314] very important events.<sup>n112</sup>

I suggest that the idea/expression dichotomy and the idea/execution dichotomy are the same.<sup>n113</sup> At a minimum, the force behind the latter dichotomy -- the concern for *labor* -- significantly contributes to explaining the idea/expression division. The courts' ad hoc approach in this area suggests that copyrightability may be based as much on what we feel are people's deserts as on what we feel are society's informational needs. It has been said that the idea/expression issue is uniquely well-suited for juries.<sup>n114</sup> I suggest that this is so not because juries care about a doctrine that ameliorates copyright and first amendment tensions and not because they know what idea-making is, but rather because jurors sense what *labor* is.

First amendment considerations define the "idea" side of the copyright dichotomy -- that which must be kept as a public preserve. Labor defines the "expression" side -- that which must be rewarded because it is unpleasant activity. Protection of expression and not of ideas can be understood as protection for that part of the idea-making process that we are most confident involves labor. In a world in which we cannot definitely separate idea and execution, we still find ways to emphasize that property protection goes to execution and less to the ideas themselves.

In fact, these first amendment concerns have a place in a Lockean theory. In a Lockean framework, first amendment freedom manifests a problem with the "common." Stated simply, some ideas and facts cannot be removed from the common because there would not be the slightest chance of there being "enough and as good" afterwards. Imagine the absurdity of a political debate in which some people held copyrights over certain "new ideas." This leads to the second element of a Lockean theory of intellectual property: the common.

#### [\*315] C. IDEAS AND THE COMMON

It requires some leap of faith to say that ideas come from a "common" in the Lockean sense of the word. Yet it does not take an unrehabilitated Platonist to think that the "field of ideas" bears a great similarity to a common.

The differences between ideas and physical property have been repeated often. Physical property can be used at any one time by only one person or one coordinated group of people. Ideas can be used simultaneously by everyone. Furthermore, people cannot be excluded from ideas in the way that they can be excluded from physical property. You may

prevent someone from publicly using an idea, but preventing the private use of ideas may not be possible. These two basic differences between ideas and physical goods have been used by some writers to argue *against* intellectual property,<sup>n115</sup> but, if anything, they suggest that ideas fit Locke's notion of a "common" better than does physical property.

The "field" of all possible ideas prior to the formation of property rights is more similar to Locke's common than is the unclaimed wilderness. Locke's common had enough goods of similar quality that one person's extraction from it did not prevent the next person from extracting something of the same quality and quantity. The common did not need to be infinite; it only needed to be practically inexhaustible. With physical goods, the inexhaustibility condition requires a huge supply. With ideas, the inexhaustibility condition is easily satisfied; each idea can be used by an unlimited number of individuals. One person's use of some ideas (prior to intellectual property schemes) cannot deplete the common in *any* sense. Indeed, the field of ideas seems to expand with use.

It may seem pointless to talk about how the field of possible ideas fulfills Locke's conception of the common prior to the creation of property, for the common is a concept discussed only in connection with the creation of property. The point is that Locke's treatment of the common implicitly concerns itself with the problems of distribution. This distribution problem also arises in pre-property uses of the physical common. When some starve in a pre-property world because others overconsume food or occupy all the tillable land, there is a problem of just distribution. Such distribution problems are not found in pre-property uses of the field of ideas.

### 1. The Common and Tempered Property Rights

How the creation of property affects distribution of the common depends on the extent of exclusion entailed in property rights. Existing forms of intellectual [\*316] property do not countenance complete exclusion of the non-owner. Nor can one easily imagine systems of intellectual property that could completely exclude.

This complete exclusion is impossible for two reasons. First, any property scheme which completely excludes third parties from ideas must enforce its restrictions in ways incompatible with our notions of privacy and individual freedom. Second, successful policing of such exclusion probably would be impossible. This impossibility can be thought of in either technical or economic terms. For the foreseeable future, practical considerations will limit the ways in which people can be excluded from intellectual goods. By any standard, thought-police would look more like Keystone Kops than like the KGB. Such thought policing would certainly not be cost effective. Historically, the only time the cost effectiveness of policing has not been a controlling factor is when the police enforce the claims of the sovereign and not the claims of individuals. Police states guard the interests of the state, not those of persons.

As long as complete exclusion cannot or does not happen, ideas will be available to people in their own thoughts even though these ideas already have become someone else's property. Through this availability, one idea can lead to still more ideas. In other words, once a "new" idea has been put into intellectual commerce, once people know about it, it leads to an "expansion" of the common, or of the accessible common. n116

New idea X may be the key to a whole new range of ideas which would not have been thought of without X. Assuming the Platonic model, putting X into intellectual commerce does not increase the common so much as it enhances the abilities of people to take from the common; it gives people longer arms to reach the ideas on higher branches. In this view, X just makes new ideas Y and Z more easily discovered by a wider range of people. When the range of people and/or ease of discovery is dramatically improved, one can think of the common as being practically enlarged. n117

Computer languages provide a good example of a case in which one contribution to the society makes other contributions possible. Embarking on an [\*317] effort to create a new language is a considerably more ambitious and difficult project than writing programs in an existing language. It is not something most computer scientists would undertake. In that sense, it is more a unique idea than is a new program in an existing language. This new language may stimulate programming in a way that would not have been possible *but for* the language. Furthermore, this new language creates an incentive to write these programs. Thus, it is an addition to the "common" which gives many people new ability to create even more property and expand the common even further.

Finally, idea X may be genuinely necessary to new idea Y. Orchestrations and adaptations are examples of this. The movie *Cabaret* was adapted from the musical *Cabaret* which was adapted from Isherwood's *Berlin Diaries*. Parodies provide an even better example of such necessity. The *Mona Lisa*, *American Gothic*, *Whistler's Mother*, and Hemingway's prose all have inspired generations of parodies -- cultural objects which would have neither

humor nor sense without the object of comic adoration. The original is *necessary* as a preexisting part of the culture.

Robert Nozick has argued that a system of physical appropriation benefits society in a manner analogous to this expansion in the world of ideas. n118 Yet there is an important difference between the expansion of the physical common and of the idea common. According to Locke, the act by which physical object X is transformed into property is an act that creates new social value. This added value, however, goes directly into that property owner's possession. At least this characterization applies to Locke's example of cultivated land and the added grain it produces. n119 This new physical value -- grain -- adds to the commonweal only if the owner releases it, either through gifts or commerce. Locke relies upon the money economy to facilitate this.

Intellectual property systems release the added value of a new idea without requiring the property owner's active and intentional introduction of the idea into commerce. Take the situation in which Mr. Smith creates idea X and this idea makes possible ideas Y and Z. Ideas Y and Z are not possessed by Mr. Smith in the same way the grain is possessed by the farmer. Sequel ideas are not "attached" to their antecedent ideas as grain is attached to farmland. As long as idea X is known to other people, it can inspire ideas Y and Z.

New ideas, however, can be "attached" to idea X in the sense that they seem too derivative of X to be granted their own property status. Mr. Smith, the owner of idea X, may claim that Mr. Jones, the author of Y, really did [\*318] not create anything independent and different from X. The claim

here is that Mr. Jones has not added much value (or much labor) beyond idea X.

Intellectual property systems handle this situation of questionable added labor with a few general principles. First, if the idea is sufficiently separate from its "parent" idea to have required significant independent labor or creativity, it belongs to the laborer. n120 Conversely, if the new idea bears too much resemblance to its parent idea, the owner of the parent has a controlling interest in the new idea. Finally, the two principles are limited by situations in which the descendant idea includes the entire parent idea, as with a new machine which uses a patented process as one of several steps or a play which uses someone's concerto as its theme. In these cases, the owner's interests in the parent idea must be accommodated with much less balancing than that afforded by the first two principles. n121

The law regarding parodies exemplifies the balance struck between the first two principles. A copyright does not enable its holder to prevent parodies of the copyrighted work; as long as the parody has creativity and originality, it may use substantial elements of the original. n122 However, if reasonable people would easily mistake the parody for the original, the copyright holder would have an especially strong interest in stopping publication of the parody because it will probably appear to be a bad or erroneous production of the original. n123 The creator of such a parody, because of its resemblance to the original and the little labor employed in making the parody, would possess [\*319] a lesser interest in his product. Under such balancing, the recognition of property rights in idea X still permits, indeed inspires, others to reach new ideas Y and Z.

Because creating property rights in an idea never completely excludes others from using idea, it need not be justified by Locke's legerdemain that increases in *privately* produced goods necessarily benefit the commonweal. Nor does it require justification from Nozick's reconstitution of "the Lockean proviso." n124 Under Nozick's reconstruction, the public would be better off even if an intellectual property owner could completely exclude others from his idea because it could still buy the goods and services developed from that idea. n125 This might be true, but intellectual property need not be justified on such a thin reed. People are better off today because there are more ideas available to them, at least in part, that provide springboards to generate even more intellectual property. New ideas, even most that become private property, benefit the commonweal by *immediately* being known and, in some sense, available to all. There is no need to rely on property holders to actively introduce them into the common.

## 2. The Common and Ideas That Cannot Be Granted Property Status

Intellectual property systems also are more suitable for a Lockean justification than are physical property systems because a growing set of central ideas are never permitted to become private property and are held in a *Permanent common*. n126 By preventing private control of these particular ideas, intellectual property law resolves a major inequity often present in physical property systems. Even in a vast wilderness, an individual should not be permitted to claim certain physical goods as property because their extraction from the common will not leave "as good and as many" for the remaining individuals. The "New World" prior to its colonization may have been as close to a Lockean common as human history records,

yet it is easy to make a list of things which the society could not allow to be appropriated as private property: the Amazon, St. Lawrence, and Ohio Rivers, the Cumberland Pass, or the St. George's Bank fisheries.

Earlier I described two broad categories of ideas to which ascription of private ownership is denied. The first is the category of common, "everyday" [\*320] ideas, such as thinking to wash one's car, to add paprika to a quiche for coloring, or to tell mystery stories to your cub scout troop. The second is the category of extraordinary ideas like the Pythagorean theorem, the heliocentric theory of the solar system, or the cylindrical column in architecture.

One reason that we do not permit property rights in either category of ideas may be that doing so would involve tremendous reallocations of wealth toward the property holders of these ideas. If we had to pay a royalty each time we told a ghost story or walked the dog, unprecedented wealth would concentrate in the hands of those "holding" the most common ideas. These common, everyday ideas are too generically useful to allow someone to monopolize them. The common would not have "enough and as good" if they were removed.

The same is true of extraordinary ideas. This category, however, actually contains two distinct groups of ideas. First, there are ideas that are extraordinarily important because they disclose facts about the world, such as the Pythagorean theorem and the theory of electromagnetism. In the case of electromagnetism, the Supreme Court ruled that Samuel Morse could not monopolize the general idea of using galvanic current for long-distance communications, although he could

monopolize his particular process for exploiting the idea. n127

A second group of extraordinary ideas -- which contains ideas like the architectural columns -- may not be monopolized because of their widespread public use. At first, this sounds like a poor argument: that the idea of a column is widely used may mean it is a "public idea," but that is hardly a self-evident reason why it *must* be public. Yet widespread use of something, like columns and vaulted ceilings, has another effect: it makes a particular idea *appear* to be a basic truth or process. At some point, one hardly can imagine the larger social organization without the lesser object. Columns would appear as a far less basic truth to cave dwellers than to those who inhabit a post-Hellenic world in which columns prevent our buildings from crumbling into impromptu pyramids.

In short, some ideas become "depropertized." Originally, they could have been subject to private ownership (unlike the first kind of extraordinary ideas), but the pressure to keep them in the common increases as the ideas become increasingly important to the society. As an idea becomes extraordinary, it is clear the common will not have "enough and as good" if the rights to the idea continue to be privately held.

Law itself provides an interesting example. Saul Levmore has adroitly observed that "the law does not normally offer intellectual property rights to [\*321] lawyers who develop novel arguments and establish precedents." n128 Perhaps legal arguments could be fit within either of the two subcategories of extraordinary ideas. In one view, arguments adopted by a court become valuable (as precedent) precisely because the court believes that argument is a basic *truth*

about the legal system or the world. For the legal realist who sees no truths, the novel argument still can become (like architectural columns) a necessary fixture in the social edifice. In fact, that is the basis for Benjamin Kaplan's criticism of *Continental Casualty v. Beardsley*, n129 a 1958 case upholding the copyright on certain insurance forms. n130 Without reaching the broader issue of ideas beyond privatization, Kaplan observed that, "[t]he effect of the decision may be to force users to awkward and possibly dangerous recasting of the legal language to avoid infringement actions." n131 Kaplan's criticism is basically that the language in those forms had become necessary to the legal system and therefore should be beyond privatization. n132

Ideas which *can be* privatized fall between these extremes of common and extraordinary ideas. A new device to wash cars may be patentable; a quiche recipe with secret herbs and spices can be privatized as a trade secret; the original mystery story can be transferred from campfire to copyrighted novella. Even things which are related to extraordinary ideas may be privatized. While neither Leibniz nor Newton could copyright the calculus under today's copyright laws, each probably could copyright his own system of notation for calculus. n133 The idea of a science fiction "space empires-at-war" story cannot be copyrighted, but when *Battlestar Gallactica* is too much like *Star Wars*, the owner of *Star Wars* can drag the Galacticans into court with a credible claim of property infringement. n134 The Supreme Court has struggled with perhaps the most basic dilemma of this sort: When can an algorithm [\*322] be made into property? n135 Its present doctrine is that an algorithm closely linked to a specific technological application may qualify for

patent protection. n136 This provides an example of a specific application (the technology) being used to bring the general idea (the algorithm) into the field of protectable ideas.

What separates the everyday idea from the protectable idea is the former's relative unimportance and the latter's uniqueness; what separates the protectable idea from the extraordinary idea is that the extraordinary idea is uniquely important. One rule of thumb is that the more generally required by society an idea is, the more important and less subject to proprietization it becomes. n137 However, very detailed ideas or pieces of information also may be beyond privatization because monopolistic control of them would harm society. For example, in the eighteenth century, copyright over a navigation map was held not to preclude someone from copying its geographic details. n138 In eighteenth-century navigation, these details provided the *only* safe way to proceed. There would not be "enough and as good" without free access to these details.

With ideas that *become* extraordinary, society's increasing dependency on them creates a pressure to remove them from private control. For example, a popular trademark that comes to serve a unique representational function loses some of its property protection under the doctrine of genericness. n139 Examples of trademarks which have or may have lost their property status because the words are so generally relied upon for communication include "thermos," "cellophane," "aspirin," and "xerox." n140 At least one commentator has remarked that this can be an unfair penalty on one "who has made skillful use of advertising and has popularized his product." n141 Perhaps the [\*323] loss of a trademark would seem less

like a penalty if we view the situation as the owner lulling the society into a dependency on a privately owned word. When the society realizes that dependence it should place the word in the permanent common.

### 3. Augmenting the Common Through Expiration of Property Rights

For those trademarks which have become generic words, their "condemnation" is a method of de-privatizing ideas. Other intellectual property regimes augment the idea common in another way: they require *all* idea property to return to the common automatically at some point. Copyrighted property enters the public domain fifty years after the death of the author. n142 Patents expire after a maximum of thirty-four years. n143 News becomes commonplace information, and the shadowy existence of its quasi-property status dissipates. n144 Trade secrets may be the lone exception; they must be constantly defended, not only against real industrial espionage but as a legal requirement to maintain their protection. Trade secrets and "gathered information" property have no fixed expiration, but they tend to be self-extinguishing. At some point, the guard drops and the trade secret expires. This general occurrence of expiration marks a radical difference from physical property arrangements.

I find it helpful to think of two commons: a "common of ideas" and a "common of potential ideas." Perhaps progress is an inexorable movement of the former gobbling up more and more of the latter. When an individual augments the common of ideas, we recognize a property right. Yet at some point an individual's addition to the common of ideas appears to be part of the historic migration of ideas from the potential common to the actual

common. n145 At that point, the property right expires.

Robert Nozick hints at this point in his example of the scientist who stumbles upon a new substance. Nozick argues that this scientist does not deprive anyone of the substance by privatizing it and excluding others from its use. While this is certainly true at the moment of discovery, Nozick recognizes [\*324] that limitations on the discoverer's rights may be justified later because, "as time passes, the likelihood increases that others would have come across the substance." n146 Nozick uses this reasoning to justify limitations on the bequest and inheritance of physical goods. n147 Expiration times in intellectual property regimes also seem inspired by this idea. n148

Expiration ensures that most ideas eventually reside in the common unfettered in any way. This new wealth cannot be retaken and privatized by someone else; it is material which will be held permanently in common. This new material will lead to new ideas, hence new property for as yet unidentified people. This condition is sufficient to show "enrichment" of the common even in those rare instances in which the public might be successfully and totally excluded from an idea during its period as privately held property. If the owners of new ideas could exclude everyone from the idea, social progress would be slow, but as long as those new ideas eventually become freely available, idea-based progress would continue.

The expiration of intellectual property rights may help a Lockean scheme of intellectual property overcome one general objection to Locke's theory. This objection is that Locke's vision of property rights justifies property for one generation, but cannot justify

the subsequent property arrangements of future generations. Hillel Steiner has expressed one form of this attack:

Consider, first, Locke's construction of individuals' original rights. The claim that for a limited (early) historical period each person was entitled to appropriate a quantitatively similar collection of natural resources is open to the unanswerable objection -- noted by Nozick -- that a right of historically limited validity and, thus, of less than universal incidence, cannot be constituted by any set of moral rules that extend the same kinds of rights to all persons. The titles thereby established can preclude historically later persons from exercising the same kind of right. Hence the set of rights constituted by Locke's rule fails the test of coherence. . . . n149

Nozick particularly addresses this problem with his discussion of the "Lockean proviso." Nozick has deftly interpreted Locke's condition that there must be "enough and as good left in common for others" as a principle meant "to ensure that the situation of others is not worsened" by the appropriations of property from the common. n150 Nozick says that Locke would justify privatization of things previously in the common unless "appropriation [\*325] of an unowned object worsens the situation of others." n151 Assuming that acts of propertization do produce inequalities, Nozick's reformulation of Locke's "enough and as good" provision holds that inequalities of this sort always should be tolerated so long as they do not make the worse-off more badly off. To use the economist's jargon, Nozick is adopting the principle of Pareto optimality. n152 Whether or not this reformation is successful, both Locke and Nozick have used the original acceptability of initial property rights to lead to

the acceptability of property rights for succeeding generations.

Intellectual property systems avoid these shoals. As long as there is an ever-growing common of ideas available for everyone's unlimited use, every person has at least as much opportunity to appropriate ideas as had the first man in the wilderness. There is an equilibrium between those ideas being removed from the common through privatization and those ideas that society relies heavily upon. What results is akin to John Rawls' treatment of justice between generations. Rawls argues that a fixed rate of savings between generations allows each generation to reap the same rewards and make the same investment in the future. n153 This effectively happens with intellectual property. The common of ideas grows like investment in an idea bank.

#### D. THE NON-WASTE CONDITION AND INTELLECTUAL PROPERTY

Historians treat Locke's condition of non-waste as an ugly step-sister of the enough and as good condition -- maligned, not for its own infirmity, but for how quickly Locke abandons it in his adoption of a money economy. n154 Nozick offers a criticism from another side: true application of Locke's "enough and as good" provision makes the non-waste condition superfluous. n155 This criticism attacks the *place* of the non-waste condition in Locke's theory, not the condition itself. Without entering this fray, I suggest that many systems of intellectual property neither embody nor require a non-waste condition.

##### 1. Intellectual Property and the Money Economy

A "pure" Lockean account might dismiss the applicability of the non-waste condition on the grounds that intellectual property exists

only in societies which have transcended the condition. n156 It is possible, however, to imagine [\*326] intellectual property existing before the creation of a money society. Certainly the *subjects* of intellectual property exist in primitive states: the corkscrew method of raising water from the Nile, the varied means of tanning hides, or original straw weaving patterns. When the originator of one of these ideas shared it with others, he gave some value to the others by allowing them to remove property from the common with less labor.

This can produce paradoxical results depending on our understanding of Locke's theory of private property. For example, if what separates private property from the common is labor, then sharing a labor-saving idea with a friend actually may rob my friend of her Lockean title to those goods she extracts with my idea. This is especially true if *more* labor makes one's property claims stronger. My friend is, after all, laboring less for the thing she gets. A related question is whether use of the idea by another is equivalent to additional labor by its originator. If so, when a friend uses my idea to draw water from the Nile, it would be as if the friend and I drew the water together. Would we, therefore, have some type of joint title to the water?

There is a powerful argument that ideas cannot be subjects of Lockean property rights in the pre-money state. If so, this sharply distinguishes ideas from physical objects. In the state of nature, people take what they need for survival. Those who fail to appropriate enough perish. In this situation, giving a friend my labor-saving idea would likely produce one of two results: either it preserves her life when otherwise she would have perished for insufficient labor to appropriate

enough *or* it allows her to accumulate surpluses with which to barter. n157

The first possibility, that the idea preserves her life, runs counter to Locke's assumptions. If a person of average physical capability requires the idea to take enough from the common to survive there is something wrong either with the common or with human capacities. Before we even reach the question of "enough and as good," the common is not good enough.

The simplest cure is to say that the idea is part of the common -- as something everyone needs to take the common's physical things -- or that the idea is part of human capacities -- an idea all humans should possess in the same way they would possess the idea of using their arms to climb trees. Either way, the idea could not be the subject of propertization. I prefer to view certain ideas as things Locke would consider basic to human capacities. These might include, for example, the use of simple tools -- the club, the [\*327] knife, the rope, and clothing. n158 This would seem to fit Locke's description of the state of nature in which men do certain activities that entail the use of simple tools.

On the other hand, if the idea I give my friend allows her to accumulate a surplus for bartering, this idea exists in or begins the money economy. The idea can be treated as intellectual property precisely because it produces surplus value which can be traded. n159

## 2. The Non-Waste of Intellectual Property.

Locke presents his non-waste condition most directly in the example of food spoilage, and this particular form of loss powerfully demonstrates the appeal of the non-waste condition. The waste of food is an absolute loss. Arguably, the moral force of the non-

waste condition dissipates in a world in which all have enough or more than enough to meet their needs. This is the jist of Nozick's argument that Locke does not need the non-waste condition so long as he employs the "enough and as good" condition. n160

But spoiled food can be viewed as waste in either of two ways: food that spoils is available neither for the *present* potential use of those who do not own the food nor for the *future* potential use of its owner. There is waste in others needing something that is not being used, and in consumption of the individual's labor without bringing any benefit to the individual. The first is waste in a social context; the second is waste for the individual organism.

Nozick's argument addresses only the former, and completely misses the latter. For although no one may need the food that spoils in the pre-economic state of natural bounty, the individual's labor that was used to produce and appropriate the spoiled food nevertheless has been "wasted" -- it [\*328] was used without creating any present or future value to society or to himself. In the realm of intellectual property, there are interesting differences between these two versions of waste. Unlike food, ideas are not perishable: they almost always retain future value. From an individual's perspective, it is much harder to say at a point in time,  $T[1]$ , that the individual's investment in some idea is wasted. The investment may yield value at a later  $T[2]$ . Of course, one can claim that intellectual goods actually are perishable: ideas go stale, new stories become "old," literature becomes dated, and patents become worthless as the technology on which they are based becomes obsolete. These are examples of good ideas being introduced into society too late to yield maximum return.

Yet the value lost by hoarding an idea until it becomes obsolete is a very different kind of loss than food spoilage. There is no internal deterioration in the idea and the loss in value is seen only against a social backdrop. The loss is speculative and may be reversible. Future trends may make the outdated idea fashionable again. Even with technology-based intellectual property -- the property most prone to an objectively measurable loss in value -- there may be a recovery of value. For example, new technical improvements in equestrian equipment and train engines can still be very profitable despite the appearance of automobiles and Boeing 757s.

While the social value of an idea may decline below an optimal point, the value of the idea, apart from its value to society, may remain constant. An unpublished story may still give an author joy when shared with intimates. The secret recipe for Kentucky Fried Chicken will taste as good to the creator whether or not it is shared with Madison Avenue. With intellectual property, there is no waste to the *individual* because the act of "consumption" is inseparable from the act of production. Intellectual property holds value derived solely from the act of creation.

In intellectual property systems, manifestations of a non-waste condition are few and far between. Perhaps the most explicit inclusion of the condition in intellectual property law was the publication requirement for copyright protection. Until the 1976 Copyright Act became effective, federal copyright protection for a work commenced upon publication. n161 Publication ensured that the literary work was not being wasted. Effectively, ideas could be monopolized through copyrights only when put to good use, i.e., published. Yet since 1976, publication has not been required for federal copyright

protection, n162 and even before 1976, common law copyright or state statutes protected the author's unpublished work in the stages before federal statutory [\*329] copyrights could have been granted. n163

It is difficult to think of any other ways in which intellectual property schemes embody any notion of the non-waste condition. Patents, copyrights, and trade secrets all are recognized whether or not the owner is squandering or has shelved the idea. In the case of quasi-property, the legal right to waste a news story by nonpublication has not been clearly stated, but surely this is because of the news story's limited shelf life and not the law's limited protection. n164

#### E. FINAL COMMENTS ON A LOCKEAN JUSTIFICATION

The absence of a non-waste condition in intellectual property systems does not weaken a Lockean justification for intellectual property. Locke, after all, declined to apply the non-waste condition to the advanced social conditions which are required by most intellectual property systems. However, it may be disconcerting to those of us who believe that applying the non-waste condition to advanced societies would produce a more moral justification for property. Intellectual property systems, however, do seem to accord with Locke's labor condition and the "enough and as good" requirement. In fact, the "enough and as good" condition seems to hold true *only* in intellectual property systems. n165 That may mean that Locke's unique theoretical edifice finds its firmest bedrock in the common of ideas.

My own view is that a labor theory of intellectual property is powerful, but incomplete. I believe we also need the support of a personality theory, such as the one

proposed by Hegel, in which property is justified as an expression of the self. Some writers have suggested that Locke actually subscribed to such a personality theory in which "applying one's labor to a natural object . . . endow[s] it with certain features pertaining to one's own form of existence." n166 With [\*330] this understanding of Locke, the difference between him and Hegel -- at least as to the analysis of intellectual property -- may be minimal.

### III. A HEGELIAN JUSTIFICATION

In the preceding discussion, I argued that Locke's labor theory can serve as a powerful justification for intellectual property. But beyond intellectual property, a Lockean model thickens with the ingredients of modern life: financial markets, capital accumulation, service industries, inheritance, and the like. Those who try to apply Locke to all modern property end up multiplying distinctions like pre-Copernican astronomers calculating celestial orbits with their Ptolemaic epicycles. At some point, it becomes easier to reorient one's universe.

The most powerful alternative to a Lockean model of property is a personality justification. Such a justification posits that property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person. Professor Margaret Radin describes this as the "personhood perspective" n167 and identifies as its central tenet the proposition that, "to achieve proper self-development -- to be a *person* -- an individual needs some control over resources in the external environment." n168 According to this personality theory, the kind of control needed is best fulfilled by the set of rights we call property rights.

Like the labor theory, the personality theory has an intuitive appeal when applied to intellectual property: an idea belongs to its creator because the idea is a manifestation of the creator's personality or self. The best known personality theory is Hegel's theory of property. n169 This section sketches his property theory, its application to intellectual property, and some problems of using the personality theory as a justification for intellectual property.

In the field of intellectual property, the personality justification is best applied to the arts. This is true both in theory and in European legal systems that have recognized a personality basis for property. Efforts to introduce the personality justification into American law frequently appeal to those European intellectual property laws. n170 As an alternative, I suggest ways to [\*331] bring civil liberties doctrines to bear on intellectual property and, in so doing, inject the personality justification into American intellectual property law.

#### A. HEGELIAN INTELLECTUAL PROPERTY

##### 1. The General Hegelian Philosophy

At the heart of Hegel's philosophy are his difficult concepts of human will, personality, and freedom. For Hegel, the individual's will is the core of the individual's existence, constantly seeking actuality (*Wirklichkeit*) and effectiveness in the world. Hegel perceives a hierarchy of elements in an individual's mental make-up in which the will occupies the highest position. As one of Hegel's biographers wrote, the Hegelian will is that in which thought and impulse, mind and heart, "are combined in freedom." n171

We can identify "personality" with the will's struggle to actualize itself. Hence Hegel

writes that "[a] person must translate his freedom into an external sphere in order to exist as an Idea" n172 and that "[p]ersonality is the first, still wholly abstract, determination of the absolute and infinite will." n173 For Hegel, "[p]ersonality is that which struggles to lift itself above this restriction [of being only subjective] and to give itself reality, or in other words to claim that external world as its own." n174

Invariably, writings on Hegel devote some attention to the difference between Hegelian "freedom" -- as it appears in the passage above -- and the conception of "freedom" which lies at the root of classical liberalism. However, these disparate conceptions of freedom need not greatly affect the acceptability of Hegel's justification for property.

To the classical liberal, true freedom is a freedom from external restraint. For Hegel, freedom is increasingly realized as the individual unites with and is expressed through a higher objective order: a unity which, to the classic liberal, is tantamount to drowning the individual in the larger "geist" of social groups. In the words of R. N. Berki, Hegel's notion of "*philosophical freedom* grows with comprehensiveness and with ever higher degrees of realized self-determination, thus, an animal is freer than a physical object, a man freer than an animal, the family freer than the individual, the State freer than the family, World-History freer than the State." n175 Berki's summary is instructive [\*332] on the difference between liberal and Hegelian notions of freedom: this difference is more about the proper *receptacle* of freedom than about the *nature* of freedom. Both recognize freedom as involving expression and realization. The liberal reposes this freedom in the individual while Hegel discards the

individual when he believes it is time to pursue freedom to new and dizzying heights.

In his property theory, however, Hegel focused on the immediate freedom of an individual. n176 So at this level the liberal's critique of Hegel should be most muted. The liberal still differs from Hegel by defining freedom as the absence of restraints, but this negative definition means little without the positive freedom to act upon things. In Camus' *Caligula*, n177 the despotic Emperor declares himself to be the most free man in the world because no wish is denied him. Caligula has few external restraints; he can manifest his will on anything within the reach of Imperial legions or roman *sesterce*.

Caligula's claim to be a model of freedom for his people is faint comforts to them because they frequently are the things upon which he manifest his will. At least at the level of individual freedom, Hegel denounced such manifestations of will upon others. n178 Caligula's material self-indulgence points to a weakness in both Hegelian and classical liberal theories: the need to sort out the effects upon other people of an individual's exercise of freedom over inanimate objects. n179 In Hegel's system, property is a genre of freedom and, like any other freedom, it may have deleterious on other.

## 2. The Property/Person Connection

Drawing upon his model of the hierarchy of elements in the individual's make-up, Hegel implies that the will holds the "inferior" elements of the self as if they were a type of property. n180 It is worth noting that this view is not very distant from Locke's initial premise that "every Man has a Property is his own Person." n181 Assuming that the self is a type of property, the difference between internal property of this sort and property

external to the person is that the latter can be alienated. This reasoning can lead to an abandoning of barriers in both directions. As Dudley Knowles put it: "[T]he [\*333] contraction of the core of one's property into the sphere of personality (life, limb, and liberty) licenses the expansion of the concept of personality to cover those physical objects which are deemed to be property." n182

According to Hegel, the will interacts with the external world at different levels of activity. Mental processes -- such as recognizing, classifying, explaining, and remembering -- can be viewed as appropriations of the external world by the mind. n183 Cognition and resulting knowledge, however, are the world imposing itself upon the mind. The will is not bound by these impressions. It seeks to appropriate the external world in a different way -- by imposing itself upon the world. This is the true purpose of property and, perhaps to emphasize that purpose, Hegel explicitly disavows any need for the institution of property to satisfy physical wants. n184

Acting upon things is an initial step in the ongoing struggle for self-actualization. Socially mandated property rights do not trigger this self-actualization; they are only a means to protect the individual's initial attempt to take command of the world. Once we accept that self-actualization is manifested in enduring objects as well as in fleeting acts, property rights acquire an important purpose in preventing men from forever being embroiled in an internecine conflict of each individual trying to protect his first forays at self-actualization from the predation of others. Property becomes expression of the will, a part of personality, and it creates the conditions for further free action. n185

Respect for property allows the will to continue abstraction and "objectification." With some property secure, people can pursue freedom in non-property areas or they may continue to develop themselves by using property to move themselves toward the person they wish to become. Knowles has clearly depicted the Hegelian interaction between property and personal development: "Imaginative conceptions of our future selves are indistinguishable from fantasy or day-dreams unless they are supported by acquisition, investment, or planned savings. . . . Anyone who wishes to conduct an inventory of his desires may profitably begin by walking round his own dwelling or looking into his wardrobe." n186

Property is not just a matter of the physical world giving way to assertion of the self, for the society must acknowledge and approve property claims. Through society's acceptance of the individual's claims upon external objects, [\*334] *possession* becomes *property*, and the expression of the individual becomes more objective. n187 for Hegel, increased objectivity is increased freedom in part because social recognition of a person's claims to private property demonstrates that the individual's claims comport with that social will.

The individual person comes to be manifested in some object through "occupation" and "embodiment." n188 Although much of Hegel's language seems to support either a "first possession" theory or a labor theory, neither accurately captures what he means by occupation. He characterized possession of the object as the initial step in property, n189 but this is because the will can only occupy a *re nullius* -- either a virgin object or something that has been abandoned. n190

Abandonment occurs easily in the Hegelian system because the relationship between person and object is fluid. Being first in possession of an object is not sufficient to maintain title to it; the property relationship continues only so long as the will manifests itself in the object. Because "the will to possess something must express itself," n191 a person who fails to reaffirm constantly this expression can "lose possession of property through prescription." n192 The individual also can actively withdraw his will; this is the basis of alienability. n193

Labor often is the means by which the will occupies an object. n194 But while labor may be a sufficient condition for occupation, it is not a *necessary* one. For example, one may manifest one's will in a gift or in a natural object to which one becomes emotionally attached. n195 There is a rock on my shelf from the coast of Corsica that reminds me of days spent there. My will occupies that rock without wishing to change it and without having labored upon it. This exemplifies another non-condition of occupation; Hegel specifically [\*335] argues that an individual need not *use* an object to occupy it. n196

This is not to say that there are no objective indicia of the will's occupation. Hegel sets out three ways in which the will may occupy an object: physically seizing it, imposing a form upon it, and marking it. n197 This would not appear to be an exhaustive list of events that signal possession, nor is Hegel precise in defining these three events. Thus he finds *use*, when aimed toward preservation of the object, equivalent to "marking it" because it shows the will's desire to make the object a permanent part of the inventory of things utilized and enjoyed by the individual. n198

Hegel seems to envision spatio-temporal proximity between the individual and the object, but that too is only indicia rather than a requirement. Unlike the labor theory, Hegel's personality justification

focuses on where a commodity ends up, not where and how it starts out. . . . [I]t focuses on the person with whom it ends up -- on an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing. n199

As Radin points out in this passage, the connection between personality and property is open-ended. A person could claim a personality stake in any material object, meaning that the personality justification is liable to excessive claims. It is a theory that allows Virginia Woolf to claim a room of her own, but also allows Louis XIV to claim the 2,697 rooms of Versailles.

This subjectivity causes unhealthy identifications with property that should not give rise to legitimate property claims. Early in his writings, Hegel hinted that certain self-identifications with property were destructive to the individual. For example, in the *Theologische Jugendschriften*, n200 Hegel argues that the ownership of property can stand in the way of complete harmony between individuals in love. "The dead object in the power of one of the lovers is opposed to both of them, and a union in respect of it seems to be possible only if it comes under the dominion of both." n201

This destructive effect of property should be distinguished from the alienation that later came to propel Hegelian and Marxian social criticism. It differs from the problem of a laborer who attaches his existence to objects that he produces but does not own: the plight

for such a laborer is that his identity is attached to something that is *not* his property. Nor is this the problem [\*336] of a person owning things with which he does not identify. n202 In the *Jugendschriften*, the problem is that a person owns *and* identifies with some property to his own detriment; it prevents a greater happiness in the form of a love relationship.

Generalizing from this example, we might say that a person's identification with property is "unhealthy" when it prevents that person from maximizing self-actualization from other sources -- lovers, friends, careers, peer groups, other property, and even feelings antithetical to the possession of property such as the flower-child freedom of the 1960s. The complexity of maximizing self-actualization usually makes us defer to the judgments of the individual. However, when the industrialist is inextricably in love with the flower child, we may conclude that his property is unhealthy for his present and future self-actualization.

Radin also has expressed concern about the adverse effects of property on self-actualization. However, she focuses concern on the detrimental impact of property on people other than the property owner. She distinguishes between "fungible" and "personal" property, the latter being property which increases self-actualization. She adopts the principle that property fungible to person X should be denied to X if giving that property to X would deny personal (that is, self-actualizing) property to Y. n203

Radin's standard accords with Hegel's own reasoning. In addressing the severe inequality of property distribution in his own day, Hegel argued that his system required only equality as to the *possibility* of obtaining property. n204 Hegel implicitly endorses the view that property can be denied to person X if giving

this property to X would deny Y the possibility of obtaining property. Under Radin's standard, whether an act of appropriation is "healthy" depends upon whether it has deleterious effects on others. This standard has a resemblance to Locke's "enough and as good" condition. As long as there is enough and as good potential property for the self-actualization of others, one may appropriate.

In fact, Radin's principle of "fungible" and "personal" property *is* the "enough and as good" condition unless we construe it in one of two ways. The first construction would require people to disgorge their fungible property, even when there is "enough and as good." This position does not make much sense if subjective judgments determine personal attachment to property. Property that objectively appears to be fungible may actually be personal; [\*337] occasionally someone will have a personality stake in U.S. Savings Bonds or GM stock.

The second construction would *not* require people to disgorge personal property even when there is not "enough and as good" property available to all. This position makes some sense on a cost/benefit rationale: with truly personal property, we may be damaging the self-actualization of the property-loser as much as we would augment the self-actualization of those to whom the property is distributed. In a world of property shortage, some persons will be malnourished in their self-actualization. It is just a matter of *who*.

The fungible/personal distinction therefore renews the subjectivity dilemma, a problem recognized by Radin. "Fungible" and "personal" are strong intuitive guides in a culture enamored with economic analysis. Stock portfolios, mining rights, and tons of wheat are fungible; photos, diaries, and pets

are not. Yet this leads us nowhere with the person willing to sell his grandmother or the person who keeps pet wheat. We are left with either an artificially constrained or an entirely subjective measure of when property actualizes the self.

### 3. Intellectual Property Under Hegel

For Hegel, intellectual property need not be justified by analogy to physical property. In fact, the analogy to physical property may distort the status Hegel ascribes to personality and mental traits in relation to the will. Hegel writes:

Mental aptitudes, erudition, artistic skill, even things ecclesiastical (like sermons, masses, prayers, consecration of votive objects), inventions, and so forth, become subjects of a contract, brought on to a parity, through being bought and sold, with things recognized as things. It may be asked whether the artist, scholar, &c., is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, &c., that is, whether such attainments are "things." We may hesitate to call such abilities, attainments, aptitudes, &c., "things," for while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it, and for this reason the Understanding may be in perplexity about how to describe such possession in legal terms. . . . n205

Intellectual property provides a way out of this problem, by "materializing" these personal traits. Hegel goes on to say that "[a]ttainments, eruditions, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody [\*338] them in something external and alienate them." n206

Hegel takes the position that one cannot alienate or surrender any universal element of one's self. Hence slavery is not permissible because by "alienating the whole of my time, as crystallized in my work, I would be making into another's property the substance of my being, my universal activity and actuality, my personality." n207 Similarly, there is no right to sacrifice one's life because that is the surrender of the "comprehensive sum of external activity." n208 This doctrine supplies at least a framework to answer the question of intellectual property that most concerns Hegel. It is a question we ignore today, but one that is not easy to answer: what justifies the author in alienating copies of his work while retaining the exclusive right to reproduce further copies of that work?

A sculptor or painter physically embodies his will in the medium and produces one piece of art. When another artist copies this piece Hegel thinks that the hand-made copy "is essentially a product of the copyist's own mental and technical ability" and does not infringe upon the original artist's property. n209 The problem arises when a creator of intellectual property does not embody his will in an object in the same way the artist does. The writer physically manifests his will only "in a series of abstract symbols" which can be rendered into "things" by mechanical processes not requiring any talent. n210 The dilemma is exacerbated by the fact that "the purpose of a product of mind is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, &c." n211 This concern for the common of ideas is familiar.

In resolving this dilemma, Hegel says that the alienation of a single copy of a work need not entail the right to produce facsimiles because such reproduction is one of the

"universal ways and means of expression . . . which belong to [the author]." n212 Just as he does not sell himself into slavery, the author keeps the universal aspect of expression as his own. The copy sold is for the buyer's own consumption; its only purpose is to allow the buyer to incorporate these ideas into his "self."

Hegel also identifies the instrumentalist-labor justification as a consideration against granting full rights of reproduction to buyers of individual copies [\*339] of a work. Hegel admits that protecting intellectual property is "[t]he purely negative, though the primary, means of advancing the sciences and arts." n213 Beyond this, Hegel says little. He declares that intellectual property is a "capital asset" and explicitly links this label to a later section in which he defines a "capital asset." n214 There is considerable literature on how Hegel did not develop the idea of "capital" to its logical conclusions, n215 but here "capital asset" can be understood as property which has a greater tendency to permanence and a greater ability than other property to give its own economic security.

#### B. PROBLEMS IN APPLYING THE PERSONALITY JUSTIFICATION TO INTELLECTUAL PROPERTY

A property system protecting personality will have difficulty finding reliable indicia for when people do and do not have a "personality stake" in particular objects. The personality justification also leaves some nagging theoretical questions. Even if we reliably could detect when a person possesses a "personality stake" in an object, we surely would find that personality is manifested to varying degrees in different objects. This is the personality counterpart to the varying amounts of labor one "puts" into different objects. Neither personality nor labor is simply an on-off

proposition. The question is: Does more personality warrant more property protection?

This problem also has a "categorical" aspect -- different categories of intellectual property seem to lend themselves to different amounts of "personality." Poetry seems to lend itself to personality better than trade secrets, symphonies better than microchip masks. Should poetry as a category receive more protection than microchip masks. Should some categories receive no protection at all from the personality justification? Finally, the theory suffers from internal inconsistency in its somewhat incoherent account of alienation.

#### 1. Varying Degrees of Personality in Intellectual Property

One of the problems with the labor theory discussed in Part II is that some intellectual products have no apparent social value or require no labor to produce, leaving these pieces of property unjustified by the labor theory. The personality justification has the same problem with those intellectual products that appear to reflect little or no personality from their creators. As with the labor theory, we can overcome this difficulty with a utilitarian principle [\*340] that justifies property rights on the grounds that they protect the "net gain" of personality achieved by the entire system. This avoids the question of whether or not personality is present in every case of intellectual property. Yet the personality justification has this same "coverage" problem at a "categorical" level. With a controversial exception mentioned below, there seem to be no categories of intellectual property that are especially more or less hospitable to the labor theory. This is not true with the personality justification. Some categories of intellectual property seem to be receptacles for personality; others seem

as if they do not manifest any "personality" of their creators.

Poems, stories, novels, and musical works are clearly receptacles for personality. The same can be said for sculpture, paintings, and prints. Justice Holmes aptly characterized such works as "the personal reaction of an individual upon nature." n216 Another receptacle for personality is the legal concept of an individual's "persona." The "persona" is an individual's public image, including his physical features, mannerisms, and history. n217 In the U.S., it is debated whether or not the personal should be considered intellectual property at all. The answer to this question may turn on what justification we use for intellectual property.

The persona is the one type of potential intellectual property which is generally thought of as *not* being a result of labor. n218 Even if the persona is considered to be a product of labor, people would work on their personas without any property rights being necessary to motivate them. Therefore, the instrumental labor justification is not necessary. In contrast, the persona is the ideal property for the personality justification. No intermediary concepts such as "expression" or "manifestation" are needed: the persona is the reaction of society and a personality. Property rights in the persona give the individual the economic value derived most directly from one's personality. n219 As long as an individual identifies with his personal image, he will [\*341] have a personality stake in that image. n220

The problems for the personality justification do not arise in justifying these obvious expressions or manifestations of personality, but with those kinds of intellectual property that do not seem to be the personal

reaction of an individual upon nature. Even in the field of copyright these problems arise. While most of the personality-laden categories are protected by copyrights, copyrights protect more than just personality-rich objects. Atlases and maps are a good example. In the early days of oceanic explorations, mapmakers competed with one another on their claims of accuracy. Today, the same competition does not arise because the generic information is already there in the form of old maps and publicly held government materials. n221 The result is that maps have a tremendous uniformity. There may be personality galore in a map of Tolkien's Middle Earth, but not much in a roadmap of Ohio. That does not mean maps are absolutely devoid of personality. Certainly a new form of map manifests personal creativity, as in the case of Peter Arno's revisions of the Mercator projections. n222 Even in everyday maps, there can be artistic content or social commentary in the choices of color, identifying symbols, and information included. n223

More difficult problems for the personality justification are posed by copyrightable computer software and other technological categories of intellectual property: patents, microchip masks, and engineering trade secrets. These items usually embody strongly utilitarian solutions to very specific needs. We tend not to think of them as manifesting the personality of an individual, but rather as manifesting a raw, almost generic insight. In inventing the light bulb, Edison searched for the filament material that would burn the longest, not a filament that would reflect his personality. Marconi chose to use a [\*342] particular wavelength for his radio because that wavelength could travel much farther than waves slightly longer, not because that

wavelength was his preferred form of expression.

In a report related to the recently enacted microchip mask protection law, n224 the House Judiciary Committee discussed attempts by some microchip inventors to protect chip designs by copyrighting photographs of the chips' layout as artistic designs. n225 This clear attempt to use a system designed to protect personality-rich art for the protection of engineering designs exudes irony. The House Committee concluded, as most of us do, that engineering designs are characterless and without personality. As congressmen or consumers, we generally think that state of the art is not art. n226

Yet technology may not be categorically different from atlases and maps. The primary goal of computer programs is to produce a particular result using as little software and hardware as possible. But writing programs, like creating logical proofs, can involve a certain aesthetic vision. n227 Within the constraints of efficiency, it is frequently possible to write a program a number of ways -- some simpler, some more byzantine; each depicts a particular style for resolving the problem. If there are ten ways to write a program of roughly the same efficiency, it seems perfectly reasonable to think that the choice among the ten may demonstrate personality. n228

It is an oversimplification to think that some genres of intellectual property *cannot* carry personality. This oversimplification avoids the true issue of the constraints of economy, efficiency, and physical environment which limit the range of personal expression. Such constraints exist to some degree in every genre. Few movies or plays can afford to

ignore the average attention span of audiences or the limits of a budget; the artist in the plastic arts is constrained by the physical properties of the materials; the architect faces these material constraints with the additional limits of plot size, location, and zoning regulations. The computer programmer and the cartographer are further along the spectrum of constraint, but even they can embellish their works to suit at least some of their own predilections. The genetic researcher [\*343] or the aerospace engineer are even more constrained; their slightest embellishments may be dangerous indeed.

The more a creative process is subject to external constraints, the less apparent personality is in the creation. At some point, these constraints on a particular form of intellectual property may be too great to permit meaningful expressions of personality. We may determine that the personality justification should apply only to some genres of intellectual property or that the personality generally present in a particular genre warrants only limited protection. n229

In the ideal situation, before we made such a determination we would ask the creator what personality she sees in her creation. As mere consumers we may think a genre of intellectual property too constrained to permit expressions of personality, while the majority of creators in that genre may think that their works do express personality. Subtle manifestations of personality may be visible only to people knowledgeable in that field. n230 Just as chess players can recognize particular moves as reflecting the personality of certain players, particular moves in a computer program or a chemical process may be characteristic of a particular inventor or group.

This subjective inquiry approaches personality stake as being a question of whether or not there is personality *in* the object. In other words, does the object show others an aspect of the creator's self? This aspect of the personality-property connection focuses on the *expression* of the creator's will through the *medium* of her creation. The creation itself is merely a conduit for the expression of personality. Another type of personality stake may exist, however.

A person may claim property so that others will *identify* him with the property. In this case, the creator claims his property in order to *create* (rather than *express*) a particular persona. This "externalization" accords with Hegel's theory. Hegel argues that recognizing an individual's property rights is an act of recognizing the individual as a person. n231 That same reasoning applies to the externalization connection: if X owns a patent, people will recognize him as a *particular* person -- the inventor of a unique innovation.

There is a problem, however, with founding intellectual property rights upon such externalization. X can't just say "I want people to identify me with the World Trade Center" and expect this to justify his property claim to [\*344] it. The individual must have some *internal* connection to the claimed property. This connection need not be that the object "expresses" the owner's personality. It may be simply that the owner *identifies* himself with the object. With inventions, the object may precede the personality stake, but with time the scientist or engineer comes to identify himself with his scientific or technological advances. Doppler became identified with certain principles of sound, Edison with the light bulb and gramophone, Bell with his telephone. The personality inquiry cannot just examine the object. The *relationship* between

object and creator is where personality is visible.

## 2. Alienation and the Personality Justification

Hegel regards alienation as the final element in the agenda of an individual's relationship to the propertized thing. Viewed as a single act, alienation is equivalent to abandonment: "The reason I can alienate my property is that it is mine only insofar as I put my will into it. Hence I may abandon . . . as a *res nullius* anything that I have or yield it to the will of another. . . ." n232

There is some intuitive appeal in this view of alienation, especially in a barter-exchange framework. n233 Two people can exchange distinct objects if each thinks her own personality would be better expressed through the object presently owned by the other. Jessica can exchange her comic books for Ken's baseball cards if she has more interest in baseball than in the exploits of Spiderman. Ken will engage in the same transaction if he identifies with superheroes more than with the baseball heroes collecting dust in his closet. Each person increases the actualization of his or her personality.

In a money economy, however, the exchange may lose some of its intuitive appeal. An individual alienates his property for *value* which he can then invest in things which will increase self-actualization above what it would have been had he continued to own the alienated property. Depending upon the degree of development, however, the individual might not be able to increase self-actualization through future investment. One can no longer be as certain that he will receive a profitable return. A fragile money economy - - subject to inflation and shortages -- threatens the prospect of translating value received into

increased self-actualization. A stable economy strengthens the prospect.

The risk of unprofitable investment, however, is not the main problem. Alienation is more than just "giving up" something. Like many of the rights encompassed by property, the right to alienate X is the right partially to determine X's future. In an absolute sense, only the future decisionmaker -- the transferee -- for X is determined, but in practice an act of alienation usually [\*345] establishes clear probabilities as to the future of the object itself. This is true whether the alienation conveys land to a developer, sends a horse to a glue factory, or sells weapons to terrorist organizations.

To better understand this, imagine a system of depositing or redepositing objects in a "community bank" for which, upon deposit, one received value coupons. The property, once in the bank, becomes a *res nullius*, and the bank would dispose of this property on a first-come/first-serve basis, much like the government auctions newly acquired lands or unclaimed postal freight.

The difference between alienation and this community bank is that most alienation involves some degree of determining the object's future. Imagine that Jessica can sell her new baseball card collection to David, an avid collector, or to Nat, the restaurateur who is opening a sports version of the Hard Rock Cafe and is looking for wall decorations. Now Jessica's act of alienation involves the choice of where and how the property will be used in the future.

This is the paradox of alienation under the personality model of property. The present owner maintains ownership because he identifies the property as an expression of his self. Alienation is the denial of this personal

link to an object. But if the personal link does not exist -- if the object does not express or manifest part of the individual's personality -- there is no foundation for property rights over the object by which the "owner" may determine the object's future. An owner's present desire to alienate a piece of property is connected to the recognition that the property either is not or soon will not be an expression of himself. Thus, the justification for property is missing. This subtle control of the object's future does not jibe with foreseen future denial of the personality stake.

One way to explain this paradox is to say that the personality justification is powerful for property *protection*, but that it fails to explain property *exchange*. Using Radin's terminology, the willingness to sell a piece of property suggests that the property has moved from the "personal" category to the "fungible" category. This follows because personal property is defined as having an internal value for the property owner in excess of possible external value. When a buyer comes forward offering a price acceptable to the owner, there is an external valuation of the property commensurate to the owner's internal valuation and the personality justification for guarding rights to personal property vanishes.

Specific covenants and restrictions on property suffer in the same way. A restriction -- covenant, servitude, or easement -- acknowledges that the present owner has a limited personality interest continuing into the future. Restrictions on real property, such as preservation of particular natural features or prohibitions on particular uses, seem like very honest claims to future [\*346] personality stakes in property. By using a restriction, a person retains the specific stick(s) in the bundle of property rights which will "contain" his continuing personality stake.

The restriction turns a present owner's freedom to choose from varying courses of action into a future static condition inherent in the property. A farm owner's right to cut down a woods in the corner of his farm is transformed into a static condition when he sells the farm with a restriction against destroying those trees. This conversion produces a static condition which continues regardless of the evolving wishes of either the original owner or the new owner. This static condition replaces both the original owner's right and the new owner's right. With alienation, the condition becomes subject to the new owner's right. The original owner alienated his property, betting only on the probability that the new owner would not pursue a course of action that offends him.

It is more difficult to defend a personality justification for restrictions than it is for complete alienation. We often use our property rights to alter an object to suit our personality. A restriction destroys the flexibility by which property becomes and continues to be a reflection of those who own it. This flexibility, of course, may not matter to an original owner seeking to preserve memories, but it will matter a great deal to the new owner seeking to maximize his personal expression. Perhaps it is no accident that even more so than covenants disallowed for violating public policy or constitutional provisions, n234 covenants creating affirmative obligations on real property are generally limited n235 and "a general restraint upon alienation is ordinarily invalid." n236 Such a restraint would be *ideal* for an owner who wishes to alienate *and* to control the object's future. It would permit him to choose the new owner (whose probable use of the property can be known) and restrict to whom the new owner can alienate.

Alienation of intellectual property can take one of two basic forms. The first is its entire alienation by selling, at one time, all rights to the property. The second is the complete alienation of copies of the property with limitations on how those copies may be used: the selling of copies of copyrighted works, objects displaying trademarks, or licenses to use patented technology. n237

Alienation of the entire intellectual property -- all rights to a trademark, [\*347] patent, or copyright -- has the same paradoxical problems as does the alienation of physical objects. If a person genuinely has no personality stake in a work, why should she determine who publishes it, who markets it, or who dramatizes it? If an inventor foresees that an invention will neither manifest his vision of the world nor speak as an expression of his identity, why should he derive economic value from it? As with physical property, on most occasions the complete alienation of intellectual property is an exercise of rights over property in an act that, by its nature, denies the personality stake necessary to justify property rights.

This paradox of personality and alienation is more acute with intellectual property because, in the absence of any physically tangible *res* (other than the copy, which is not itself the entirety of the property) that is distinct from the creator's personality, it is difficult to conceive of abandonment. If there is no "thing" to abandon, how is alienation possible? Abandonment of an idea is arguably alienation of personality -- a prohibited act in Hegel's system. n238

When I take the rock from my shelf and toss it back onto the Corsican beach, I do so because I no longer identify with the memories the rock evokes and no longer see it as

manifesting a part of my life. We go through this same process when we put old knick-knacks in a garage sale or send old clothes to the Salvation Army. The *res* exists independent of our personality, so it is not incoherent to claim that there is no longer a personality stake in the *res*.

This abandonment of a personality stake will be incoherent if there is no recognizable *res* that exists beyond the individual's expression. The question is whether the created work exists independent of the creator: does the expression turn to artifact? Performing artists often war with writers and composers over this issue. Seeking maximum freedom, the performers view the particular play or musical composition they are using as a device for their own expression, a *res* through which they can express their personalities. Yet the writer or composer may not think the *res* is abandoned at all.

Playwrights versus actors, composers versus conductors and orchestras -- these two sides will always be locked in one another's arms, in a grip that is both mortal combat and mutual need. It is possible to draw many comparisons and analogies to this issue. There is the familiar comparison to the rights of parents -- the author having a parental stake in her work. A less familiar analogy might be made to the questions of original intent and interpretivism in constitutional jurisprudence.

The "interpreters" believe that intellectual property can be, and usually is, [\*348] abandoned. Their vision is reinforced by both popular notions of artistic development and philosophical notions of personal identity. A writer may simply no longer identify with something he previously wrote. A Picasso or a Le Corbusier may change radically the style of his work and, in the end, no longer identify

with the works of the abandoned period. David Bowie can move beyond "Ziggy Stardust" n239 and David Stockman can repudiate his doctrine of supply-side economics. n240 Philosophers are familiar with arguments that there is no reason to identify the works written by Jorge Luis Borges in 1956 as a manifestation of the personality of Jorge Luis Borges as of 1986. For Borges in 1986, his earlier works may indeed have seemed liked a *res nulli*. n241

Hegel seems to have taken a contrary view, considering the complete alienation of intellectual property to be wrong -- morally analogous to slavery or suicide because it is the surrender of a "universal" aspect of the self. n242 Selling an entire piece of intellectual property seems like a lesser surrender of the self, but Hegel considered it too much a "universal" part of the individual to be permitted. He seemed to identify the intellectual object as an ongoing expression of its creator, not as a free, abandonable cultural object. Supporting Hegel's view, we can note that even when the creator thinks he has abandoned the object, he may still identify with it enough to oppose certain uses for it. Even after "abandoning" a visual image, the artist might oppose its use as a symbol by a fringe political or religious organization.

The alienation of copies of the intellectual property offers a different set of [\*349] issues. An owner may or may not limit the uses to which the alienated copies may be put. However, in either case the original owner still retains rights over the property. This type of alienation does not fall prey to the paradox of complete alienation: there is no exercise of property rights (alienation) after an "owner" no longer has a personality stake in an object. It also is immune from Hegel's objection to the selling of a part of oneself. Unlike physical

property, the owner can, in this way, alienate the intellectual property while keeping the "whole" of the property and himself.

Not only does Hegel's personality theory pose no inherent objection to this kind of alienation of intellectual property, it also provides affirmative justifications. Hegel focuses on one such justification -- concern for the economic well-being of the intellectual property creator. n243

At first blush, this economic rationale seems far removed from the concerns of personality theory, n244 yet it can be recast into the framework of the personality theory. From the Hegelian perspective, payments from intellectual property users to the property creator are acts of recognition. These payments acknowledge the individual's claim over the property, and it is through such acknowledgement that an individual is recognized by others as a person. n245 "Recognition" involves more than lip service. If I say "this forest is your property" and then proceed to flagrantly trespass, cut your timber, and hunt your deer, I have not recognized your property rights. Similarly, verbal recognition of an intellectual property claim is not equal to the recognition implicit in a payment. Purchasers of a copyrighted work or licensees of a patent form a circle of people recognizing the creator as a person.

Furthermore, this generation of income complements the personality theory in as much as income facilitates further expression. When royalties from an invention allow the inventor to buy a grand piano he has always wanted, the transaction helps maximize personality. But this argument tends to be too broad. First, much income is used for basic necessities, leading to the vacuous position that life-sustenance is "personally maximizing"

because it allows the personality to continue. Second, this approach could justify property rights for after-the-fact development of personality interests without requiring [\*350] such interests in the property at the time the property rights are granted.

The personality theory provides a better, more direct justification for the alienation of intellectual property, especially copies. The alienation of copies is perhaps the most rational way to gain exposure for one's ideas. This is a non-economic, and perhaps higher, form of the idea of recognition: respect, honor, and admiration. Even for starving artists recognition of this sort may be far more valuable than economic rewards.

Two conditions appear essential, however, to this justification of alienation: first, the creator of the work must receive public identification, and, second, the work must receive protection against any changes unintended or unapproved by the creator. Hegel's prohibition of "complete" alienation of intellectual property appears to result from his recognition of the necessity for these two conditions. While he would permit alienation of copies, and even the rights to further reproduction, n246 he disapproves alienation of "those goods, or rather substantive characteristics, which constitute . . . private personality and the universal essence of . . . self-consciousness." n247 Such alienation necessarily occurs if the recognition of the connection between a creator and his expression is destroyed or distorted. When the first condition is violated, this recognition is destroyed; when the second condition is violated, it is distorted.

### C. THE PERSONALITY JUSTIFICATION IN U.S. LAW

These two conditions are recognized in French and German intellectual property law under the general name of "moral rights." n248 For both copyright and patent owners, there is the right to be properly identified with one's creations. n249 For copyright owners, there also exists an inalienable right to guard the integrity of a work against change that would damage the author's reputation or destroy his intended message. n250

[\*351] Although this article will not critique these continental laws in depth, a couple of observations are in order. First, even in these systems, there is no clear right for patent owners to protect the integrity of their creation, although they do enjoy a right to have their name attached to the patent. This may reflect an implicit social judgment that the degree of personality reflection in most patented works is different and smaller than in most copyrighted works. Second, by forbidding alienation of certain rights in intellectual property, these civil systems prevent the complete alienation of the property: "transfer of the copyright as a whole between living persons is basically precluded on account of the elements of the right of personality (*droit moral*)." n251

There are no provisions in American copyright law giving an author "moral rights" to protect against distortion and to ensure recognition. n252 It is interesting, however, to note how the personality justification has subtly affected American copyright doctrine. n253 The property interest in a work does not depend on any external measure of artistic, cultural, or social worth in any field covered by copyright. The world is full of bad, but nonetheless personal, poetry and of paintings that look like Rorschach images to everyone but the painter. Initially there seems to have been some confusion as to whether worth was

a prerequisite to copyright -- but this uncertainty was dispelled in the 1903 case of *Bleistein v. Donaldson Lithographing Co.* n254

In *Bleistein* the plaintiff sought to protect three lithographs used as advertisements for a circus. Against the defendant's calls to require some level of artistic achievement before conferring copyright, the Supreme Court held that copyright of the prints was not barred because of their "limited pretensions." n255 Writing for the majority, Justice Holmes wrote that "[a] very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." n256 Holmes was prepared to cast a wide net to recognize tiny bits of [\*352] individual personalities: "Personality always contains something unique. It expresses its singularity even in handwriting. . . ." n257

Perhaps *Bleistein* marks only a momentary flirtation with the personality justification. Indeed, it is the Supreme Court's only intellectual property opinion that uses the word "personality" as a juridically significant concept. There are few cases inheriting -- and explicitly averring -- Holmes' reasoning. n258 Yet both the notions it exorcised from American law and the notions it enshrined are significant.

*Bleistein* rejected any "great art" requirement as too high a threshold for copyright. Such a requirement would have limited property protection to those few works in which it is clearly evident that the work came from a *particular* personality, and was of such a nature that most other personalities could not have created it. Commercial art or realist art would be left unprotected under this standard because it lends itself to almost mechanical, automatic production by any

techniquely skilled artisan, and contains little indication of the creator's personal expression. Creations reflecting an easily recognizable personality expression would be protected or at least eligible for protection.

Additionally, the "great art" requirement implicitly included a *social* judgment of the value or worth of the creation. Lowering this standard to a "modest grade of art" n259 meant a shift in focus from society's judgment of an object's worth to a subjective, personal judgment of that worth. Shifting from an artistic merit standard (which demands more "objective" uniqueness) to the *Bleistein* test grants protection to more expressions of individuality.

The *Bleistein* standard arguably is no more connected to personality than are the patent law standards of "uniqueness" and "novelty." The Supreme Court has never squarely addressed this question. n260 Still, the language in copyright cases suggests that courts are recognizing something besides the novelty of a previously unknown technology. In the nineteenth-century case of *Burrow-Giles Lithographic Co. v. Sarony* n261 the Supreme Court held that a [\*353] photograph may be copyrighted if it is "an original work of art." n262 More recently, the Court generously found that "those aspects of [President Ford's memoirs] . . . that display the stamp of the author's originality" were protected. n263

Holmes' "irreducible something" has become "[t]he author . . . contributing something 'recognizably his own'" n264 -- a standard quite different from patent law's strict requirement of new additions to existing technology. Patent protection is denied to minor advances that could be achieved by "an ordinary mechanic acquainted with the business" n265 or, as Judge Hand called him,

"the hypostated average practitioner, acquainted with all that has been published and all that has been publicly sold." n266 In copyright law, there is no such external comparison; copyright is not denied because the work could be done by some hypostated artist or computer program capable of "writing." The benchmark is subjective: whether the creator has brought something subjective to the external world. This is the Holmesian "modest grade of art."

The "modest grade of art" standard also is an apt characterization of trademark law. Indeed, the history of trademarks may bear witness to the competition between the labor and personality justifications of intellectual property. When the Supreme Court originally refused to grant property status to trademarks, it largely was because there is no apparent labor in their creation. n267 However, if the Court had instead adopted a modest grade of art standard, the unique wavy script of the Coca-Cola label or the ravenous "D" consuming the vowels in the Dior logo surely would have been recognized as the reflection of an individual creator.

When protection for trademarks was finally granted, it seemed moved by the unseen hand of the personality justification. The original scope of trademark protection, both under common law n268 and the first federal statute, n269 limited protection to "fanciful" and "arbitrary" marks. n270 Such marks include [\*354] both abstract symbols and "words" coined to be marks, n271 as well as words applied to objects in an arbitrary manner, such as the "Stork Club" as a name for a nightclub. n272 Arbitrary, fanciful, and "inherently distinctive" marks n273 are the kinds of marks that show some creativity and personality. Labels like "Stork Club" tend to have personal stories or inspirations behind

them. At the opposite end are impersonal labels such as "Raisin-Bran" n274 and "100% Liquid Centers," n275 labels left unprotected because they are purely descriptive.

Trademarks are frequently justified, in the words of one commentator, by the "consumer's right to be told the truth." n276 The Supreme Court itself has endorsed trademark propriety as furthering the "consumer's [right] . . . to purchase a given article because it was made by a particular manufacturer." n277 However, this justification based upon consumers' rights is weak. A real consumer's right to the facts would be protected by truth-in-advertising or misrepresentation laws, not by trademark. Trademark is a right of expression for the manufacturer, not a right of the consumer to receive information. n278 In fact, trademarks fulfill the recognition aspect of the personality theory of property by providing an important means of securing respect and recognition to those who originate the items bearing the trademark.

#### [\*355] D. CIVIL RIGHTS SUPPORT FOR A PERSONALITY JUSTIFICATION

The most frequently attempted bridge from existing American law to more control over intellectual property has not been civil rights, but defamation claims. Common examples include a playwright suing when a director "degrades" the play, or a novelist suing the producer when the movie script focuses on sex and violence in a way the novel does not.

Defamation claims are perhaps the *worst* method of protecting personality interests within existing doctrine because any "distortion-as-defamation" doctrine will eventually have to be reconciled with *New York Times v. Sullivan* n279 and its progeny. n280 These cases have established rigorous standards for proving libel and defamation in

news stories and cartoons. Ultimately, they must stand as a bulwark against finding libel in printed material or copyrighted works in general. It would be very odd jurisprudence which had rigorous tests for defamation when the defamer was using his own words, but made it easier to show defamation when the victim used the victim's own expression.

In place of the defamation strategy, I suggest using two civil rights approaches to protect intellectual property. Although generally unrecognized, there are civil liberties arguments available that functionally can provide some "moral rights" that protect the personality of the creator as it is manifested in the creation.

#### 1. The Privacy Right Argument

For centuries unpublished works have been protected by copyright, either statutorily or under common law. Copyright over unpublished works can be explained by economic considerations -- allowing a person to retain the economic value in an unpublished work until he or she chooses to exploit that value. Yet the privacy of the individual also is at issue. We always allow people to shape their public images; this is part of having private and social selves. n281 Similarly, an author should be able to guard a work until she is satisfied that the work warrants public consideration. It also is possible that a person may intend for his writings or art *never* to reach the public, having created the work solely for his private pleasure and that of his intimates. Seeing the personality issues involved, Samuel Warren and Louis Brandeis [\*356] declared that the right to privacy should allow a person to prevent publication of private letters, even when the would-be publisher was the recipient of the letters. n282

Once a work has been published, the force of the Warren-Brandeis theory seems to ebb. If the author willingly has placed his works before the public, how can he argue that he has some privacy attendant to the works? One might retort that individual privacy is not completely abandoned by the act of introducing a work into the public arena. Permitting the public to see part of one's self -- whether in an autobiography or a revealing hemline -- surely does not oblige one to reveal *more* of one's self. There is still the privacy argument that no one should be forced to reveal more than he intended to reveal.

A series of cases have recognized, as a principle, that dissemination of a work under the author's name and against the author's wishes may infringe privacy rights. This principle, however, almost invariably remains dicta. In *Shostakovich v. Twentieth Century-Fox Film Corp.* n283 the right was recognized, but the plaintiffs did not succeed in preventing the appearance of their names as the composers of the music used in an anti-Soviet film because their music already was in the public domain. n284 In *Geisel v. Poynter Products, Inc.* n285 Theodor Suess Geisel could not succeed in a privacy action against those using "Dr. Suess" attached to toy dolls because "Dr. Suess" was judged to be his trade name or *nom de plume*, not his proper name. n286

It is instructive to note the posture of the privacy arguments made by both Shostakovich and Geisel. On the surface, the plaintiff in each case claimed that public use of his name against his will invaded his privacy. Interestingly, this is the reverse of the right to demand that one's name be used publicly with one's work.

The privacy argument in *Shostakovich* and *Geisel* is only one of several distinct privacy

arguments. To explore those different arguments it might be helpful to start with Professor Lloyd Weinreb's suggestion that the fourth amendment's protection extends to two different types of privacy: "privacy by presence" and "privacy in place." n287 Privacy in place is the individual's [\*357] privacy interest over certain locales: homes, cars, luggage, etc. Privacy by presence is the individual's interest in being able to move through public in daily life with virtual anonymity. n288

At first glance, the privacy argument in the *Shostakovich* and *Geisel* cases can be taken as an argument for anonymity. Shostakovich's position was that even if his music was used in the movie, he should be able to prevent use of his name. In essence, he presented a claim to stay out of public notice. The unauthorized attachment of one's name to a film or to dolls says nothing about one's private life; it reveals no personal facts which one planned to keep private. It is purely a matter of avoiding unwanted attention.

The analog of an invasion of the privacy of place is the revelation of personal facts an individual had intended to keep private. Indeed, revealing such personal facts often requires an actual breach of privacy of place. Snooping is needed to find the love letters in a desk or the drugs in the dresser. These might also be called attacks on our "substantive privacy." This is *not* a privacy claim that one should be able to remain unknown or anonymous, but that substantive, personal information which the person did not intend to reveal should not be revealed.

Such unauthorized revelation could occur when intellectual property is altered to reveal compromising information about the creator -- for instance, changes in a semi-

autobiographical work about a homosexual relationship. When the author chooses not to release the work, as with E. M. Forster's *Maurice*, the privacy claim follows the Brandeis-Warren theory regarding an author's control over letters. n289 But what about when the author releases the work as a heterosexual story, as with Edward Albee's *Who's Afraid of Virginia Woolf?* or W. Somerset Maugham's *Of Human Bondage*? When a repertory company tries to produce an all-male version of *Who's Afraid of Virginia Woolf?* does Edward Albee have a legitimate substantive privacy claim? n290

If an author produces an edited, final draft and someone attempts to reinstate revealing lines previously removed by the author, the author should possess a substantive privacy claim against the revision. n291 Grounds for such a claim should exist if someone rewrites an author's work to make explicit what the author only intimated when what was revealed were private [\*358] prejudices or life details. Such protection, though, might create problems. We would not want the publication of a scholarly thesis showing how particular themes emerge and reemerge in a writer's work to constitute a privacy violation. How, then, would we settle the issue of an editor who puts explanatory notes into the original text against the writer's wishes? It seems innocuous to explain that "King Billy" refers to Kaiser Wilhelm in Yeats' *Lapis Lazuli*, but it could have been more harmful to add notes to the premiere program of Berlioz's *Symphonie Fantastique* describing how it embodied his secret passion for an actress.

When Johann Strauss first released the *Emperor Waltz* or Satie published his piano piece *En Habit de Cheval* the ambiguities of the respective titles were intentional. n292 Each composer would have been outraged if

someone had published an explanation of the titles discovered from some private material of the composer. In Strauss' case his career prospects could have been hurt significantly, since he had chosen a title paying homage, albeit ambiguously, to both Kaiser Franz Josef and Kaiser Wilhelm.

What distinguishes such revelations from the "revelations" of a critic announcing the "real" meaning of the title is that the revelations discovered from the author's private materials can be directly attributed to the author himself. It is public revelation from the horse's mouth shorn of the buffering effects of intimations, third party reports, and rumors. It is forcing the writer himself to make public what he intended to keep private.

This should cause us to reconsider what was at stake in the *Geisel* and *Shostakovich* cases. These cases presented more than a claim for anonymity and for remaining out of public view; those claims were counterparts of the substantive privacy we have been considering. Edward Albee, Shostakovich, and Geisel all opposed publication of a message that could be mistaken as theirs. Edward Albee's substantive privacy concern was to prevent publication of intimate details descriptive of him. However, Shostakovich's and Geisel's concerns are different. Shostakovich opposed being identified with the substance of an anti-Soviet movie. Geisel opposed being identified with the marketing of a doll. These concerns do not really fit a *privacy* argument since nothing private is being revealed. It is a matter of distortion. Such distortion can be attacked through defamation doctrine, but the first amendment might provide another means to protect this interest.

## 2. The Freedom of Expression Argument

First amendment freedom of expression often is portrayed as the enemy of [\*359] intellectual property rights. Proponents of cutting back copyright protection usually invoke free speech and the marketplace of ideas, if not a direct appeal to the first amendment, as a "trump" over the copyright clause. Recent articles, typify this approach. One argues that "[a] First Amendment defense to [copyright] infringement actions . . . would guarantee the free dissemination of ideas conveyed through visual media." n293 Another includes a milder observation that "[o]ur deep rooted tradition of free speech stemming from the first amendment's mandate requires the same balance of interests when a creator alleges violations of his personal, rather than pecuniary, rights." n294

While these arguments may be persuasive, they face a potentially powerful pro-copyright first amendment counterargument which might be stated as follows: *freedom of expression is meaningless without assurances that the expression will remain unadulterated.* n295 Free speech requires that speech be guaranteed some integrity. It follows that if intellectual property is expression, it merits the same guarantee.

To better see this connection, consider the milieu in which free speech exists. At times, constitutional interpreters have treated free expression as an end in itself. n296 At other times, free speech has been viewed as a means of furthering other goals such as democratic participation n297 and market efficiency. n298 All of these approaches require that the speaker's audience receive his intended message, or something approximating it. If speech is divorced from the speaker's intent, both market efficiency and democratic processes are hindered. The sole justification for free expression that seems not to require

audience understanding is that speech is a purely therapeutic activity. n299 Yet this, too, is dubious because a speaker's ego would hardly be [\*360] reinforced if he thought the audience did not understand him.

Any system that emphasizes that the audience should receive the speaker's *intended* message must protect the speaker's expression from distortion. It especially must protect expression from systematic distortion that the speaker cannot overcome. Major public figures, for example, are the focus of intensive reporting and face commensurate distortion of their expressions. But public figures theoretically possess the means to counteract this distortion by virtue of their status as public figures and the accompanying access to and ability to clarify their expressions through the media.

When the individual is relatively powerless vis-a-vis those who might distort his expressions, the legal system can compensate by creating protective mechanisms. American libel doctrine expresses sensitivity to the varying ability to overcome such false reports. The public figure receives less protection than the private person, in part, because the public figure has greater ability to combat distortion. n300

Copyright protects written and artistic expressions that generally are protected by the first amendment. In the framework described above, the artist or writer is the speaker, and the issue would be his relative power vis-a-vis the medium through which he communicates. In the case of writers, there may be very little opportunity to correct distortions in meaning introduced by publishers and editors. Few of us have the printing resources of a Random House or *The Miami Herald*. We may be able to turn to alternative publishers to print our

"correct" views, but even this alternative requires the cooperation of people who still might distort our intent.

One need not turn to Soviet publishing practices n301 to find prospects for distortion that can interrupt the communicative link between the person of letters and his audience. *Reader's Digest's* condensed books, ABC Television's editing, and the American Repertory Theatre's innovative interpretations all stand as examples of the possible frustration of the "speaker's" intent.

In *Gilliam v. American Broadcasting Companies, Inc.* n302 the British comedy show *Monty Python's flying Circus* successfully enjoined the ABC network [\*361] from broadcasting radically edited versions of the Monty Python comedy programs. ABC had removed twenty-four minutes from each ninety-minute show. n303 The Second Circuit found that "the truncated version at times omitted the climax of the skits . . . and at other times deleted essential elements in the schematic development of a story line." n304 The court concluded:

We therefore agree with Judge Lasker's conclusion that the edited version broadcast by ABC impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents. We believe that a valid cause of action for such distortion exists and that therefore a preliminary injunction may issue. . . . n305

Cases of this sort presently are treated as contract disputes or matters to be decided under equitable principles, n306 but they could be collected and made the building materials for a first amendment claim built into copyright protection. Justice Brennan's dissent in *Columbia Broadcasting System v. Democratic*

*National Committee* n307 touches the heart of the matter. Although writing about access to media, the basic concern applies to copyright:

[I]n the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views. n308

At issue is not just the right to use an appropriate and effective medium, but also to make a particular medium appropriate and effective. The goal is to ensure that printed and published materials effectively convey the creator's expression.

Even if I have overstated the degree of distortion that occurs or is likely to occur, commentators indicate that the changing conditions of the information era will place an increasingly higher premium on the free flow of ideas [\*362] and a commensurate pressure to reduce copyright protection. n309 Writing twenty years ago Benjamin Kaplan accurately summarized this view: "as the imperium in communications passes from books to electronic manifestations, as the 'Gutenberg galaxy' decays, not only is the relationship between author and audience radically changed but the author's pretensions to individual ownership and achievement are at a discount." n310

The notions of individual creativity and personal achievement in writing and the arts risk replacement by an attitude that ideas are just plucked from the air by anyone. This is the manna-from-heaven mentality that earlier I characterized as antithetical to the labor theory of intellectual property. It is not difficult to see

how, at its extreme, it also is at odds with the personality theory. *Some* reduction in the perceived personal achievement of producing a copyrighted work need not spell the end of copyright protection any more than this attitude toward scientists has caused us to eliminate patents.

Such a deterioration in the perception of individual achievement is less probable than the rise of a countervailing attitude -- what Stephen Stewart calls "consumer politics" n311 -- demanding the greatest supply of copyright material at the lowest cost, no matter what the long-term effects. New technology tends to fuel this new demand by eliminating impediments to infringement. Video tapes of movies, for example, are copied easily whereas films can be copied only with great difficulty. A problem is developing further on the horizon as libraries and individuals come to depend on on-line or stored data computer systems for access to what presently are printed materials. In such systems, undetected alteration of texts can occur much more readily than presently possible. A disgruntled computer user can change a single computer file, or an unknown central authority could rewrite everyone's version of a text with an efficiency that might have dazzled Hitler's book burners. With Orwellian humor, Harvard law students a few years ago produced a campus musical on a legal totalitarian world run by a vanguard of Critical Legal Studies scholars bolstering their control by changing precedents in LEXIS as the need arose.

The rise of the printing press actually strengthened the author's ability to protect his work. n312 By centralizing the reproduction process, the printing press permits the author to deal with one person at one time, to insure the [\*363] integrity of the text. Computerized

systems offer both increased centralization and increased decentralization, undoubtedly forcing the author to do more on-going surveillance. After a publisher has printed a book, the author can rest tranquil if he is satisfied with the text. Authors will rest less comfortably when their works are published on a computerized databank that at any time can be centrally altered. n312

New technology also raises new economic concerns that may increase the need for protection of the expression. Historically, the unauthorized publisher faced an unprofitable environment. First, the pirate faced publishing costs similar to those of the legitimate publisher -- fixed costs that far exceeded the cost of royalty payments avoided by piracy. This meant that the pirate's ability to underprice authorized publishers was limited to his savings in royalties not paid. Furthermore, the original publisher usually enjoyed a market-introduction advantage. These "barriers to entry" have been steadily eroded by developments in the past decades. Scanning devices allow the pirate to create computer files of a book directly from an authorized copy, without retyping the text manually. This lowers the pirate's production costs and diminishes the time advantage enjoyed by the authorized publisher. Desktop printers allow nearly anyone to produce high quality reproductions of (possibly altered) texts, logos, and insignias. n313 The less sophisticated pirate might discover that these days it is frequently cheaper to photocopy a book than to buy a published copy. This is especially true with hardbound books of 300 pages or less.

We know that the author has an interest in preventing such activities. *Society's* interest in preventing distortions and preserving original forms is less obvious. As Roberta Kwall

writes, "[p]rotection for creators' personal rights . . . enables society to preserve the integrity of its cultural heritage. The public's right to enjoy the fruits of a creator's labors in original form and to learn cultural heritage from such creations has no time limit." n314

The preservation of cultural works has become increasingly important to [\*364] all modern societies, but what counts as effective preservation varies with the cultural object. It is not enough to preserve music scores in a library basement if no one plays them or no one knows the tempo at which they should be played. The level or degree to which an original will be preserved is proportional to available resources, but our society of relative abundance should preserve the original form of a work so that it may contribute effectively to our on-going cultural discourse.

A system that actively protects expression guarantees that the most radical and unconventional voices will survive. n315 The less respect a system accords particular expressions, the more likely that those expressions will disappear or will be altered to fit conventional thinking. Even if the quantity of expression remains the same, the content may be pasteurized into a dull conformity. n316 Protection of expressive integrity advances systemic evolution by countering the conformist pressures that befall unusual messages.

A strict Darwinian marketplace of ideas might serve as a foundation to oppose legal protection for the content of expressions. In such a view, valuable ideas and expressions will always survive because value is an evolutionary armor. Ideas that are likely to die should not be protected because they have inferior value. In this Darwinian vision, ideas adapt to win over the world or at least to

survive. Changes, or "mutations," increase the longevity and usefulness of the idea or expression.

Yet even a marketplace of ideas calls for some limited protection of expression because of market imperfections. For a new product's value to be tested properly it must cross some threshold of available outlets, visibility, and time on the market. A passing sense of fashion might destroy an expression that, with time, otherwise would establish itself in the market. Perhaps the market is actually *very* imperfect. Society often does not recognize a good idea for decades because of tremendous inertia in the realm of societal beliefs and values. The marketplace's evaluation of truth and value in ideas might work so slowly that we would want to compensate by requiring at least a generation to pass before discarding or altering an idea. Such a system would result [\*365] in wider social interest in protecting the integrity, or "personality," in expressions.

#### IV. CONCLUSION

Twenty years ago, in a lecture at Columbia Law School, Benjamin Kaplan applied the pragmatist's lens to intellectual property and concluded as follows:

Examining the view from the top of the hill, I find one temptation easy to resist, and that is to sum up copyright with just the word "property" or "personality" or any one of the other essences to which scholars, foreign and domestic, have been trying to reduce the subject. . . . [C]haracterizations in grand terms then seem of little value: we may as well go directly to the policies actuating or justifying the particular determinations. n317

This Article has looked to the social policies and the judicial determinations underlying our system of intellectual property, but it has done so while testing two grand

characterizations. There is a purpose to such characterizations. Husserl once observed that "tradition" meant only that the particulars of the past had been forgotten. Of course, it is inevitable that the details of the past will be lost. That means that we have a choice between unreflective tradition and grand theories; I find the latter a preferable way to capture and condense a history. The grand characterization can be tested, more thoroughly than the tradition, as it is used as a guide for new situations.

Both of the grand theories for intellectual property -- labor and personality -- have their own strengths and weaknesses. The labor justification cannot account for the idea whose inception does not seem to have involved labor; the personality theory is inapplicable to valuable innovations that do not contain elements of what society might recognize as personal expression. The personality justification has difficulty legitimating alienation, while the labor explanation may have to shuffle around Locke's non-waste condition.

At the same time, the two justifications seem to apply more readily to intellectual property than to the property they are usually called upon to legitimate. The Lockean labor theory applies more easily because the common of ideas seems inexhaustible. The Hegelian personality theory applies more easily because intellectual products, even the most technical, seem to result from the individual's mental processes. As for Hegel's interests in using property rights to secure recognition for the individual, intellectual property rights are a powerful instrument to this end because the *res* is not merely *seized* by the individual, but rather it is a *product* of the individual.

Earlier I suggested that the personality theory might justify rights to protect [\*366] one's private property without justifying rights to alienate that property. I must add, as a possible corollary, that the labor justification, with its emphasis on value maximization, might legitimate alienation and value exchange without safeguarding rights to keep particular objects merely as "possessions." In this way, the two theories may compensate for each other's weaknesses.

There are two reasons to seek out such grand generalizations to explain the social institution of intellectual property. The first is that "labor" and "individuality" have much more populist appeal than "property." To return full circle, rights to labor and rights to individual expression *do* have much more of a siren's call than property rights. The second reason, applicable to all social institutions, is that we cannot avoid generalizations. Our only course is to face such generalizations squarely and assemble them consciously.

#### FOOTNOTES:

n1 The Declaration of Independence para. 1 (U.S. 1776).

n2 The heralding article on this subject is Reich, *The New Property*, 73 *YALE L.J.* 733 (1964); see also *Goldberg v. Kelly*, 387 U.S. 254, 264 (1970) (finding sufficient private interest in welfare payments to warrant due process protections in termination cases).

n3 408 U.S. 564, 577 (1972).

n4 See generally G. HEGEL, *PHILOSOPHY OF RIGHT* PP41-45 (T.M. Knox trans. 1967) (1821) (individual demonstrates ownership of property by imposing his will on it and thereby "occupying" it); Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's*

*Political Thoughts*, in PROPERTY, NOMOS XXII, at 130, 134 (J. Pennock & J. Chapman eds. 1980) (same); *see also* sources cited *infra* note 170.

n5 Professor Richard Rorty argues that "mirror imagery" has been the foundation for the Cartesian and Kantian philosophical traditions. R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 12 (1979). Rorty probably would not object to the mutual reinforcement of justification and law, but would probably claim this work is more analytic -- and flawed -- as "an attempt to find nonhistorical conditions of . . . [an] historical development." *Id.* at 9. Professor Laurence Tribe has also used the mirror image to condemn the Supreme Court's narrow interpretation of the equal protection clause in recent decisions. L. TRIBE, CONSTITUTIONAL CHOICES 238-45 (1985); Tribe, *The Supreme Court in the Mirror of Justice*, 4 JUST. DEPT. WATCH 1 (1981).

n6 P. J. PROUDHON, WHAT IS PROPERTY? AN INQUIRY INTO THE PRINCIPLES OF RIGHT AND OF GOVERNMENT 11-12 (B. R. Tucker trans. 1966) (Paris 1840).

n7 Marx quickly grasped the fallacy of Proudhon's position. *See* Marx, On Proudhon, *reprinted in* 2 KARL MARX AND FREDERICK ENGELS, SELECTED WORKS 25-26 (U.S.S.R. pub.).

n8 *See* E. BURKE, *Reflections on the Revolution in France*, in 2 THE WORKS OF EDMUND BURKE 277, 324 (George Bell & Sons pub. 1905) ("property . . . tends the most to the perpetuation of society itself"). Hegel similarly advocated an important role in social stability for the landed class. HEGEL, *supra* note 4, P313 (a chamber of landed gentry "is a surer guarantee for ripeness of decision and it

obviates the accidental character which a snap-decision has and which a numerical majority may acquire"). Hegel emphasized the landed class' moral authority and independence as their virtues in government. *Id.* PP305-06.

n9 *See* E. BURKE, *supra* note 8, at 316 ("Whenever the supreme authority is vested in a body so composed, it must eventually produce the consequences of supreme authority placed in hands of men not taught habitually to respect themselves; who could not be expected to bear with moderation . . . a power, which they themselves . . . must be surprised to find in their hands.").

n10 *Id.* at 317.

n11 *See id.* at 324 ("[t]he power of perpetuating our property in our families is one of the most valuable and interesting circumstances belonging to it"); *see also* G. HEGEL, *supra* note 4, P178 ("The natural dissolution of the family by the death of the parents, particularly the father, has inheritance as its consequence so far as the family capital is concerned.").

In the eighth and ninth books of the *Republic*, Plato avers that the best government is an aristocratic state led by a propertied class. Yet the drive for property eventually produces an undesirable oligarchy with a propertiless underclass: "such a state is not one, but two states, the one of poor, the other of rich men; and they are living on the same spot and always conspiring against one another." PLATO, REPUBLIC 303 (B. Jowett trans. 1986).

n12 Lincoln applied for and was granted U.S. Patent No. 6,469 (May 22, 1849).

n13 Lewis (1845-1890) was a black American sculptress known for her neoclassical busts and medallions. She is an

especially apt example because royalties from copies of her busts supported her move to Rome, where she established her studio. V. PORTER, MODERN NEGRO ART ART 58 (1943). Several of her works survive in the National Museum of American Art, Washington, D.C.

n14 UNESCO, THE ABC OF COPYRIGHT 12 (1981).

n15 B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2-9 (1967).

n16 Denmark and Norway are the only countries that have granted perpetual rights in intellectual property. The ordinance which created these rights was somewhat less perpetual. It was adopted in 1741 and repealed in 1814. UNESCO, *supra* note 14, at 15.

n17 Copyright provisions are codified at 17 U.S.C. § § 101-914 (1982 & Supp. IV 1986). The Patent Act is codified at 35 U.S.C. § § 1-376 (1982 & Supp. IV 1986). Federal trademark law is codified at 15 U.S.C. § § 1051-1127 (1982 & Supp. IV 1986). Trade secret protection is left to the states. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 493 (1974) ("Congress, by its silence over these many years, has seen the wisdom of allowing the states to enforce trade secret protection.").

n18 Semiconductor Chip Protection Act of 1984, 17 U.S.C. § § 901-912 (Supp. IV 1986).

n19 17 U.S.C. § 103.

n20 248 U.S. 215, 236-42 (1918) (one who expends time and resources for purposes of lucrative publication has a quasi-property interest in the results of the enterprise as against a rival in the same business; appropriation of those results to the damage of one and the profit of another constitutes unfair competition).

n21 See *infra* notes 217-20 (discussing concept of persona and property interest in same).

n22 There are two international copyright conventions; a nation may belong to both without conflict. The Universal Copyright Convention, signed by the United States and more than fifty other countries, provides for reciprocity of rights extended to nationals, and also provides some substantive protections, including protection for "not less than the life of the author and twenty-five years." Universal Copyright Convention, July 24, 1971, art. IV, § 2(a), 25 U.S.T. 1341, 1347, T.I.A.S. No. 7868, 1347, 943 U.N.T.S. 178, 196. The Berne Convention, which the United States ratified in 1988, has over seventy signatories and provides more definite substantive requirements, such as protection "for the life of the author and fifty years." The Berne Convention for the Protection of Literary and Artistic Works, July 14, 1967, art. 7, § 1, 828 U.N.T.S. 221, 235 revised July 24, 1971, reported in WORLD INTELLECTUAL PROPERTY ORGANIZATION, COPYRIGHT: A MONTHLY REVIEW OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION 1971, at 135, 137 [hereinafter Berne Convention]; see The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 100th Cong., 2d Sess. (Oct. 31, 1988).

There are also two major patent treaties, both of which the United States has signed. The Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305 (entered into force April 26, 1970); and The Patent Cooperation Treaty, opened for signature June 19, 1970, 28 U.S.T. 7645, T.I.A.S. No. 8733 (entered into force Jan. 24, 1978).

n23 See generally S. Levitsky, COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW xi-xiii (1979) (citing Soviet Union's acceptance in 1973 of the Universal Copyright Convention); Kase, *Copyright in Czechoslovakia - - The New Copyright Statute of 1965*, 14 BULL. COPYRIGHT SOC. U.S. 28(1966) (reviewing history of copyright in Czechoslovakia); Pavelic, *The Protection of Private Rights in a Socialist State: Recent Developments in Yugoslav Copyright Law*, 14 HARV. INT'L. L.J. 111, 117-26 (1973) (Yugoslavian copyright law expands protection of authors' rights). Although China is not a signatory of any international intellectual property conventions, in April 1985, it promulgated its own patent law drafted with the aid of American jurists. See SECTION OF PATENT, TRADEMARK, AND COPYRIGHT LAW, AMERICAN BAR ASSOCIATION, 1987 COMMITTEE REPORTS 347 (1987).

n24 See *Enforcement News*, IP ASIA, Apr. 22, 1988, at 30-31 (noting Taiwan's persistent enforcement problems); *Taiwan: Licensing Foreign Trademarks*, IP ASIA, Apr. 22, 1988, at 2 (Taiwan's pronounced government policy is to deny protection).

n25 For example, patents are granted for the same range of devices and processes, with the exception of chemical substances, in South Korea as in the United States. Some believe this exception reflects a fear that patents in this area would facilitate foreign monopolization of Korea's fledgling fertilizer, pharmaceutical, and petrochemical industries. Min & West, *The Korean Regime for Licensing and Protecting Intellectual Property*, 19 INT'L LAW. 545, 557 (1985). Similarly, the South Korean government has tied trademark protection to the achievement of a prescribed level of average per capita income in the country. See Krause, *Am Cham Seeks Bold Shifts in Investment*

*Rules*, BUS. KOREA, Feb. 1984, at 70 (although Korea signed Paris agreement governing international patents and copyrights, government has indicated it will not be able to enforce strict compliance until per capita income reaches \$ 5,000). Latin America countries have joined to expressly isolate foreign trademarks, patents, and royalties and subject them to a common treatment. See UNITED NATIONAL COMMISSION ON TRADE AND DEVELOPMENT, POLICIES RELATING TO TECHNOLOGY OF THE COUNTRIES OF THE ANDEAN PACT (1971). In the 1988 Montreal GATT Conference, Brazil and India opposed more international intellectual property protection in the fear that it would slow down the flow of advanced technology to combat social problems in the Third World. Farnsworth, *Brazil and India Fight New Copyright Rules*, N.Y. Times, Dec. 7, 1988, at 48, col. 1. Brazil has consistently denied protection to new drugs so as to increase their availability to the poor. See *Whose idea is it anyway?*, THE ECONOMIST, Nov. 12, 1988, at 73.

n26 See Hughes, *Between Art and Law*, Harvard Crimson, Jan. 21, 1985, at 3, col. 1.

n27 *Id.* *Endgame's* stage direction called for a bare, grey stage. The Cambridge production set the play in a gutted, abandoned Boston subway station. In 1988, Beckett successfully opposed efforts by the Comedie-Francaise in Paris to do a production of *Endgame* on a set bathed in pink light. See Int'l Herald Tribune, Oct. 14, 1988, at 18, col. 8.

n28 1 P.D. ROSENBERG, PATENT LAW FUNDAMENTALS § 1.03 (2d ed. 1985).

n29 17 U.S.C. § 107 (1982).

n30 *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 497 (1850). This exception, of course, is not

useful to research laboratories that are pursuing developments which may have commercial applications. Accordingly, a problem has emerged in biomedical laboratories because the patenting of certain cell lines prevents other research labs from using these types of cells in their research. Weiner, *Universities, Professors, and Patents: A Continuing Controversy*, TECH. REV., Feb./Mar. 1986, at 32, 42-43.

n31 U.S. CONST. art. I, § 8, cl. 8.

n32 See J. LOCKE, *Second Treatise of Government*, § § 138-40, in TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d ed. 1698).

n33 *Id.* § 25.

n34 This suggests to me a God who is slightly myopic, less than benevolent, or himself enjoying a practical joke. For Locke, this was because of Man's fall. *Id.* With respect to Locke's position that the common is a gift from God, Robert Paul Wolff has suggested that "[i]f we secularize this theory, it is not difficult to see that it is really based on the supposition that property is originally *social* or *collective*. . . . The opposite view, that property is originally individual, is completely contrary to Locke's orientation. . . ." Wolff, *Robert Nozick's Derivation of the Minimal State*, in READING NOZICK 101-02 n.9 (J. Paul ed. 1981). I disagree that secularizing Locke's theory means property is originally social. In fact, I see *no* reason why Wolff would think that this is the case and I think that a social conception of property would have undermined Locke's position. See Hamilton, *Property -- According to Locke*, 41 YALE L.J. 864, 867-68 (1932) (Locke's theory of property based on popular perception in seventeenth century that all property derives from "magnanimity of a bountiful creator"; government established

by compact can have no other goal than to preserve possessory rights of citizens without doing prejudice to property rights of others in same natural property); see generally Rowen, *A Second Thought on Locke's First Treatise*, 17 J. HIST. IDEAS 130 (1956).

n35 J. LOCKE, *supra* note 32, § 33.

n36 *Id.* § 27. See generally Mautner, *Locke on Original Acquisition*, 19 AM. PHIL. QUARTERLY 259, 260 (1982) (claiming "enough and as good" condition not actually a premise in Locke's argument). Although some scholars agree with Mautner, most seem to treat the proposition as a central premise of Locke's argument. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 201 (1962); G. PARRY, *JOHN LOCKE* (1978). Perhaps even Mautner implicitly retreats from saying the "enough and as good" condition is not a premise by admitting that Locke makes an "assumption of original abundance." Mautner, *supra*, at 260.

n37 J. LOCKE, *supra* note 32, § 37.

n38 *Id.* § § 36, 37 & 41. An interesting problem raised by these examples is the geographical consideration in determining what counts as "enough and as good." For example, the Treaty of Paris left the new United States with the unsettled Northwest Territory (which became Ohio, Indiana, Illinois, Michigan, and Wisconsin). Does this mean the enough and as good condition would be satisfied for those within the Territory? Would it be satisfied for everyone within the United States assuming unrestricted immigration? Would it be satisfied for all within the English-speaking world?

n39 Letter from Richard Epstein to the author (Aug. 28, 1985) (copy on file at *Georgetown Law Journal*).

n40 Epstein, *Possession as the Root of Title*, 13 GA. L.J. 1221, 1227 (1979).

n41 J. LOCKE, *supra* note 32, § 27, cited in Epstein, *supra* note 40, at 1227.

n42 Epstein, *supra* note 40, at 1227.

n43 By definition, "possession" involves a relationship which includes domination. The possessor controls his *possession*. He is dominant over it. The mind-body connection, however, is not based upon unilateral domination. While it is said that the mind "controls" the body, we now know that the symbiosis between the two renders such a statement inaccurate. We cannot say that the mind controls the body any more than that the body controls the mind. There is an integration of the two -- or perhaps the concept of two separate entities is itself misleading -- but there is no possessory relationship.

n44 J. LOCKE, *supra* note 32, § 37.

n45 *Id.*

n46 *Id.*

n47 *Id.* § 50.

n48 Thomas Scanlon seems to consider this consent critical because "the original moral foundation for property rights is no longer valid" once we have a money economy. Scanlon, *Nozick on Rights, Liberty, and Property*, in READING NOZICK, *supra* note 34, at 107, 126. But Nozick appears to disagree. See R. NOZICK, ANARCHY, STATE AND UTOPIA 18 (1974) (social contract not necessary for free exchange of goods); see also Rapaczynski, *Locke's Conception of Property and the Principle of Sufficient Reason*, 42 HIST. IDEAS 305, 306 (1981) ("Locke attempts to provide a justification of property which would make ownership independent of any explicit or implicit social consent.").

n49 Such an alloy exists if people were to give their tacit consent to the distribution of property because (1) they believed that the present distribution arose from an original distribution based on the labor justification and (2) they believed that the labor justification was indeed valid.

n50 See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 590, 637 (1834) ("a literary man is as much entitled to the product of his labour as any other member of society"). In *The Trademark Cases*, 100 U.S. 82 (1879), the Supreme Court used a labor model to hold that trademarks were unprotected. "The writings which are to be protected *are the fruits of intellectual labor.*" *Id.* at 94. The Court held that the trademark is unprotected because it does not require "any work of the brain . . . no fancy or imagination, no genius, no laborious thought." *Id.*; see also *Goldstein v. California*, 412 U.S. 546, 561 (1973) ("writings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor").

n51 Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413 (1983).

n52 *Id.* at 415.

n53 J. LOCKE, *supra* note 32, § 27.

n54 *Id.*

n55 Becker, *The Labor Theory of Property Acquisition*, 73 J. PHIL. 653, 655 (1976).

n56 J. LOCKE, *supra* note 32, § 34.

n57 Minogue, *The Concept of Property and its Contemporary Significance*, in PROPERTY, NOMOS XXII, *supra* note 4, at 3, 10.

n58 David Ellerman argues that the "labor theory of property has throughout its history been entwined with and often confused with

the *labor theory of value*. . . . The admixture of the two labor theories [was] present even in Locke." Ellerman, *Property and the Theory of Value*, 16 PHIL. F. 293, 294 (1985). Ellerman writes of the confusion of normative propositions, but the same confusion can occur with the consequentialist arguments. For example, should we use property to give people incentives, or should we use some other measure of value?

n59 347 U.S. 201 (1954).

n60 *Id.* at 219 (emphasis added).

n61 U.S. CONST. art. I, § 8, cl. 8; *see also Grant V. Raymond*, 31 U.S. (6 Pet.) 218, 241-42 (1832) (Marshall, C.J.) (copyright and patent clause indicates that purpose of patent statute is to stimulate invention).

n62 A. LINCOLN, *Second Lecture on Discoveries and Inventions*, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (R.P. Basler ed. 1953).

n63 *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1976) ("The protection [of publicity] provides an economic incentive . . . to make the investment required to produce a performance. . . . This same consideration underlies the patent and copyright laws long enforced by this Court."); *Goldstein v. California*, 412 U.S. 546, 555 (1973) ("to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward"); *cf. United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.").

n64 Easterbrook, *Foreword: The Court and the Economic System in The Supreme Court 1983 Term*, 98 HARV. L. REV. 4, 21-29 (1984).

n65 Jurists have also recognized the enjoyable, personal value of creating intellectual works. Justice Holmes spoke of "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought." Address by Justice Oliver Wendell Holmes, Harvard University (Feb. 17, 1886), *reprinted in THE MIND AND FAITH OF JUSTICE HOLMES* 33 (M. Lerner ed. 1943).

n66 P.D. ROSENBERG, *supra* note 28, § 1.07.

n67 Becker, *The Moral Basis of Property Rights*, IN PROPERTY, NOMOS XXII, *supra* note 4, at 187, 193.

n68 347 U.S. 201 (1954).

n69 *Id.* at 219.

N70 U.S. CONST. art. I, § 8, cl. 8.

n71 248 U.S. 215 (1918).

n72 *Id.* at 234-35. "We need spend no time . . . upon the general question of property in news . . . since it seems to us the case must turn upon the question of unfair competition in business." *Id.*

n73 *See generally* 1 D.S. CHISUM, PATENTS § § 4.01-4.04 (1988).

n74 15 F. Cas. 1018 (C.C.D. Mass. 1819) (No. 8,568).

n75 *Id.* at 1014.

n76 P. GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 492 (1981).

n77 *See Brenner v. Manson*, 383 U.S. 519, 533-36 (1965) (requiring showing of positive social benefit to satisfy utility requirement).

n78 E.g., *Connell v. Sears, Roebuck & Co.*, 559 F. Supp. 229, 245 (N.D. Ala. 1983), *aff'd*, *modified*, *vacated in part*, 722 F.2d 1542 (Fed. Cir. 1983).

n79 E.g., *Brown-Bridge Mills, Inc. v. Eastern Fine Paper, Inc.* 700 F.2d 759, 763 (1st Cir. 1983).

n80 See 35 U.S.C. § 103 (1982) (patent granted if advancement not "obvious at the time of the invention . . . to a person having ordinary skill in the art"). This standard, now statutorily embodied, originated in *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248, 265-67 (1850), in which the substitution of porcelain doorknobs for wooden knobs was considered too obvious for a patent.

n81 *Bennett v. Halahan*, 285 F.2d 807, 811 (C.C.P.A. 1961); *Oetiker v. Jurid Werke GmbH.*, 209 U.S.P.Q. (BNA) 809, 824 (D.D.C. 1981).

n82 See *Graham v. Horn Deere*, 383 U.S. 1, 25 (1965).

n83 P. D. ROSENBERG, *supra* note 28, § 8.03, at 8-8.

n84 Such an invention might indirectly produce value for society by improving a technology that, after further research and improvement, eventually surpasses existing technologies.

n85 For chemical compounds, there is a strict utility requirement: "Mere usefulness in further chemical research will not suffice to satisfy the utility requirement. . . . [It] must produce a useful product." P. D. ROSENBERG, *supra* note 28, § 8.06, at 8-12.

n86 *Id.* § 2.02, at 2-4.3 to 2-4.4. Such exclusion seems to deprive society of potential value. Furthermore, the lack of use of a patent may create antitrust problems. See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 424-25 (1908).

n87 Copyright Act, 17 U.S.C. § 408(a) (1982) (allowing copyright registration "[a]t any time during the subsistence of copyright in any published or unpublished work"); *cf.* *National Conference of Bar Examiners v. Multistate Legal Studies*, 692 F.2d 478, 480 (7th Cir. 1982) (upholding constitutionality of copyright protection for standardized tests that are never published in normal sense and only disseminated in a control environment), *cert. denied*, 464 U.S. 814 (1983).

n88 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940).

n89 *Id.* at 50 (stars were Joan Crawford and Robert Montgomery).

n90 *Id.* at 48; see also *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916) (Hand, J.) (awarding 100% of the profits to the defendant for a song which copied only the refrain melody from the plaintiff and was a success clearly because of its patriotic lyrics).

n91 Compare Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1575-76 (1963) (urging courts to narrow standard of copyright infringement) with B. KAPLAN, *supra* note 15, at 63 (arguing for more stringent standards for issuance of copyrights).

n92 B. KAPLAN, *supra* note 15, at 71 (apportionment schemes "seduce" judges into granting partial relief to plaintiffs in "dubious" cases).

n93 For a biography, see L. EGAN, THOMAS EDISON (1987).

n94 W. FAULKNER, SARTORIS (1929).

n95 W. FAULKNER, ABSALOM, ABSALOM! (1936).

n96 In a 1986 book, Umberto Eco describes the medieval view that an artist conceives his

art before executing it. Eco criticizes that view precisely on this issue: "[T]here [was] no sign of awareness that art, nourished by intellectual insight and skilled craftsmanship, involves an arduous process in which physical manipulations do not *follow* the conception of the intellect, but *are* the intellect conceiving something by making it." U. ECO, ART AND BEAUTY IN THE MIDDLE AGES 111 (1986) (emphasis in original).

n97 Remark of Hadi Abu Shakra, LL.M. candidate, Harvard Law School (May 1985).

n98 W. V. O. Quine recently put it another way: "If the fantasy of the UNIVERSAL LIBRARY were realized, literary creativity would likewise reduce to discovery: the author's book would await him on the shelf." W. V. QUINE, QUIDDITIES 39 (1987).

n99 Copyright Act, 17 U.S.C. § 102(a) (1976) (limiting copyright protection to works "fixed in any tangible medium of expression"). By contrast, West German law might protect even the fleeting form of spoken words. 6 IIC STUDIES, GERMAN INDUSTRIAL PROPERTIES, COPYRIGHT, AND ANTITRUST LAWS 111, 132-33 (Beier, Schricker, & Fikentscher eds. 1983).

n100 293 F. Supp. 130 (S.D.N.Y. 1968).

n101 *Id.* at 144.

n102 17 U.S.C. § 102 (1976) (granting copyright protection to "original works of authorship fixed in any tangible medium" but not to "any idea . . . embodied in such works").

n103 *E.g.*, *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 n.3 (9th Cir. 1983).

n104 *E.g.* *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Universal Athletic Sales Co.*

*v. Salkeid*, 511 F.2d 904, 906 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); *Anselh v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 137-38 (8th Cir.), *cert. denied*, 287 U.S. 666 (1932).

n105 *Sid and Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977) (*dicta*) (Michaelangelo's David deserves protection as expression while idea of statue of nude male does not).

n106 *Scenes a faire* are elements (e.g., scene, character, plot component) of a genre of literature so common that they are customary. For example, in space-voyage science fiction, a battle scene and a non-human character would probably qualify as *scenes a faire*.

n107 *Reyher*, 533 F.2d at 91 (*scenes a faire* not entitled to copyright protection); *Alexander v. Haley*, 460 F.Supp. 40, 45 (S.D.N.Y. 1978) (plaintiff may not include *scenes a faire* as elements of copyright infringement).

n108 *Krofft Television*, 562 F.2d at 1167; *see Roth Greeting Cards v. United Cards Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (copyright violation when "total concept and feel" of defendant's greeting cards same as those of plaintiff; similarities include characters and mood portrayed, combination of artwork and message, and arrangement of words on cards).

n109 *See Lee v. Runge*, 404 U.S. 887, 890-93 (1971) (Douglas, J., dissenting from denial of certiorari) (first amendment questions raised if Congress' power over copyrights construed to allow grant of monopolies over ideas rather than merely over means of expressing ideas).

n110 *Krofft Television*, 562 F.2d at 1170; *see also Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1178 (5th Cir. 1980) (Brown, J., concurring) ("The idea-expression dichotomy generally provides a

workable balance between copyright and free speech interests.").

n111 Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

n112 *Id.* at 1197-1200 (photographs of My Lai massacre and film of John F. Kennedy's assassination could not be censored from public by copyright owners). An audacious example of copyright over the expression of a public event is the television evangelist Jimmy Swaggart's claimed copyright over his public confession of relations with a prostitute. Swaggart claimed copyright in an effort to stop the Cincinnati Opera from using part of the confession in an advertisement for the opera "Susannah." Int'l Herald Trib., June 18-19, 1988, at 14, col. 7. What other reason would Swaggart have to claim copyright than to chill the confession's use by others?

n113 The two dichotomies may not be completely parallel. Under present law when "idea" and "expression" merge, the creation is unprotected on the rationale that one could not express the idea any other way. See 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.10[c], 1-82 to 1-84 (1963) [hereinafter NIMMER] (using the example of the Vietnam War's My Lai massacre to demonstrate that in some instances the form of expression, e.g., photography, is essential to convey the idea).

n114 See *Krofft Television*, 562 F.2d at 1169 ("the intrinsic test for expression is uniquely suited for determination by the trier of fact").

n115 See Prager, *The Early Growth and Influence of Intellectual Property*, 34 J. PAT. OFF. SOC'Y 106, 108-09 (1952) (authors, unlike creators of tangible things, lose right to exclusive use of words and ideas after publication and public possession).

n116 In fact, this addition to the common pool of ideas has been recognized as part of the "bargain" of patent law: "such additions to the general store of knowledge are of such importance to the public weal that the Federal Government is willing to pay the high price of 17 years of exclusive use for its disclosure, which disclosure, it is assumed, will stimulate ideas and the eventual development of further significant advances." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974). To some, society has the better bargain: "[t]he purpose of disclosure to the public is to catalyze other inventors into activity. . . . The inventor makes a truly Faustian bargain with the sovereign, exchanging secrecy of indefinite and of possibly perpetual duration, for ephemeral patent rights." P. D. ROSENBERG, *supra* note 28, § 1.02, at 1-5.

n117 Another point is that idea X may breathe new life into the common by making set of ideas Y worth developing. For example, L'Enfant's plans for Washington, D.C., made it viable for generations of architects to develop ideas to use the city's oddly shaped intersections.

n118 See R. NOZICK, *supra* note 48, at 174-82 (social considerations favor establishment of private property and a free market system would not violate Locke's proviso that "enough and as good" remain in the common).

n119 J. LOCKE, *supra* note 32, § 32.

n120 This is true even where the inventor of the "child" holds a license to the "parent" idea. Hence the pressure for "grant-backs" of offspring patents to the owner of the original patent. See 2 P. D. ROSENBERG, *supra* note 28, § 16.02[2] (discussing various methods for exchanges of patent rights).

n121 In a celebrated example, Sir Ambrose Fleming patented a vacuum tube with two

electrodes and Dr. Lee DeForest patented a vacuum tube with three electrodes. Marconi Wireless -- the holder of Fleming's patent -- confessed judgment as to one of DeForest's patents while DeForest Radio was held to have infringed one of Fleming's patents. *Marconi Wireless Telegraph Co. v. DeForest Radio Telephone & Telegraph Co.* 236 F. 942, 943 (S.D.N.Y. 1916) (confessed judgment by Marconi), *aff'd*, 243 F. 560 (2d Cir. 1917); *id.* at 955 (infringement found against DeForest's company). According to Rosenberg, "[i]n most instances wherein there are such overlapping claims owned by different parties, each licenses the other." P. D. ROSENBERG, *supra* note 28, § 1.03, at 1-13.

n122 Parody is considered a "fair use" of the copyrighted work and a parody's "fair use" of an original is usually more extensive than the "fair use" of an ostensibly rather unrelated work. At a minimum, a parody can "conjure up" an original for the sake of humor. *See, e.g., Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam) (*Saturday Night Live* transformation of song *I Love New York* into *I Love Sodom* was fair use). A parody threatening to displace the original within the market may infringe. *See Warner Bros., Inc. v. American Broadcasting Co.*, 654 F.2d 204, 208 (2d Cir. 1981) (to determine whether similarity between original work and parody constitutes "substantial and hence infringing similarity," court must decide whether similarities are "something more than mere generalized ideas or themes").

n123 At the same time, the purported parody -- no longer recognized as such -- is not "complimenting" the original as a parody normally does by indicating that the original has reached a certain level of fame.

n124 *See* R. NOZICK, *supra* note 48, at 175-82.

n125 *See id.* at 180.

n126 Professor Michelman has suggested a triumvirate of property statuses: the common, private property and the "anticommon" -- "a pure 'social property' regime in which *everyone* has exclusive rights over every resource; or, in other words, no one is privileged to make any use of any resource without the unanimous consent of everyone else." Address by Professor Frank Michelman, 1985 American Association of Law Schools Meeting (Jan. 1985) (copy on file at *Georgetown Law Journal*). None of Michelman's categories captures the idea common in which anyone can enjoy free access to all ideas without need for anyone else's consent.

n127 *O'Reilly v. Morse*, 56 U.S. (15 How.) 62, 113 (1854).

n128 Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 96 (1985). Levmore attributes this reluctance to the twin reasons "that such [lawyer's] arguments might be independently discovered later and that contribution of any one precedent to legal victory might be uncertain." *Id.* at 96 n.72.

n129 253 F.2d 702 (2d Cir.), *cert. denied*, 358 U.S. 816 (1958).

n130 *Id.* at 704.

n131 B. KAPLAN, *supra* note 15, at 65.

n132 Another example of the "necessary fixture" exception to ideas that can be privatized is the *scenes a faire* rule in copyright law. *See supra* note 106 (discussing *scenes a faire*); *see also Alexander v. Haley*, 460 F. Supp. 40, 45-46 (S.D.N.Y. 1978) (concept of *scenes a faire* in literature on slavery protected author of *Roots* from claims of copyright infringement); 3

NIMMER, *supra* note 113, § 13.03[A][1] (Release No. 22 1988) (discussing nonliteral similarity between works).

n133 This conclusion seems to follow the from the "algorithm" cases. *Compare Gottschalk v. Benson*, 409 U.S. 63, 71-72 (1972) (mathematical method of converting binary-coded decimals into pure binary numbers does not qualify for protection) *with In re Jones*, 373 F.2d. 1007, 1014 (C.C.P.A. 1967) (disk for mechanical conversion of analog to digital measurements and method for using disk may be patentable).

n134 *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 (9th Cir. 1983) (vacating trial court's grant of pretrial summary judgment for MCA, creator of "Battlestar Galactica").

n135 *Parker v. Flook*, 437 U.S. 584 (1978).

n136 *Id. at* 591 ("The process itself, not merely the mathematical algorithm, must be new and useful.").

n137 *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (literary themes may at some point become so generalized that they no longer are protected), *cert. denied*, 282 U.S. 902 (1931).

n138 *Sayre v. Moore*, 102 Eng. Rep. 139, 140 (K.B. 1785), *reported in Cary v. Longman*, 102 Eng. Rep. 138, 139 n.(b) (K.B. 1801).

n139 This is sometimes called the "Aspirin and Cellophane doctrine." *See Bayer Co. v. United Drug Co.*, 272 F. 505, 514-15 (S.D.N.Y. 1921) (L. Hand, J.) (expiration of Bayer's patent terminated exclusive right to word "aspirin" as trademark in direct sales to consumers); *DuPont Cellophane Co. v. Waxed Products Co.*, 85 F.2d 75, 80 (2d Cir.) (expiration of patent terminated manufacturer's exclusive right to use word "cellophane"), *cert. denied*, 299 U.S.

601 (1936); *see also King-Seeley Thermos Co. v. Aladdin Indus.*, 321 F.2d 577 (2d Cir. 1963) (no exclusive right to use word "thermos").

n140 *See XEROX CORP., TRADEMARK POLICY*, *reprinted in Current Developments in Trademark Law and Unfair Competition*, PRACTICING LAW INSTITUTE (1982).

n141 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION AND TRADEMARK* 1149-50 (2d ed. 1950).

n142 17 U.S.C. § 302(a) (1982).

n143 35 U.S.C. § 154 (1982).

n144 *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 218 (1918).

n145 These two images of idea-making as individual achievement and inexorable progress have been in tension in patent cases when the patent's validity is in question because of similarity to, or simple extension of, prior art. While stressing the creativity of a patented invention held by Marconi, Justice Frankfurter aptly characterized the foundation of the argument against patents:

Great inventions have always been parts of an evolution, the culmination at a particular moment of an antecedent process. So true is this that the history of thought records striking coincidental discoveries -- showing that the new insight first declared to the world by a particular individual was 'in the air' and ripe for discovery and disclosure.

*Marconi Wireless Co. v. U.S.*, 320 U.S. 1, 62 (1942) (Frankfurter, J., dissenting).

n146 R. NOZICK, *supra* note 48, at 181.

n147 *Id.*

n148 *See Marconi Wireless*, 320 U.S. at 62 (Frankfurter, J., dissenting). That patent law

does not reflect such variations may be due to administrative difficulties.

n149 Steiner, *Slavery, Socialism, and Private Property*, in PROPERTY, NOMOS XXII, *supra* note 4, at 244, 251.

n150 R. NOZICK, *supra* note 48, at 175.

n151 *Id.*

n152 See P. SAMUELSON & W. NORDHAUS, ECONOMICS 483 (12th ed. 1985) (Pareto efficiency is achieved when one person's utility can be increased only by lowering the utility of another).

n153 J. RAWLS, A THEORY OF JUSTICE 204-93 (1971).

n154 J. LOCKE, *supra* note 32, § § 46-51.

n155 R. NOZICK, *supra* note 48, at 176.

n156 J. LOCKE, *supra* note 32, § § 46-51.

n157 A third, less likely possibility is that the idea I give my friend allows her to labor less to survive and to loiter more. However, this does not seem to accord with Locke's view of human motives, for he assumed that people will inevitably strive to accumulate material objects. J. LOCKE, *supra* note 32, § 46. As Walter Hamilton humorously observed, "[Locke's] natural state is a curious affair, peopled with the Indians of North America and run by the scientific principles of his friend Sir Isaac Newton." Hamilton, *supra* note 34, at 871.

n158 This idea, of course, is elementary to the sciences of biology and anthropology. Biological and cultural evolution both contribute to the understanding of new concepts and to a species' ability to translate these ideas into technology -- tool use. For a general statement of this idea, see J. BRONOWSKI, THE ASCENT OF MAN 41 (1973) ("The development of [finely

manipulable tools] and the use of fire is not an isolated phenomenon [in the evolution of man]. On the contrary, we must always remember that the real content of evolution (biological as well as cultural) is the elaboration of new behaviour.").

n159 To attack the notion that there is no intellectual property in the pre-money economy, one might argue that we should make a distinction between a *barter* economy and a *money* economy. Locke does not draw any significant distinction between the two, but one could infer from Locke's discussion that the barter economy is a situation in which people are trying to acquire more of the "useful" goods they need without doing violence to the non-waste condition and without accumulating non-useful goods like gold. "First-order" bartering displays this kind of exchange: short-lived fruits bartered for more durable nuts. Such barterers are useful things in Locke's scheme; the person receiving nuts avoids the non-waste condition and the person receiving the fruits adds variety to his diet. Given Locke's announced antipathy toward non-useful items that people value (gold, silver, baubles), as soon as these items enter the barter system, one has a money economy: an exchange system based on an unnatural, or at least less fundamental, second-order of valuation.

n160 R. NOZICK, *supra* note 48, at 175-76.

n161 D. JOHNSTON, COPYRIGHT HANDBOOK 32-33 (2d ed. 1982).

n162 *Id.*; 17 U.S.C. § § 101-104, 301(a) (1976) (§ 104 explicitly recognizes that § § 101-103 cover unpublished works).

n163 See, e.g., *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1100-01 (2d Cir. 1982) (state law protects the owner's work from creation through publication); *Burke*

*v. National Broadcasting Co.*, 598 F.2d 688, 691-92 (1st Cir. 1979) (common law protects owner's work until publication).

n164 The trademark "token use" doctrine will be abolished after November 16, 1989, the effective date of the Trademark Law Revision Act of 1988. Pub. L. No. 100-667, 100th Cong., 2d Sess. (Nov. 16, 1988). The "token use" doctrine sanctioned waste of a trademark by permitting someone to protect a mark without really using it. After November 1989, a real use or intent to use will be required.

n165 It has been argued that this condition never occurred with physical goods, or that it has not occurred during the known history of mankind. See C. B. MACPHERSON, *supra* note 36. Others argue that even if this condition applied to physical goods at one point in time, it cannot be used in a justification for property enduring past its original allocation. See Steiner, *supra* note 149, at 251-52 (eventually all land will be owned and nonlandowners will be trespassers unless they obtain permission for use from owners (citing H. SPENCER, SOCIAL STATICS 114-15 (1851))); Mautner, *supra* note 36, at 267-68 (justification fails because claim that property was legitimately acquired can rarely be supported).

n166 Rapaczynski, *supra* note 48, at 307.

n167 Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

n168 *Id.*

n169 This theory was most thoroughly developed in G. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 4.

n170 See Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5-16 (1985) (urging U.S. to adopt aspects of European copyright law which recognize moral and personal rights of

creator in work produced, rather than mere pecuniary interests recognized under U.S. law); Katz, *The Doctrine of Moral Rights and American Copyright Law -- A Proposal*, 24 S. CAL. L. REV. 375, 391-409 (1951) (proposing that the U.S. incorporate the European concept of moral rights into copyright law); Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 558-65 (1940) (arguing that the U.S. should adopt European moral rights in copyrighted work, which includes right to publish, or not, in form desired and right to prevent deformation).

n171 Acton, 3 THE ENCYCLOPEDIA OF PHILOSOPHY *Hegel, Georg Wilhelm Friedrich* 442 (1967 ed.).

n172 G. HEGEL, *supra* note 4, P41.

n173 *Id.*

n174 *Id.* P39.

n175 Berki, *Political Freedom and Hegelian Metaphysics*, 16 POL. STUD. 365, 376 (1968).

n176 The *Philosophy of right* is divided into three parts. Part I, "Abstract Right" is concerned with the individual agent as a person in relationships with other persons and things. Parts II and III are concerned with the higher development of the agent as an autonomous moral subject and as a member of the rational community ultimately manifested in the State. G. HEGEL, *supra* note 4.

n177 A. CAMUS, CALIGULA (1945).

n178 For example, he attacks parents who treat their children as "things." G. HEGEL, *supra* note 4, P43.

n179 The first principle of Rawls' architectonic system addresses this concern: "Each person is to have an equal right to the most extensive total system of equal basic

liberties compatible with a similar system of liberty for all." J. RAWLS, *supra* note 153, at 250; *id.* at 302.

n180 G. HEGEL, *supra* note 4, PP47-48.

n181 J. LOCKE, *supra* note 32, § 27.

n182 Knowles, *Hegel on Property and Personality*, PHIL. Q., Jan 1983, at 45, 48.

n183 Acton, *supra* note 171, at 446.

n184 G. HEGEL, *supra* note 4, P24.

n185 *See, e.g.,* H. MARCUSE, REASON AND REVOLUTION 192-95 (1960) (property is the first embodiment of freedom and individuality is manifested in property); Ilting, *The Structure of Hegel's 'Philosophy of right'*, in HEGEL'S POLITICAL PHILOSOPHY (Pelczynski ed. 1971).

n186 Knowles, *supra* note 182, at 52-53.

n187 John Plamenatz has made this point nicely:

To make a claim is not to give vent to an appetite; it is not to be demanding in a way that even an animal can be. It is to make a moral gesture that has meaning only between persons who recognize one another as persons. . . . The creature that aspires to freedom is a social being and can get what it aspires to only in society -- or, in the language of Hegel, it belongs to an ethical universe and can achieve freedom only inside it.

Plamenatz, *History as the Realization of Freedom* in HEGEL'S POLITICAL PHILOSOPHY 30, 40-41 (Pelczynski ed. 1971).

n188 G. HEGEL, *supra* note 4, P51.

n189 *Id.* P50.

n190 *Id.* P51.

n191 *Id.* P64.

n192 *Id.*

n193 *Id.* P65.

n194 *Id.* P56.

n195 *Id.* P55.

n196 *Id.* P59.

n197 *Id.* PP54-58.

n198 *Id.* P60. Note that this "marking" accords with Hegel's apparent recognition that secure property or capital allows continued personal development.

n199 Radin, *supra* note 167, at 987.

n200 G. HEGEL, EARLY THEOLOGICAL WRITINGS (T.M. Knox trans. 1977).

n201 *Id.* at 308.

n202 Note that this is also different from Marx's classic statement of alienation in which the laborer expends labor on the object he produces but *neither* identifies with it *nor* owns it. *See* K. MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 110-11 (B. Struik ed. 1964).

n203 Radin, *supra* note 199, at 989-91.

n204 G. HEGEL, *supra* note 4, P49.

n205 *Id.* P43.

n206 *Id.*

n207 *Id.* P67.

n208 *Id.* P70. The oblique references to slavery and suicide in paragraphs 67 and 70 are made explicit in the Additions, at paragraphs 44 and 45.

n209 Probably because of the technology of his time, Hegel did not consider the possibility of mass production capable of imitating an artist's work. *See id.* P68 (copy of a work of art contains elements of copyist's skill whereas copy of books are merely mechanical reproductions).

n210 *Id.*

n211 *Id.* P69.

n212 *Id.*

n213 *Id.*

n214 *Id.*; *see also id.* P170.

n215 *See generally* J. HYPOLITE, *STUDIES ON MARX AND HEGEL* 82-83 (1969); D. MCLELLAN, *THE YOUNG HEGELIANS AND KARL MARX* 140-41 (1969); C. TAYLOR, *HEGEL AND MODERN SOCIETY* 144-45 (1979).

n216 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

n217 "Persona" is a term used when discussing the right of publicity and the right to one's image, name, or likeness. Hengham & Wamsley, *The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen*, 14 PAC. L.J. 181, 182 (1983).

n218 While some politicians and rock stars may work on their public images, the world is full of famous athletes, heroes, and actors who do not labor to create their public images. However, in *Memphis Development Foundation v. Factors*, 616 F.2d 956, 959 (6th Cir. 1980), the court found that protection of the persona was intended to motivate creativity.

n219 Aspects of the persona have been given property or quasi-property protection in a series of cases throughout the country. *See, e.g., Hirsch v. S. C. Johnson & Sons, Inc.*, 90 Wis.2d 379, 403, 280 N.W.2d 129, 140 (1979) (publicity rights granted over use of nicknames); *Price v. World Vision Enter.*, 455 F. Supp 252, 266 (S.D.N.Y. 1978) (enjoining defendants from using voices and likenesses of Laurel and Hardy), *aff'd*, 603 F.2d 214 (2d Cir. 1979); *see generally* Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and*

*Federal Preemption*, 66 CORNELL L. REV. 673, 680 (1981) (citing several cases granting publicity rights).

n220 Indeed, it is hard to say whether an author's writing or an author's persona is the better medium for expressing personality. The persona may be more important because it represents a whole character, image, and lifestyle, while an author's written works consist of only specific expressions. On the other hand, a novel may be a more accurate representation of personality for some writers because the work is an intentional expression of the creator, while the persona is the individual's intentional and unintentional actions combined with popular reaction to these actions. Indeed, it is difficult to fit personas into both the labor and personality theories of intellectual property. They are sometimes the result of hard work towards securing a public image based on an internal vision. But quite often they are creations of pure chance, perhaps the only "intellectual property" without intentionality.

n221 The privatization of space satellites, however, raises the spectre of new geographic data being monopolized in the hands of private individuals and released only in copyrighted works.

n222 Arno corrects for Mercator distortions that make the northern hemisphere, i.e. first and second world countries, appear larger in land area than they really are and that make the less developed nations of the southern hemisphere look smaller. *See* P. ARNO, *A NEW MAP OF THE WORLD* (1983).

n223 For example, since the 1950s, China has been consistently colored yellow on National Geographic maps. *See, e.g., NATIONAL GEOGRAPHIC SOCIETY,*

ATLAS OF THE WORLD 132-43 (14TH ed. 1975).

n224 Trademark Clarification Act of 1984, Pub. L. No. 98-620, 98 Stat. 3335.

n225 See H.R. REP. NO. 781, 98th Cong., 2d Sess. 9, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5750, 5758-59 (discussing H.R. 1007, 96th Cong., 1st Sess. (1979)).

n226 We tend to feel that a particular invention, unlike a particular novel, would eventually be created by someone. See generally *Marconi Wireless Co. v. United States*, 320 U.S. 1, 62 (1943) (assessing importance of individual inspiration to scientific and technological development in light of view that scientific progress is gradual evolutionary process).

n227 Cf. P. DAVIS & R. HERSH, *THE MATHEMATICAL EXPERIENCE* 298-316 (1981) (chapters "Comparative Aesthetics" and "Nonanalytic Aspects of Mathematics").

n228 Cf. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983) (dictum) (when idea underlying computer program can be expressed in different ways, choice of expression can be protected by copyright), cert. dismissed, 464 U.S. 1033 (1984).

n229 Refusing to grant property rights over discovered scientific facts may be a fitting example of insufficient personality association limiting property rights over a set of ideas.

n230 See *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951) (though variations in manner of sculpting might be appreciated only by a "fancier," such variations are nonetheless a product of "something irreducible" in sculptor).

n231 G. HEGEL, *supra* note 4, P71.

n232 *Id.* P65.

n233 See generally *id.* PP72-81.

n234 See *Shelley v. Kraemer*, 334 U.S. 1, 22-23 (1948) (states violate fourteenth amendment by enforcing racial discrimination clauses in real estate agreements).

n235 See generally *Reno, The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951, 972 (1942) (affirmative burdens on purchased land not enforceable in equity).

n236 *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 404 (1910).

n237 Licensing arrangements take either of two forms. One approach, common with patents, is to license an individual to use a patented process for her own work. This is directly analogous to alienation of single copies. "Licensing" might also take the form of giving a marketing company all rights to a copyright or patent in exchange for fixed royalties. This would seem more analogous to complete alienation of the *res*.

n238 G. HEGEL, *supra* note 4, § 66.

n239 Compare *Bowie, The Rise and Fall of Ziggy Stardust and the Spiders from Mars* (RCA 1972) with *Bowie, "Heroes"* (RCA 1977).

n240 See D. STOCKMAN, *THE TRIUMPH OF POLITICS* (1987).

n241 Perhaps no writer has stated this more eloquently than Borges himself:

It's the other one, it's Borges that things happen to. . . . News of Borges reaches me through the mail and I see his name on an academic ballot or in a biographical dictionary. I like hourglasses, maps, eighteenth century topography, the taste of coffee, and Stevenson's prose. The other one shares these

preferences with me, but in a vain way that converts them into the attributes of an actor. It would be too much to say our relations are hostile; I live, I allow myself to live, so that Borges may contrive his literature and that literature justifies my existence. I do not mind confessing that he has managed to write some worthwhile pages, but those pages cannot save me, perhaps because the good parts no longer belong to anyone, not even to the other one, but rather to the Spanish language or to tradition. . . . But I must live on in Borges, not in myself -- if indeed I am anyone -- though I recognize myself less in his books than in many others, or than in the laborious strumming of a guitar. Years ago I tried to free myself from him and I passed from lower-middle-class myths to playing games with time and infinity, but these games are Borges' now, and I will have to conceive something else. . . . I do not know which of us two is writing this page.

J.L. BORGES, *Borges and I*, in LABYRINTHS 246 (J.E. Irvy trans. 1964).

n242 G. HEGEL, *supra* note 4, PP66-69 (discussing inalienable types of property that constitute one's "own private personality," such as inventor's idea for a machine; comparing alienation of such property to total alienation of personality in slavery).

n243 G. HEGEL, *supra* note 4, P69 ("the primary means of advancing the sciences and arts is to guarantee scientists and artists against theft and to enable them to benefit from the protection of their property").

n244 A creator concerned only with economic return might allow radical brutal changes in his work if this produced the most profit. Personality considerations, by contrast, cause owners to prohibit change, deletions, or misattributions during any reproduction.

Indeed, a creator concerned purely with personality expression might allow free reproduction of his work as long as these restrictions were honored.

n245 G. HEGEL, *supra* note 4, P 71.

n246 *Id.* P69.

n247 *Id.* P66.

n248 American intellectual property laws are often compared to their European counterparts, which are based on the concept of "moral rights." *See, e.g.*, Katz, *supra* note 170, at 410-20 (examining receptivity of American law to doctrine of moral rights); Roeder, *supra* note 170, at 557 (comparing American copyright law with European doctrine of moral rights); Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1042 (1976) (discussing reasons for absence of moral rights doctrine in American copyright law).

n249 *See, e.g.*, Sarraute, *Current Theory on the Moral Rights of Authors and Artists under French Law*, 16 AM. J. COMP. L. 465, 478-80 (1968) (discussing French statutory and case law protections of an author's right to have his name associated with his work).

n250 *See Buffet v. Fersing*, [1962] Recueil Dalloz [D. Jur.] 570, 571 (Cour d'appel Paris) (enjoining sale of separate panels from refrigerator creator had painted and had intended as integrated whole); *cf. Whistler v. Eden*, [1898] Recueil Periodique et Critique [D.P. II] 465 (Cour d'appel Paris) (on moral rights grounds, James McNeill Whistler was allowed to refuse to deliver portrait he had finished and had been paid for, although he was required to restitute contract price). "Inalienable," however, should not be construed in absolute terms. For example, under French law, an author can contract to

not exercise at least some of his "inalienable" content control.

n251 6 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: GERMAN INDUSTRIAL PROPERTY, COPYRIGHT, AND ANTITRUST LAWS 114 (F. Beier, G. Schricker & E. Ulmer eds. 1983).

n252 *See supra* note 170.

n253 In late 1988, the United States became the 78th nation to join the Berne Copyright Convention. *See supra* note 22. The Convention provides minimum standards of copyright protection in member states including a provision that protects "moral rights." Berne Convention, *supra* note 22 art. 6, bis (1); *see* Goldberg & Bernstein, 7 A.B.A. PAT., TRADEMARK & COPYRIGHT NEWSL., No. 3, at 5 (1989) (response of Congress and World Intellectual Property Organization that U.S. law already provided compatible protection to "moral rights" was a bit of a stretch).

n254 188 U.S. 239 (1903).

n255 *Id.* at 250.

n256 *Id.*

n257 *Id.*

n258 In fact, LEXIS searches uncovered only one case that explicitly reasons with the "personality" model adopted by Holmes: *F.W. Woolworth Co. v. Contemporary Art Inc.*, 193 F.2d 162, 164 (1st Cir.) (artist's rendering of cocker spaniel in show position reflected "something irreducible" about artist and is therefore protected by copyright (citing *Bleistein*, 188 U.S. at 249-50)), *aff'd*, 344 U.S. 228 (1951).

n259 188 U.S. at 250.

n260 However, Justice Douglas did present the issue in an unusual dissent from a denial of certiorari. *See Lee v. Runge*, 404 U.S. 887, 890

(Douglas, J., dissenting from denial of certiorari) (courts should not apply more lenient constitutional standards to copyright than to patent law), *denying cert. to* 441 F.2d 579 (9th Cir. 1971).

n261 111 U.S. 53 (1884).

n262 *Id.* at 60.

n263 *Harper & Row v. Nation Enters.*, 471 U.S. 539, 547 (1985).

n264 *Doran v. Sunset House Dist. Corp.*, 197 F. Supp 940, 944 (S.D. Cal. 1961), *aff'd*, 304 F.2d 251 (9th Cir. 1962), *quoted in Runge v. Lee*, 441 F.2d 579, 581 (9th Cir.), *cert. denied*, 404 U.S. 887 (1971).

n265 *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248, 267 (1850).

n266 *Harries v. Air King Products*, 183 F.2d 158, 162 (2d Cir. 1950).

n267 *See Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (trademarks not afforded similar constitutional protections given to copyrights and patents).

n268 *See Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U.S. 446, 453-54 (1911) (term "rubberoid" merely descriptive of asphalt roofing product and not arbitrary misspelling of "rubberoid").

n269 Federal Trademark Act, ch. 592, 33 Stat. 724 (1905) (current version at 15 U.S.C. § § 1051-72, 1092-96, 1111-27 (1982)).

n270 *See* 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 5:3, at 137 (2d ed. 1984). "Fanciful" marks are words or symbols that did not exist in common usage prior to their creation for the purpose of trademark. "Arbitrary" marks are words or symbols that are in common usage, yet are unrelated to and nondescriptive of the item to which they are attached.

n271 Examples of such "words" are "Clorox," "Cutex," "Cuticura," "Polaroid," "Sanka," and "Yuban." *Id.* § 11:3, at 428.

n272 *Stork Restaurant v. Sahati*, 166 F.2d 348, 355 (9th Cir. 1948) (words "Stork Club" arbitrarily used by successful restaurant developed secondary meaning -- a club for storks -- that is protected from exploitation by imitators).

n273 1 J. MCCARTHY, *supra* note 270, § § 11:1-11:2, at 433-36 ("inherently distinctive" encompassess "fanciful," "arbitrary," and also "suggestive" marks -- those that fall in the middle ground between inventions and pure description).

n274 This is a label for cereal made of raisins and bran. *Skinner Mfg. v. Kellogg Sales Co.*, 143 F.2d 895, 898 (8th Cir. 1948) (trademark disallowed as merely descriptive).

n275 This was a description of chocolate candies with a liquid center. *In re Bianchi Co.*, 165 U.S.P.Q. (BNA) 145 (1970) (trademark disallowed as merely descriptive).

n276 1 J. MCCARTHY, *supra* note 270, § 2:13, at 94 (truth is necessary to ensure that decision to purchase ultimately made by consumer, not dictated by manufacturer through manipulation of trademarks).

n277 *Federal Trade Comm'n v. Royal Milling Co.*, 288 U.S. 212, 216 (1933).

n278 Indeed, the Second Circuit has held in *Colligan v. Activities Club of New York*, 442 F.2d 686, 692 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971), that consumers do not even have standing to sue under section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (1982), which provides that "[a]ny person who shall affix, apply, or annex or use in connection with any goods or services . . . a false designation of origin, or any false designation or

representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false designation or representation." *Id.* (emphasis added).

n279 376 U.S. 254 (1964) (public official cannot recover damages for defamatory falsehood without a showing of actual malice).

n280 *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (under state statute providing remedy for "unwanted publicity" *New York Times* standard applicable not only to public officials, but also to matters of public interest); *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 349 (1974) (private individuals must meet *New York Times* standard to recover presumed or punitive damages).

n281 *See generally* E. GOFFMAN, *FRAME ANALYSIS* (1974); E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1971).

n282 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 201, 205 (1890).

n283 196 Misc. 67, 80 N.Y.S.2d 575 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

n284 *Id.* at 69, 80 N.Y.S.2d at 577.

n285 295 F. Supp. 331 (S.D.N.Y. 1968).

n286 *Id.* at 355-56 (assumed name or pseudonym not within meaning of New York Civil Rights Law); *see also Jaggard v. R. H. Macy & Co.*, 176 Misc. 88, 89, 26 N.Y.S.2d 829, 830 (1940) (name assumed only for business purposes not within protection of Civil Rights Law), *aff'd per curiam*, 265 A.D. 15, 16, 37 N.Y.S.2d 570, 571 (1942) (finding that dress designer is not even entitled to protection of her true name when dress had been placed in public domain without copyright protection).

n287 Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52-54 (1974).

n288 *Id.* at 52-53 (privacy by presence exists when a person is present in a public place and is not engaged in a public performance or event).

n289 See Warren & Brandeis, *supra* note 282, at 201, 205.

n290 A repertory company in Texas actually began work on such a production but stopped when Albee threatened legal action. *Stick to the Script*, N.Y. Times, Aug. 5, 1984, § 4, at 7, col. 3.

n291 Note, however, that lines that the authors explicitly committed to non-publication could be protected under the Warren-Brandeis privacy argument, not as invading the authors' substantive privacy, but because authors retain the right to prevent publication of private writings. See *supra* text accompanying note 282.

n292 Satie was particularly well-known for his humorously obscure approach to the arts. His title, "En Habit de Cheval" can be understood either as "In Riding Clothes" or "In the Clothes of a Horse."

n293 Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1565 (1984) (by P. Krieg).

n294 Kwall, *supra* note 170, at 68.

n295 See generally D. LADD, *SECURING THE FUTURE OF COPYRIGHT, A HUMANIST ENDEAVOR* (1984) (proposing new domestic laws and minimum international standards to combat perceived threat to copyright resulting from technological innovation). I am indebted to David Ladd, Registrar of Copyrights from

1978-1985, for time spent in discussing this argument. Surprisingly, I have not encountered other uses of the freedom of expression rationale in my survey of the literature.

n296 Free speech serves an "individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living." Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 33 (1969 ed.).

n297 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (free political discussion is fundamental principle of American system of government); see also A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (discussing importance of freeech in understanding validity and comprehensive meaning of the Constitution).

n298 See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (free flow of commercial information necessary for consumers to make informed choices and best allocate resources).

n299 In his famous *Whitney* concurrence, Justice Brandeis formulated what may be the only mention by a Justice of a personal development/personal health basis for free speech. He drew a link between "freedom to think as you will and speak as you think." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 24-26 (analyzing Brandeis' four justification for free speech).

n300 See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false

statements than private individuals normally enjoy."); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979) ("[P]ublic figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective 'self-help.'").

n301 Cinelli, *Comrade's Doublespeak: The Intransigent and Unchanging Soviet Copyright Laws* (unpublished paper on file with author).

n302 538 F.2d 14 (2d Cir. 1976).

n303 *Id.* at 26.

n304 *Id.* at 25.

n305 *Id.*

n306 See, e.g., *Stevens v. NBC*, 148 U.S.P.Q. (BNA) 755, 758 (Cal. Super. Ct. 1966) (contract did not contain grant of television rights enabling defendant network to make changes; network therefore enjoined from inserting commercials that would "alter, adversely affect or emasculate the artistic or pictorial quality of [the film] so as to destroy or distort materially or substantially the mood, effect, or continuity"); *Seroff v. Simon & Schuster*, 6 Misc. 2d 383, 390, 162 N.Y.S.2d 770, 777 (1957) (defendant publisher had a duty to select appropriate, competent foreign translator when publisher had translation rights and sold them to third party who produced distorted translation).

n307 412 U.S. 94 (1973).

n308 *Id.* at 193 (Brennan, J., dissenting).

n309 See M. MCLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* (1962) (discussing change of ideas, beliefs, and values spurred by technological advancements and the consequences for an "open society").

n310 Kaplan, *supra* note 15, at 118 (citing M. MCLUHAN, *supra* note 309).

n311 Address by Stephen Stewart, 1980 Geiringer Lecture at New York University (Nov. 17, 1980), reprinted in 28 BULL. COPYRIGHT SOC'Y 351, 369 (1981).

n312 The limited reproduction process before the printing press revolutionized publication was very decentralized. An author could not police the scribes reproducing his book and catch all the intentional and unintentional mistakes they made.

n313 The increasing quality of desktop "printing" has brought copyright issues to the fore already. The varying views are reflected in two editorials in PUBLISH: THE HOW-TO MAGAZINE OF DESKTOP PUBLISHING (August 1987). In his column, the magazine's publisher writes,

[I]f you believe that it is *illegal* to tamper with an image without obtaining prior consent from the copyright owner, what then? Does that mean Andy Warhol was really a soup-can scanner? Is the Picasso estate now wide open to a class-action suit brought by all the aboriginal tribes of Papua New Guinea whose primitive art influenced the Spanish painter?

Bunnel, *Scanned Laughter*, *id.* at 9 (emphasis in original). The editor of the magazine argued otherwise: "[T]he boundaries of intellectual property are at issue here, and those borders are to be jealously guarded. Artists, photographers, graphic designers -- like writers and consumers -- earn their living (when they're lucky) by selling, licensing, even bartering what they create." Gubernat, *Stop, Thief!*, *id.* at 17.

n314 Kwall, *supra* note 170, at 69.

n315 [T]he pertinacious orators and writers who get hauled up are merely extremist spokesmen for a mass of more thoughtful and more retiring men and women. . . . When you

put the hotheads in jail, these cooler people do not get arrested -- they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the nation.

Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 561 (1946 ED.).

n316 I can think of no better example, having been part of the process myself, than the American law review. Compared to legal journals elsewhere or other scholarly journals

in the United States, the law review editing process produces an increasingly monotonous literature where no radical positions are expressed uncompromised and no propositions are put forward without the editor disagreeing in contrapuntal footnotes. *But see* Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 364 n.316 (1988) (author's style retained in unedited tirade).

n317 B. KAPLAN, *supra* note 15, at 74.