

August 2009

Invitation to a Discourse Regarding the History, Philosophy and Social Psychology of a Property Right in Copyright

Sharon E. Foster

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>

Recommended Citation

Foster, Sharon E. (2009) "Invitation to a Discourse Regarding the History, Philosophy and Social Psychology of a Property Right in Copyright," *Florida Journal of International Law*: Vol. 21: Iss. 2, Article 2. Available at: <https://scholarship.law.ufl.edu/fjil/vol21/iss2/2>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

ARTICLES

**INVITATION TO A DISCOURSE REGARDING THE HISTORY,
PHILOSOPHY AND SOCIAL PSYCHOLOGY OF A PROPERTY
RIGHT IN COPYRIGHT**

*Sharon E. Foster**

| | | |
|------|--|-----|
| I. | INTRODUCTION | 172 |
| II. | THE HISTORY OF THE EXISTENCE OF A PROPERTY RIGHT IN EXPRESSIONS AND THEIR REPRODUCTION | 175 |
| | A. <i>Interests in Expressions in Ancient Greece</i> | 175 |
| | B. <i>Interests in Expressions in Ancient Roman</i> | 177 |
| | 1. References to Creative Expressions as “Mine” in Ancient Rome | 177 |
| | 2. Roman Law Relating to Theft of Intangibles | 179 |
| | 3. Roman Law Relating to Creative Works | 180 |
| | C. <i>Interests in Expressions From the Medieval Period to the Enactment of the Statute of Anne (476-1709)</i> | 182 |
| | 1. Pre-Printing Press | 183 |
| | 2. The Introduction of the Printing Press in the United Kingdom | 184 |
| III. | PHILOSOPHICAL THEORIES ADDRESSING PROPERTY RIGHTS IN EXPRESSIONS AND THEIR REPRODUCTION | 192 |
| | A. <i>The Natural Law Theory</i> | 193 |
| | B. <i>The Personality Theory</i> | 194 |
| | C. <i>Utilitarian Philosophy</i> | 196 |

* Assistant Professor, University of Arkansas School of Law. The author would like to thank the University of Arkansas School of Law for its grant support and the faculty, staff, and students for all their encouragement and support.

| | | |
|-----|---|-----|
| IV. | SOCIAL PSYCHOLOGY REGARDING A PROPERTY RIGHT IN CREATIVE EXPRESSIONS AND THEIR REPRODUCTION | 198 |
| | A. <i>Biological Instinct: The Selfish Gene</i> | 200 |
| | B. <i>The Personality Theory: Personification of Creations as Justification For a Property Right in the Reproduction of Creations</i> | 203 |
| | 1. Anthropological Studies | 204 |
| | 2. Tie Between Possessions and Self | 204 |
| | C. <i>Social Constructionists</i> | 205 |
| V. | CONCLUSION | 207 |

We are by nature stubbornly pledged to defend our own from attack, whether it be our person, our family, our property or our opinion....The little word *my* is the most important one in all human affairs, and properly to reckon with it is the beginning of wisdom.¹

I. INTRODUCTION

Should the right to reproduce creative expressions be given the status of a property right as they are in many Western states² and international conventions?³ This is a question that has plagued humanity for centuries⁴ and is part of the current debate taking place in international human rights law between those who advocate more

1. James Harvey Robinson, *The Mind in the Making* 41, 45-46 (1921), available at <http://books.google.com/books?id=zyAVAAAAIAAJ>.

2. *E.g.*, 17 U.S.C. §§ 106-106A.

3. *E.g.*, Berne Convention For the Protection of Literary and Artistic Works, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

4. For example, Thomas Jefferson was not, at first, in agreement with the notion of even a limited monopoly for copyright. See Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 815 (2000).. Indeed, Thomas Jefferson stated, “[t]he saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14. years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression. Letter from Thomas Jefferson to James Madison (July 31, 1788), in THE PAPERS OF THOMAS JEFFERSON, at 442-43 (Julian P. Boyd et al. eds. 1950), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s46.html>; see also Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL’Y. 108, 109 (1990); Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1344-52.

access to copyrighted and patented materials and those who advocate more protection for intellectual property.⁵ But what seems to be missing from this debate is *why* the right to reproduce creative expressions ever became a property right in much of the Western world. Most of the commentary on the question of a property right in creative expressions focuses on utilitarian and economic perspectives taking for granted the existence of a property right as if such a right emerged fully formed from the head of Zeus.⁶ But there is a dearth of discussion examining the significance, if any, of the simple fact that people throughout history have referred to creative expressions as “mine,” possibly indicating the belief in a possessory interest which evolved into a property right.

This paper explores the reference to a creative expression as “mine” in relation to the question of *why* there is a property right in the reproduction of creative expressions from an historical, philosophical and social psychological perspective. And why does this matter? The law is not created in a vacuum; it reflects history, human nature, culture, and many other considerations. As the introductory quotation properly points out, we must understand the human tendency to lay claim to creative expressions in order to have the wisdom to decide if a legal property right should still be acknowledged or if it is time to consider some alternatives. History, philosophy and social psychology relating to intellectual property, specifically copyright, and property in general provides a rich resource for such a discourse though not a panacea.

The first section examines the historical evidence using written and verbal expressions from ancient Greece, Rome and pre-copyright history in England. Although the historical evidence does not indicate any copyright law as we know it today in the ancient period, it does indicate the existence of a belief in a possessory interest in creative expressions and their reproduction. This belief continued through the middle ages both before and after the invention of the printing press. Due to the abundance of evidence, and in the interest of brevity, this paper utilizes a case study of England. We see in this case study the increasing political and economic importance of the printing trade after

5. See Pilar N. Ossorio, *The Human Genome As Common Heritage: Common Sense or Legal Nonsense?*, 35 J.L. MED. & ETHICS 425 (2007); Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INT’L ECON. L. 861 (2002); Jamie Crook, *Balancing Intellectual Property Protection with the Human Right to Health*, 23 BERKELEY J. INT’L L. 524 (2005).

6. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11-36 (2003); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3-13, 57-63 (1987).

the introduction of the printing press in England resulting in a solidification of the possessory interest in creative expressions and their reproduction in the form of a property right first in the Crown and then in creators and their assigns.

The second part of this paper examines some suggestions about human nature through philosophical theories that have been utilized in an attempt to justify a property right in the right to reproduce creative expressions. Specifically, the natural law philosophy; the personality theory; and the utilitarian theory have all been cited as justification for the treatment of the right to reproduce an expression as a property right. While this paper treats the various theories in isolation some states, such as the United States, invoke natural law, the personality theory, and utilitarianism to justify the existence of a property right in copyright law.⁷

Finally, this paper looks to social psychology for a cultural answer to the question *why* creative expressions and their reproduction are treated as a property right. Again, Western notions are emphasized because it is from the West that we get this property right in creative expressions and their reproduction. Here I explore the early social psychology theory of biological instinct to explain the human need for property basically as an accident of nature. Conversely, the personality theory in social psychology explains a human need for property through a fetish phenomenon. The last theory in this section is the social psychology theory of social construction to explain property. The social constructionist theory provides an existential perspective in the recognition that things, including creative expressions, exist before they can be infused with the essence of property to meet the human need for social communication.

This collage of essence justification indicates a lack of universalism on the domestic level let alone the international level. Such a realization leads this author to conclude that, while intangible things, such as copyright, may be designated property, the rationalization for such a designation is not universal except to the extent that all the different justifications seem to be rooted in the inexplicable desires to call an expression thing “mine.”

7. See *Elder v. Ashcroft*, 537 U.S. 186, 212 (2003) (invoking utilitarian philosophy); *id.* at 245-46 (Breyer, J., dissenting) (providing examples of natural law and utilitarian philosophies); *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954) (suggesting personality philosophy); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-50 (1903) (suggesting personality philosophy).

II. THE HISTORY OF THE EXISTENCE OF A PROPERTY RIGHT IN EXPRESSIONS AND THEIR REPRODUCTION

The reference of “mine,” relating to an expression and the copying of an expression, can be traced to the inception of recorded history. Prior to the advent of the printing press, photograph, videotape, copy machine, computer, tape recorder, etc., appropriation of another’s artistic creations was difficult but not impossible. Although the visualization of some scribe furiously chiseling away at a stone tablet in order to copy the words of some great orator may bemuse us in this modern era of techno-copying, it was not amusing to those whose works were usurped. Still, plagiarism seems to have been endemic in the ancient world,⁸ leaving us here today with a plethora of recorded evidence condemning the act.⁹ These recorded responses indicate a belief among ancient creators that an expression could have the quality of a possessory interest and the unauthorized reproduction of an expression was a theft.

A. *Interests in Expressions in Ancient Greece*

Although there is little documentary evidence remaining regarding ancient Greek law,¹⁰ ancient Greek plays provide an example of the social attitude towards plagiarism.¹¹ For instance, in Aristophanes’ play *Frogs*, Dionysus, the divine patron of drama, is distraught after the death of the tragic poet Euripides in 405 B.C.E. as he believes that all the great tragic poets are dead. Dionysus resolves to descend into the underworld to bring back Euripides. In the beginning scene, Dionysus encounters Heracles (Hercules) and engages in a discussion about whether Euripides or another great tragic poet, Sophocles, should be brought back:

Heracles: But say, why don’t you bring up
Sophocles

8. ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 65 (1952); H.M. PAULL, LITERARY ETHICS: A STUDY IN THE GROWTH OF THE LITERARY CONSCIENCE 103 (1929); GEORGE HAVEN PUTNAM, AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES (3d ed. 1967). There appears to be an abundance of evidence that the ancients freely pilfered stories and expressions from each other. For example, there are numerous diluvial stories such as the one found in the Epic of Gilgamesh and in the Bible. Compare THE EPIC OF GILGAMESH: A NEW TRANSLATION 88-100, tablet XI (Penguin Classics 1999) with *Genesis* 6:7 (King James).

9. PAULL, *supra* note 8, at 103.

10. DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 42-43 (1978).

11. *See id.*

By preference, if you must have some one
back?

Dionysus: No, not till I've had Iophon quite alone
And seen what note he gives without his
father.¹²

Iophon was the son of Sophocles and was also a playwright. Apparently, some of his plays were written in collaboration with his father.¹³ This reference to Iophon was a less than subtle accusation of plagiarism; specifically that Iophon relied upon Sophocles or that Sophocles relied upon Iophon for creative expression.

Once in the underworld, Dionysus finds a contest in progress between Euripides and the tragic poet Æschylus for the Throne of Poetry. Dionysus is selected to judge who between these contestants is the greater poet. As the characters of Euripides and Æschylus first take the stage they are hurling insults at each other, including an accusation of plagiarism from Æschylus:

Æschylus: How say'st thou, Son o' the goddess of
the Greens? –
You dare speak thus of me, you phrase-
collector,
Blind-beggar-bard and scum of rifled rag-
bags!
Oh, you shall rue it!
...
Because my poetry hasn't died with me,
As his has. . . .¹⁴

12. ARISTOPHANES, *THE FROGS*, in *EURIPIDES* 186 (Gilbert Murray trans., Longmans, Green, & Co. 1902).

13. *Id.*

14. *Id.* at 240-41. Much of the evidence of the belief in a possessory interest from ancient texts is in the use of the possessory words “my” and “mine.” I would like to thank my colleague, Professor Ned Snow, for his suggestion that this may only establish a creative relationship and not something akin to a property right in the minds of the ancients. We will probably never know just what was in the minds of the ancients and certainly relying on translations, as this author had to do, create a plethora of problems. That said, if the translations are accurate “my” and “mine” do connote a possessory interest. *CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH* 754, 783 (8th ed. 1990).

It is apparent from this satirical treatment of plagiarism that there was a belief in a possessory interest in a creative work by claiming such expressions as “my poetry.”¹⁵

Further evidence of a possessory claim to a creative expression and its copy is recounted in the story by the first century B.C.E. Roman architect, Marci Vitruvius in Book VII of his seminal work “The Ten Books on Architecture” about an act of plagiarism at a festival in celebration of the opening of the famous library of Alexandria. In the story Vitruvius recounts how several poets were found guilty of copying the works of others, were accused of theft, and banished.¹⁶ His story indicates the belief in a possessory interests going back at least as far as the Greco/Roman period in the first century B.C.E. by claiming the two poets that most pleased the audience “recited things not their own” and by use of the term “theft.”¹⁷ In these examples we see a belief in the existence of a possessory interest in expressions but nothing to indicate the essence of that interest. So, while we do know that in the minds of the ancient Greeks a possessory interest did exist, we do not know what legal right, if any, existed.

B. Interests in Expressions in Ancient Roman

The authors of ancient Rome were in an interesting juxtaposition in relation to their ancient Greek counterparts. Being the conquerors, they were for all practical purposes free to pilfer from the vanquished including the literary works of the Greeks.¹⁸ *Moribus antiquis res stat Romana virisque.*¹⁹ Certainly, imitation is the highest form of compliment,²⁰ and the ancient Romans held the literary works of the ancient Greeks in high esteem.²¹ Yet, such altruistic motives apparently

15. PAULL, *supra* note 8, at 103; PUTNAM, *supra* note 8, at 68, 73.

16. VITRUVIUS, THE TEN BOOKS ON ARCHITECTURE, BOOK VII, at 195-197 (Morris H. Morgan, trans., Kessinger 2005). Ptolemy III reigned from around 246-222 B.C.E. and is probably the Ptolemy referred to by Vitruvius given the fact that Aristophanes the Grammarian lived around 257-185 B.C.E. However, Ptolemy I is usually given credit for creating the great library of Alexandria. See *The House of Ptolemy: Kings, Queens, and the Rest of the Royal Ptolemies*, <http://www.houseofptolemy.org/housekng.htm#RULERS> (last visited Mar. 24, 2009).

17. VITRUVIUS, *supra* note 16, at 197.

18. TERENCE, THE EUNUCH, in THE COMEDIES 155-56 (Peter Brown trans., 2006); PUTNAM, *supra* note 8, at 167-68.

19. Translated, this statement by Quintus Ennius (239-169 B.C.E.) means, “On ancient ways and heroes stands the Roman state.” See STEPHEN BERTMAN, CULTURAL AMNESIA: AMERICA’S FUTURE AND THE CRISIS OF MEMORY 39 (2000).

20. CHARLES CALEB COLTON, LACON OR MANY THINGS IN FEW WORDS: ADDRESSED TO THOSE WHO THINK 101 (Kessinger 2004) (1820).

21. LINDEY, *supra* note 8, at 66.

held little value when one was the victim of the compliment. Thus, while Virgil imitated Homer²² and purloined verses from his fellow Romans,²³ he reputedly complained when accorded with reciprocal compliments.²⁴

Unlike the Greeks, the Romans had more specific, codified laws; however, much is missing from the historic record leaving the scope and breadth of the law open to speculation. Certainly, there is no evidence to date of a specific copyright code in ancient Rome. Yet, the evidence that we do have indicates the existence of a belief in a possessory interest in expressions and the reproduction of expressions.

1. References to Creative Expressions as “Mine” in Ancient Rome

Reference to creative expressions as “mine” and accusations of theft or plagiarism are too prolific in the ancient Roman record to ignore. For example, the first century (A.D.) Roman epigrammatist Martial is credited with the first use of the term *plagium* to describe the conduct of those who copied from his works.²⁵ His epigrams on the subject reflect his strong views regarding this practice:

To your charge I entrust, Quintianus, my works – if, after all, I can call those mine which that poet of yours recites. If they complain of their grievous servitude, come forward as their champion and give bail for them; and when that fellow calls himself their owner, say that they are mine, sent forth from my hand. If thrice and four times you shout this, you will shame the plagiarist.²⁶

Rumour asserts, Fidentinus, that you recite my works to the crowd, just as if they were your own. If you wish they should be called mine, I will send you the poems gratis; if you wish them to be called yours, buy my disclaimer of them.²⁷

22. *Id.*; THOMAS MALLON, *STOLEN WORDS* 4 (Harvest 2001).

23. PAULL, *supra* note 8, at 104.

24. *Id.*

25. *Plagium* denoted kidnapping. BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 12-13 (1967); PUTNAM, *supra* note 8, at 203.

26. I MARTIAL, *EPIGRAMS* 63 (Walter C.A. Ker trans., 1919), available at <http://books.google.com/books?id=w4ZfAAAAMAAJ>.

27. *Id.* at 47.

There is one page of yours, Fidentinus, in a book of mine – a page, too, stamped by the distinct likeness of its master – which convicts your poems of palpable theft. . . . My books need no title or judge to prove them; your page stares you in the face, and calls you “thief.”²⁸

That book you recite, O Fidentinus, is mine. But your vile recitation begins to make it your own.²⁹

Corduba, . . . tell your poet, I beg you, to have some shame, and not to recite my poems scot-free. I could bear it if a good bard did this, one I could visit with pain in his turn. A bachelor debauches without reprisal, a blind man cannot lose that whereof he robs you. Nothing is worse than a naked robber, nothing more safe than a bad poet.³⁰

Martial’s use the terms *plagium*, “thief,” “my,” and “mine” with regard to use by others of his creative expression reflects some belief in a possessory interest in the reproduction of expressions. Again, as with the ancient Greeks, we do not know the essence of this right but we do know that it existed at least in the minds of the creators.

2. Roman Law Relating to Theft of Intangibles

In support of Martial’s protestations regarding his claims of ownership over reproduction of his creative expressions the Roman concept of natural law recognized property interests in intangibles and the theft of those interests.³¹ For example, “things” (*res*) under Roman law covered all that had a pecuniary value.³² This would include tangible things (corporeal) and intangibles things (incorporeals).³³ As explained by Justinian:

Now, some things are corporeal, others incorporeal. Corporeal things are those which, by their nature, can be touched, eg land,

28. *Id.* at 63, 65.

29. *Id.* at 53.

30. 2 MARTIAL, EPIGRAMS 365, 367 (Walter C.A. Ker trans., 1920), available at <http://books.google.com/books?id=RIxiAAAAMAAJ>.

31. See J. INST. 2.1,35-37 (J.A.C. Thomas trans., 1975).

32. J. INST. 2.1 cmt., in THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION, AND COMMENTARY, at 73 (J.A.C. Thomas trans., 1975).

33. *Id.* at 73-74.

a slave, a garment, gold, silver and, indeed, countless other things. Incorporeal things, on the other hand, are such as cannot be touched but exist in law: for instance, an inheritance, usufruct and obligations, however contracted.³⁴

Under Roman law, theft was not just the taking and depriving another of some tangible object; rather, it could include intangible rights: theft includes “the fraudulent meddling with a thing, whether the thing itself, the use or possession of it which one is barred from countenancing by natural law.”³⁵ Further, Justinian stated, “theft occurs not only when a person removes the thing of another with a view to appropriate it but, generally, whenever someone interferes with the property of another without the owner’s consent.”³⁶ It is not clear that the belief in a possessory interest in an expression and its copy translated into a property right under Roman law. What is clear, however, is that when Martial accused others of “theft” of his expressions he was asserting what he believed to be a property right under Roman law relating to intangibles.

3. Roman Law Relating to Creative Works

Ancient Roman commentary supports a natural law, fruits-of-their-labor, theory for artists’ rights in a creation. Accordingly, one who creates is entitled to the value for the creation.³⁷ Natural law, or the fruits-of-ones-labor, is reflected in *The Institutes of Gaius*, which discusses the nature of a transaction involving material value mixed with labor:

And again, if I have agreed with a goldsmith that he shall make me with his own gold some rings of a certain weight and pattern, and get say two hundred *denarii* for them, it is a point of controversy whether this be purchase and sale or location and conduction. Cassius thinks there is purchase and sale of material, location and conduction of the labour expended upon it; but the general opinion is that the contract is one of purchase and sale. But if I provide the gold, agreeing to give the

34. J. INST. 2.2.1-2; see also G. INST. 2.12-14 (W.M. Gordon & O.F. Robinson trans., 1988).

35. J. INST. 4.1.1.

36. J. INST. 4.1.6.

37. J. INST. 2.1.35-37. “Incorporeal” means “[h]aving a conceptual existence but no physical existence; intangible” BLACK’S LAW DICTIONARY 770 (7th ed. 2004). For example, copyrights and patents are incorporeal property. *Id.*

goldsmith so much for his labour, the contract is admittedly one of location and conduction.³⁸

Evidentially, the ancient Romans assigned some economic value to the labor expended in the creative process, similar to Locke's natural law theory regarding the fruits-of-ones-labor.

Justinian's writings on Roman natural law may clarify the legal question of who owns the end product made out of another's material—he who made the end product or he who owned the material.³⁹ This question is interesting in the copyright context as it evidences a legal dilemma addressed by the Romans with regard to the property rights stemming from the creative process. For example, if one makes a vase out of another's gold who owns the vase? If one makes an eye-salve out of someone else's drugs who owns the eye-salve? The natural law solution, according to the Romans, was:

*if the product can be reduced again to its original material, he who was owner of the materials owns the thing; but if it cannot be so reduced, then he rather is owner who makes the thing[.]*⁴⁰

This result did not mean that the owner of materials made into an irreducible *nova species* was without recourse.⁴¹ However, this does indicate recognition of a property right in the creative process.⁴²

Another legal dilemma that the Romans resolved through the use of natural law involved the issue of ownership of an end product with respect to a writing or a painting:

Writing, again, even though it be in gold lettering, accedes to the paper or vellum in the same way that buildings accede to the land or the seeds planted therein. Thus, if Titius write a song or narrative on your paper or vellum, not Titius but you will be regarded as the owner thereof. But if you claim your books or vellum from Titius but are unwilling to pay the cost of the writing, Titius can put up the defence of fraud, assuming – that

38. G. INST. 3.147. Location and conduction, or *locatio-conductio*, in civil law is a contract of bailment for hire. BLACK'S LAW DICTIONARY 950 (7th ed. 2004).

39. J. INST. 2.1.25.

40. *Id.*

41. J. INST. 2.1.25 cmt., in THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION, AND COMMENTARY, at 78-79 (J.A.C. Thomas trans. 1975); G. INST. 2.79.

42. J. INST. 2.1.25 cmt., *supra* note 41.

is – that he is in possession of the paper or vellum in good faith. If one person paint on another’s board, there are some who think that the board accedes to the picture while others hold that the picture, whatever it be, accedes to the board. To us, however, it appears preferable that the board accede to the painting: for it is absurd that a painting by Apelles or Parrhasius should, by accession, become part of a cheap board. Hence, if the artist seek the painting from the owner of the board who is in possession of it and does not give the price of the board, he can be met with the defence of fraud: but, equally, if the painter be in possession, it follows that the owner of the board will be given against him an extended action (*actio utilis*); in which case, if the owner be unwilling to pay the cost of the painting, he can be repelled by the defence of fraud, assuming the painter to be a possessor in good faith of the painting. It goes without saying, of course, that the owner has the action for theft in respect of the board, whether it be stolen by the artist or by someone else.⁴³

The above example reflects some consideration given by the Romans to the issue of ownership of the creative process.⁴⁴ Of further import is the specific mention of the artists, Apelles⁴⁵ and Parrhasius⁴⁶ showing some value in reputation to the artist and the inference of increased economic value to the board by paintings of artists of such caliber.

While the history of the ancient Greeks and Romans does not provide a clear explanation for the existence of a property right in creative expressions both seem to indicate the belief in the existence of a possessory interest and possibly even a property right.

C. Interests in Expressions From the Medieval Period to the Enactment of the Statute of Anne (1709)

Before the means for mass copying developed with the invention of the printing press, there was a continuation of the belief of a possessory interest in expressions and their reproduction in the West. A property right was solidified in England with the introduction of the printing press when the Crown claimed a property right in certain

43. J. INST. 2.1.33-34; see also G. INST. 2.79.

44. J. INST. 2.1.25 cmt., *supra* note 41.

45. Apelles was a Greek painter who flourished in the fourth century B.C.E. *Apelles*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://original.britannica.com/eb/article-9007988>.

46. Parrhasius was a Greek painter who flourished in the fifth century B.C.E. *Parrhasius*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://original.britannica.com/eb/article-9058554>.

printed materials.⁴⁷ In order to print an expression one had to obtain a license to do so from the Crown.⁴⁸ This licensing requirement was little more than a means for censorship, but it was effective until political power was neutralized by civil war.⁴⁹ After the English civil war the printing trade tried to reassert control by advocating a licensing requirement and through the claim of a property right, but there was little public support for this due to the abuses of censorship under the old system.⁵⁰ To alleviate this lack of support there was a change in emphasis from a property right for publishers to the protection of authors' property rights in the name of promoting education.⁵¹ This change of focus culminated in the passage of the first known copyright statute, the statute of Anne, in 1709.⁵²

1. Pre-Printing Press

The fall of the Roman Empire in the West occurred around 476 A.D.⁵³ This resulted in a fractured Western Empire, although the Eastern Empire remained intact for some time. Despite the demise of a central authority in the West, literature continued to prosper. Devoid of a mechanism to quickly reproduce and with limited market demand due to a mostly illiterate populace, the process of printing was by hand (manuscripts).

The high value placed on manuscripts and issues relating to a property right in a copy from a manuscript are evidenced in the story of Saint Columba's copying his masters' book of Psalter. This story is based upon oral tradition but reduced to writing at least as early as 1532.⁵⁴ As the story goes, Saint Columba, while visiting his master the abbot Finnen, made an unauthorized copy of Finnen's Psalter at night

47. FEATHER, *supra* note 63, at 10-11.

48. *Id.* at 10.

49. *Id.* at 40-48.

50. *Id.* at 40-48; JOHN MILTON, AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENC'D PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), available at <http://www.uoregon.edu/~rbear/areopagitica.html>.

51. BLOUNT, *supra* note 114, at 1-2.

52. Copyright Act, 1709, 8 Ann. c. 19 (Eng.).

53. Peter Drahos & John Braithwaite, The Globalisation of Regulation 6 (unpublished manuscript), available at <http://www.oiprc.ox.ac.uk/EJWP0200.pdf>.

54. Saint Columba lived around 560 A.D. The story has been attributed to Adomnan's life of Columba (around 628 A.D.) However, a reading of Adomnan does not directly refer to this tale. It merely mentions an act by Columba that was not very egregious but caused the Saint to leave Ireland. ADOMNÁN, LIFE OF COLUMBA 185 (Alan Orr Anderson & Marjorie Ogilvie Anderson trans. 1991). The earliest written reference I could locate was in the 1532 text, MANUS O'DONNELL, LIFE OF COLUMCILLE 179 (A. O'Kelleher & G. Schoepperle eds. 1918) ("To every book its transcript.").

while none could observe what he was doing; or so he thought.⁵⁵ A passer-by noticed the light by which Saint Columba was copying and observed through a window the not-so-saintly act of Columba's copying.⁵⁶ This was reported to Finnen, who claimed this act to be a theft and the copy to be his as he was the owner of the original.⁵⁷ Columba refused to give up the copy and the matter was submitted to the High King, Diarmaid.⁵⁸ The judgment rendered by the king was in favor of Finnen: "To every cow her young cow, that is, her calf, and to every book its transcript. And therefore to to Finnen belongeth the book thou hast written, O Columelle [Columba]."⁵⁹ While some commentators dispute the veracity of this story,⁶⁰ it does reflect a social attitude regarding a property interest in the copying of written works going back at least to 1532.⁶¹

2. The Introduction of the Printing Press in the United Kingdom

The first known moveable-type printing press was invented in 1450 by Johannes Gutenberg.⁶² When William Caxton introduced the printing press in England in 1477,⁶³ the novelty of printing seemed of little import; however, it was soon observed that printing could be of benefit to the political powers, the Church and Crown, as a means to disseminate propaganda.⁶⁴ For his part, Caxton seemed to be motivated by a desire to educate and enlighten his countrymen with literature at a reasonable cost. However, Caxton's motives were not purely altruistic.

55. O'DONNELL, *supra* note 54, at 177.

56. *Id.*

57. *Id.* at 179.

58. *Id.*

59. *Id.*; see also 1 GEORGE H. PUTNAM, BOOKS AND THEIR MAKERS IN THE MIDDLE AGES 46, 81 (1896).

60. See, e.g., Brendan Scott, *Copyright in a Frictionless World: Toward a Rhetoric of Responsibility*, 6 FIRST MONDAY 1, 3 (2001), available at http://firstmonday.org/issues/issue6_9/scott/; AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 42 (1899).

61. O'DONNELL, *supra* note 54, at 177, 179. I believe that this story reflects a much earlier social attitude regarding the copying of written materials as there is quite often at least a grain of truth in stories based upon oral tradition; for example the existence of Troy. However, unlike Troy, which left physical evidence to establish the truth of the matter asserted by Homer, the social attitudes of members of an oral culture leaves no physical evidence resulting in speculation and conjecture regarding such issues.

62. Zack Kertcher & Ainat N. Margalit, *Challenges to Authority, Burdens of Legitimization: The Printing Press and the Internet*, 8 YALE J. L. & TECH. 1, n.77 (citing MIRIAM ELIAV-FELDON, THE PRINTING REVOLUTION 29 (2000)).

63. JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS 10 (1994).

64. HENRY R. PLOMER, WILLIAM CAXTON 85 (1925).

He was, after all, a business man and a marketing genius. He accurately predicted the market by translating numerous texts into English and published English writers such as Geoffrey Chaucer and John Lydgate. Thus, although there may have been a comparatively small percentage of the population who were literate at this time, Caxton exploited this market to its fullest.⁶⁵ While there was some competition for Caxton in the London market within two years after he set up shop,⁶⁶ it posed no threat primarily because his competitors did not print their texts in English.⁶⁷

As the printing novelty grew in popularity, the texts grew in subjects and in language. This expansion was viewed as a threat to the political powers.⁶⁸ Accordingly, in 1504 the Crown started to grant Royal Prerogatives, a license also known as letters patents, for the right to print certain materials.⁶⁹ This power vested in the Crown was based upon an alleged property right held by the Crown to grant privileges to subjects for the exclusive use of Crown property.⁷⁰ Accordingly, certain printers who were in favor with the Crown were granted the exclusive right to print specified materials such as Bibles and service books, statutes and proclamations, law books and almanacs based upon a property right.⁷¹

Although the Royal Prerogative was based on a property right vested in the Crown, it did not apparently vest in the recipient a fee simple absolute. Rather, it seems to be akin to a fee simple conditional; conditioned upon the pleasure of the Crown. For example, in 1553 Queen Mary I took away from the Queen's Printer the privilege to print books of common law and gave it to one Richard Tottel, an established printer of law books.⁷² Consequently, it does not appear that printers in this period held an absolute property right to make copies. As with many property rights, there were exceptions for numerous reasons.

The system of regulation of printed matter by Royal Prerogative assumed a dual track when in 1556 the Stationers' Company was granted its charter.⁷³ The Stationers' Company, a guild established

65. *Id.* at 91-96; RICHARD DEACON, WILLIAM CAXTON 126 (1976).

66. DEACON, *supra* note 65, at 126.

67. *Id.*

68. *See* 1 & 2 Phil. & M., c.3 (1554) (Eng.).

69. FEATHER, *supra* note 63, at 11.

70. *Id.*

71. *Id.* at 11-14; Millar v. Taylor, 98 Eng. Rep. 201, 208-09 (K.B. 1769).

72. FEATHER, *supra* note 63, at 12.

73. E.P. SKONE JAMES ET AL., COPINGER AND SKONE ON COPYRIGHT 4 (13th ed. 1991) [hereinafter COPINGER]; W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 339 (4th ed. 1999); HUGH LADDIE ET AL., THE MODERN LAW OF

around 1357,⁷⁴ desired an exclusive right to print for their members to protect their investment. The Crown saw this granting of an exclusive right as useful to co-opt the Stationers' Company into serving the Crown's interest in censorship.⁷⁵ Under Queen Mary,⁷⁶ the Stationers' Company was granted a virtual monopoly over the printing and bookselling trade.⁷⁷ This was expanded under the reign of Queen Elizabeth I.⁷⁸ In essence, no one was allowed to print or sell a book unless it was properly registered with the Stationers' Company.⁷⁹ To be registered, the book must have been licensed as fit and could not infringe on any other person's right in the copy of the book.⁸⁰ However, no one could register a book if a Royal Prerogative had already granted an exclusive right to print and sell that book.⁸¹

The Stationers' Company oversaw this dual regulatory system of Royal Prerogatives and licensed books until 1590, at which time most of the Royal Prerogatives were transferred to English stock and the shares distributed amongst the members of the Stationers' Company.⁸² This English stock would later become quite valuable and a major concern for the Stationers' Company.⁸³

While little is written regarding the Stationers' Company during the first half of the seventeenth century, it does appear that rights in copy were bought, sold, inherited and used as security during this time thus adding to and reinforcing the belief that the right to copy was a property right.⁸⁴ But social attitudes were changing with respect to a perpetual monopoly right. In 1623, the Monopolies Act was passed limiting, for a term of years, the exclusive right to a monopoly with respect to an invention.⁸⁵ However, letters patents, or grants of privilege regarding

COPYRIGHT AND DESIGN 19 (2d ed. 1995).

74. LADDIE ET AL., *supra* note 73, at 19.

75. FEATHER, *supra* note 63, at 15; CORNISH, *supra* note 73, at 339; LADDIE ET AL., *supra* note 73, at 20-22.

76. Reign Oct. 1, 1553 to Nov. 17, 1558.

77. FEATHER, *supra* note 63, at 15; CORNISH, *supra* note 73, at 339; LADDIE ET AL., *supra* note 73, at 20-22.

78. FEATHER, *supra* note 63, at 15; CORNISH, *supra* note 73, at 339; LADDIE ET AL., *supra* note 73, at 20-22.

79. FEATHER, *supra* note 63, at 15; CORNISH, *supra* note 73, at 339; LADDIE ET AL., *supra* note 73, at 20-22.

80. FEATHER, *supra* note 63, at 15.

81. *Id.*

82. *Id.* at 24-25.

83. *Id.*

84. Indeed, this treatment of rights in copies seems to be traced back as far as 1563. *See id.* at 17-34.

85. 21 Jac., c.3 (1623) (Eng.).

printing, past, present or future, were specifically excluded from the act.⁸⁶ The granting of Royal Prerogatives for the exclusive right to print and disseminate specified written materials continued in the 1600s.⁸⁷

Political difficulties between the Crown and Parliament became the focus of events under the reign of Charles I (1624-1649), culminating in a civil war.⁸⁸ In the battle for power between Charles I and Parliament both sides recognized the power of the press. At this time political pamphlets were being printed and distributed to spread the propaganda of the various factions and incite disruption.⁸⁹ In 1637, the infamous Star Chamber issued a decree confirming the authority of the Stationers' Company to regulate the press in an attempt to stem the flow of unlicensed information.⁹⁰ This is one of the last recorded acts we have regarding the Star Chamber's decrees in matters of printing because the Star Chamber was abolished in 1640.⁹¹

After the Star Chamber was abolished there was chaos in the printing trade. Both sides during the civil war (1642-51) were focusing on control of the press, but the Stationers' Company was ill equipped to enforce censorship let alone alleged property rights during this period.⁹² Parliament, in an attempt to regain some control over the printed word issued an order in January 1642 that the author of a written work must be acknowledged by name before the work could be printed and sold.⁹³ This ordinance was not so much a predecessor to the moral right of attribution as it was an attempt to identify and hold accountable authors of scandalous works.⁹⁴ But, as we are experiencing today with the Internet, the genie was out of the bottle. For over a year the public was experiencing an unregulated press. Inexpensive information, particularly regarding political events, was being disseminated in vast quantities.⁹⁵

In 1643 Parliament again attempted to regulate the press with a licensing act. But there was resistance to the 1643 licensing act. For example, the poet John Milton attempted to dissuade Parliament from

86. *Id.* § X.

87. FEATHER, *supra*, note 63, at 38-39.

88. *Id.*

89. *Id.*

90. *Id.* at 35; Millar, 98 Eng. Rep. at 206-07.

91. 16 Car., c. 10 (1640); COPINGER, *supra* note 73, at 5; Millar, 98 Eng. Rep. at 207; 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 333 (1863) (discussing the Star Chamber cases of Leighton, Lilburne and Prynne.).

92. FEATHER, *supra*, note 63, at 40.

93. *Id.*

94. *Id.*; Millar, 98 Eng. Rep. at 207.

95. ROBERT BIRLEY, PRINTING AND DEMOCRACY 7-21 (1964).

such an act with his work *Areopagitica* written in 1643. As with many earlier government attempts to censor the press, the 1643 licensing act professed to be for the “public service.”⁹⁶ Milton questioned the validity of this by pointing out that it was in the public service to have a press free of licensing requirements.⁹⁷ In Milton’s *Areopagitica*, we see support for the notion of a property interest for the holder of a right to copy and a plea for a press free from prior restraint to encourage the advancement of education in the name of the public good.⁹⁸ While this may not be the first example of the notion of a property right in expressions and their copy, Milton inspired subsequent emissaries of such rights, including John Locke.⁹⁹ Unfortunately, Milton did not inspire Parliament, which did not reverse its licensing act and, indeed, issued another licensing act in 1649.¹⁰⁰

The Commonwealth period (1649-1660) does not appear to have much legal action of note regarding the printing trade. Cromwell’s military rule has been described as being more akin to a dictatorship,¹⁰¹ and does not seem to have been popular nor conducive to the free expression of the printed word. When Cromwell died in 1658, his son, Richard, attempted to carry on as Lord Protector but the rule of Cromwell proved so unpopular that the son of King Charles I, Charles II, was restored to the throne in 1660.¹⁰² This historical period, known as the Restoration, saw the return of licensing laws with regard to printing.¹⁰³ In 1662, another licensing act was passed which, again, required a book to be approved by Crown censors prior to publication and renewed the Stationer’s Company search and seizure powers.¹⁰⁴ However, this attempt to control the printed word does not seem to have been very successful as it appears that only around one half of the political pamphlets distributed during the Restoration period were ever licensed.¹⁰⁵ Still, the licensing act was in force and renewed in 1664.¹⁰⁶

Some interesting case law also begins to develop in the 1660s, specifically with regard to the granting of Royal Prerogatives. In

96. MILTON, *supra* note 50.

97. *Id.*

98. *Id.*

99. See generally BENAMIN RAND, THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE (1927).

100. See Millar, 98 Eng. Rep. at 207.

101. 1 LORD MACAULAY, HISTORY OF ENGLAND 93-97 (Heron 1967).

102. *Id.*

103. *Id.*

104. 14 Car. 2, c.33 (1662) (Eng.).

105. BIRLEY, *supra* note 95, at 21.

106. 16 Car. 2, c. 7 (1664) (Eng.).

Stationers v. Patentees.¹⁰⁷ Parliament held, amongst other things, that the right over the copying and dissemination of a book was a property right especially if the right was granted by Royal Prerogative.¹⁰⁸ In *Stationers v. Seymour*, the court found in favor of the holders of a patent, this time the Stationers' Company, and in so doing asserted a property right.¹⁰⁹

The licensing act lapsed in 1679,¹¹⁰ and it was not renewed until 1685.¹¹¹ During this period the Stationers' Company had no search and seizure powers and no ability to obtain injunctions. Stationers' had only common law rights, which were inadequate.¹¹² Accordingly, the Stationers Company petitioned Parliament to renew the licensing act, ostensibly to protect the public from a licentious press.¹¹³ However, the Stationers Company's paternalistic approach regarding the licentious press was countered by a renewal of Milton's argument for a free press by advocates such as Charles Blount, who wrote *A Just Vindication of Learning and the Liberty of the Press*.¹¹⁴ In this thesis, Blount expressed his belief that there was some property right in the right to copy.¹¹⁵ The battle over the licensing act continued for several more years with the act being renewed in 1685,¹¹⁶ and again in 1692,¹¹⁷ but finally expired in 1694.¹¹⁸ The end of the licensing act caused concern in the printing and bookselling trade. It was difficult to enforce registration of books to determine property rights without a statutory requirement. Hence, the Stationers' Company again lobbied Parliament to reinstate the licensing act, again arguing that it was for the public good but

107. 124 Eng. Rep. 842 (1666).

108. *Id.* at 842-43.

109. 86 Eng. Rep. 865 (1667).

110. FEATHER, *supra* note 63, at 48; COPINGER, *supra* note 73, at 6; CORNISH, *supra* note 73, at 340.

111. 1 Jac. 2, c.17 (1685) (Eng.).

112. COPINGER, *supra* note 73, at 7; CORNISH, *supra* note 73, at 340.

113. FEATHER, *supra*, note 63, at 49.

114. CHARLES BLOUNT, A JUST VINDICATION OF LEARNING AND THE LIBERTY OF THE PRESS, reprinted in BRITISH PHILOSOPHERS AND THEOLOGIANs OF THE 17TH AND 18TH CENTURIES, at 3 (René Wellek ed., Garland Press 1979) (1695). Some have accused Blount of plagiarism from Milton's *Areopagitica*. See MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 32 (1993). Having read both, it is my belief that Blount rephrased the tedious prose, which had little effect on Parliament, to make a coherent and sharp argument that did have some effect on Parliament. Further, Blount did acknowledge Milton. BLOUNT, *supra*, at 4.

115. BLOUNT, *supra* note 114, at 23.

116. 1 Jac. 2, c. 7 (1685) (Eng.)

117. 4 W. & M., c. 24, § 14 (1692) (Eng.).

118. Millar, 98 Eng. Rep. at 209.

undoubtedly the Stationers' Company wanted to protect what it had come to view as, and treat like, a property right.

In 1694 sentiment seems to have been opposed to the renewal despite the Stationers' Company support on the grounds that it was necessary to restore order to the trade. With a law on the books similar to the licensing act the Stationers' Company had the ability to control printing through coercive measures. With no such law, people could print with impunity. John Locke wrote against renewal of the licensing act invoking Milton's *Areopagitica*, however, Locke's prose was much more pragmatic and has been given some credit in persuading Parliament against renewing the licensing act.¹¹⁹

Locke was against the prior restraint aspect of the licensing act arguing that the terms were much too "general and comprehensive."¹²⁰ Additionally, Locke had particularly strong sentiments regarding the granting of Royal Prerogatives creating monopolies in certain books. On that issue he argued against the practice on the basis that competition creates a better quality work at a lower cost but Locke conceded that some limited term of years for the exclusive right to copy ought to be granted.¹²¹ On this subject Locke writes in a prose that is easily understood in any age:

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.¹²²

Thus, while Locke recognized some property right in the right to copy books he clearly thought such rights needed to be limited to living authors for a term of years.¹²³

Undeterred, the Stationers' Company continued to advance the cause of renewal of the licensing act from 1695 until the passage of the Statute of Anne in 1709 but the appeal for a free press to promote education garnered more support than cries to restrict a licentious press. In support of the free press position were authors such as Daniel Defoe

119. ROSE, *supra* note 114, at 44, 47.

120. LORD KING, *THE LIFE AND LETTERS OF JOHN LOCKE* 203 (London: Henry G. Bohn 1858).

121. *Id.*

122. *Id.* at 208.

123. *Id.*

who, in 1704, wrote a paper entitled: *An Essay on the Regulation of the Press* again arguing in favor of a free press and against any attempt to re-enact a prior restraint licensing act.¹²⁴ In this essay, Defoe carried on with the argument that seemed to be working; the need for a free press for the encouragement of learning in the public interest. However, Defoe also addressed the property rights of authors:

[Piracy of expression] is really a most injurious piece of Violence, and a Grievance to all Mankind; for it not only robs their Neighbor of their just Right, but it robs Men of the due Reward of Industry, the Prize of Learning, and the Benefit of their Studies;¹²⁵

...
This is the first Sort of the Press-Piracy, the next is pirating Books in smaller Print, and meaner Paper, in order to sell them lower than the first impression. Thus as soon as a Book is publish'd by the Author, a rascally Fellow buys it, and immediately falls to work upon it, ... to sell... a Book of three Shillings for one Shilling, a Pamphlet of a Shilling, for 2 d. a Six-penny Book in a penny sheet, and the like. This is down-right robbing on the High-way or cutting a Purse

The Law we are upon, effectually suppresses this most villainous Practice, for every Author being oblig'd to set his Name to the Book he writes, has, by this Law, an undoubted exclusive Right to the Property of it. The Clause in the Law is a Patent to the Author, and settles the Propriety of the Work wholly in himself, or in such to whom he shall assign it; and 'tis reasonable it should be so: For if an Author has not the right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that Benefit, 'twould be very hard the Law should pretend to punish him for it.¹²⁶

As with Blount and Locke before him, Defoe recognized a property right in the expression and the making of copies; however, he clarified the author's property right, which could be assigned.

124. Daniel Defoe, *An Essay on the Regulation of the Press* (1704), available at <http://darkwing.uoregon.edu/~rbear/defoe2.html>.

125. *Id.*

126. *Id.* at 20-21.

The Stationers' Company seemed to realize that it was getting nowhere with its old cries for prior restraint censorship based upon the licentious press so it changed strategies and took up the cause advocated by Defoe – to protect the author's property rights.¹²⁷ Several more attempts to get a bill passed through Parliament were made with this change in strategy starting in 1707. The window dressing of protecting the author and advancing learning was added but some attempts were still made to include a prior restraint licensing clause. These attempts were unsuccessful so the licensing clause was dropped and the first copyright statute finally passed in 1709 and with it the concept of a limited property right for a term of years.¹²⁸

III. PHILOSOPHICAL THEORIES ADDRESSING PROPERTY RIGHTS IN EXPRESSIONS AND THEIR REPRODUCTION

Western history suggests a belief in a possessory interest maturing into a property right for creative expressions and reproductions, but why? Is it human nature or culture that defines property? To understand the basis of “mine” relating to expressions, we need to explore the philosophical basis of a property right in general because many copyright cases seem to rely upon philosophical theories for justification of the end result.¹²⁹ This seemingly simple task has confounded and confused philosophers for thousands of years. Fortunately, such confusion has not stopped them from expounding upon the subject providing us with a vast variety of divergent thought on this issue in a cornucopia of material that surely must have subjected its authors to Dante's eighth circle of hell.¹³⁰

The most prominent legal philosophies justifying a property right in the right to reproduce a creation are the natural law, personality, and utilitarian philosophies. While the subsections below examine each philosophical theory in an isolated fashion, the practical reality is that both domestic and international intellectual property law tend to resemble more of a blended than a single malt philosophy.

127. ROSE, *supra* note 114, at 35-36.

128. 8 Ann., c. 19 (1710) (Eng.).

129. See *Elder*, 537 U.S. at 212; *id.* at 245-46 (Breyer, J., dissenting); *Mazer*, 347 U.S. at 206 n.5; *Bleistein*, 188 U.S. at 249-50.

130. The eighth circle of hell is described in Canto XVIII of Dante's *Inferno*. See DANTE, *THE INFERNO* 195 (Elanor Vinton Murray tr., 1920), available at <http://books.google.com/books?id=qnVMJNbFtuMC>.

A. *The Natural Law Theory*

The natural law theory as a justification of property ownership is perhaps the most familiar theory. Locke's fruits-of-their-labor theory appears to be one of the philosophical justifications relied upon by the U.S. Congress in enacting and amending copyright legislation.¹³¹ Additionally, U.S. Supreme Court decisions¹³² and legal scholarship regarding U.S. copyright law indicates a prevalent belief that natural law is the best applicable regarding copyright.¹³³

The natural law theory justifying property rights can be traced back to at least the ancient Greek philosophers. Aristotle described the art of acquiring property as part of household management; with the function of the latter to properly use the former.¹³⁴ Aristotle believed that property given for subsistence was natural, but hoarding was not.¹³⁵ Still, according to Aristotle, private ownership was desirable, given the human nature to quarrel over objects.¹³⁶ In Aristotelian philosophy and in Platonic philosophy, the existence of property rights are taken as a given; thus, the discussion revolves around what property is, rather than the basis for its existence.¹³⁷

Economic justification for creating a property right in the first copyright statute was initially premised on the natural law, Lockean fruits-of-their-labor concept.¹³⁸ The theory rested, in part, on the belief that productivity is increased through ownership and the emotional appeal, as expressed by Blackstone in the *Millar* case, that ownership

131. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1000-02 (1990) (collecting sources); see also L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 931-32 (2003).

132. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991); *Mazer*, 347 U.S. at 207 n.5; *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 264 (1918) (Brandeis, J., dissenting); *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *Wheaton v. Peters*, 33 U.S. 591, 658, 690-91 (1834).

133. Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); see also Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497 (2004).

134. ARISTOTLE, *POLITICS*, ¶ 1256a, § 1, at 19 (Ernest Barker trans., Oxford Univ. Press 1979).

135. *Id.* at 20-23.

136. *Id.* at 48-49.

137. WILLIAM BARRETT, *IRRATIONAL MAN: A STUDY IN EXISTENTIAL PHILOSOPHY* 85-86 (Penguin Books 1958).

138. Linda J. Lacy, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1539 (1989); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305 (Cambridge Univ. Press 1966) (1689).

was just.¹³⁹ However, application of this property theory in its pure form proved to be problematic from both a philosophical as well as a practical standpoint.

Philosophically, Locke did not extend his theories on tangible property to intellectual property. Indeed, he advocated term limits for copyright, a significant departure from tangible property rights.¹⁴⁰ Even with tangible property, Locke believed that property should not be wasted, and that the appropriation of property by one should not harm others in society.¹⁴¹ These conditions also exemplify the fact that Locke's "fruits-of-their-labor" theory was primarily concerned with avoiding what he perceived as the waste of rivalrous resources due to the tragedy of the commons.¹⁴²

From an economic standpoint, the natural law theory has not proven to be sound for intellectual property. Prior to the enactment of the Statute of Anne, the right to copy creative works was treated as a perpetual right as such rights would be treated under the natural law theory. And, as history teaches us, this resulted in less-than-desirable quality and quantity which, in part, stimulated the need for change.¹⁴³

B. *The Personality Theory*

We see historical hints of the personality theory going back to ancient times, e.g., with Martial, the Roman epigramist discussed above.¹⁴⁴ Despite this ancient heritage, some scholars trace this philosophical theory to Immanuel Kant.¹⁴⁵ Under Kant's personality theory, the artist's creation is infused with the artist's personality and, thus, something more than property and deserving protection under the

139. Lacy, *supra* note 138, at 1539-40; Millar, 98 Eng. Rep. at 209.

140. KING, *supra* note 120, at 208.

141. Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 179 (2004).

142. *Id.*

143. *See supra* Part II.C.2.

144. *See supra* Part II.B.1.

145. Lacy, *supra* note 138, at 1541-42; *see* EMANUEL KANT, *Of the Injustice in Counterfeiting Books*, in *ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS* 227, 229-30 (William Richardson trans., 1798), available at <http://books.google.com/books?id=eZYnSEYifGoC>. At the time Kant wrote this essay developing his philosophy relating to intellectual property, his own books were selling better and subject to counterfeiting, a fact that may indicate some material self-interest in the matter. MANFRED KUEHN, *KANT: A BIOGRAPHY* 294-95 (2001); *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 962 (1982); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

law.¹⁴⁶ Kant believed that property rights could and should be allowed under positive law.¹⁴⁷ For Kant, natural law was not applicable to property rights because natural law only applied to innate rights in one's own person, that which internally is "mine."¹⁴⁸ Property, that which externally is "mine," stems from the unilateral act of first acquisition to establish the provisional right that is subsequently ratified by the state, not the state of nature, providing institutional coercive powers.¹⁴⁹ Because creative expressions are created not acquired by the creator, property law did not seem to fit.¹⁵⁰ For Kant, a creative expression was a personality right vested in the author who could assign to an agent the right to sell the expression.¹⁵¹

Kant's personality theory would seem to contrast with his definition of moral law which, according to Kant, is based upon pure reason and universalism, a categorical imperative.¹⁵² As we see in history as well as philosophy and social psychology there is no universal belief as to intellectual property laws. Some believed that intellectual property law reflects natural law, while others believe intellectual property law is utilitarian. Indeed, many states did not even have intellectual property laws until required to do so under the World Trade Organization treaties.¹⁵³ Most intellectual property laws seem to reflect a view that the material interest aspect of intellectual property laws are an economic incentive to create more, i.e., a means to an end, or a hypothetical imperative, according to Kant.¹⁵⁴ The notion that a creative expression is infused with the personality of the creator is reflected in

146. Roeder, *supra* note 145, at 557.

147. See Emanuel Kant, *Groundwork of the Metaphysics of Morals*, in *ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS* 59-60 (William Richardson trans., 1798), available at <http://books.google.com/books?id=eZYn5EYifGoC>; Marcus Verhaegh, *Kant and Property Rights*, 18(3) *J. LIBERTARIAN STUD.* 11 (2004).

148. See *supra* note 147.

149. See *supra* note 147.

150. See *supra* note 147.

151. See *supra* note 147.

152. A categorical imperative is an action that is necessary in itself. It is not based on another interest but is universal and good in and of itself. Contrast this with the hypothetical imperative which allows practical necessity as a possible justification for action. Simply put, in the hypothetical imperative the end justifies the means, while the categorical imperative requires that the means be good in and of themselves. See KANT, *supra* note 147, at 59-60.

153. Robert J. Gutowski, *The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?* 47 *BUFF. L. REV.* 713, 717-18 (1999).

154. KANT, *supra* note 147, at 59.

moral rights found in some, but certainly not all, intellectual property laws.¹⁵⁵

For example, the United States did not include moral rights as part of its statutory copyright protection until 1989 when it was obliged to do so upon the ratification of the Berne Convention.¹⁵⁶ Accordingly, there is little U.S. federal law addressing a personality legal philosophy regarding copyright.¹⁵⁷ However, state law in the United States is not devoid of such protections. In California, the Art Preservation Act recognizes certain rights of personality creators may have in a creation.¹⁵⁸ Further, although “moral rights” were not recognized as such under U.S. federal law prior to the ratification of the Berne Convention, some case law provided protection to an author’s personality interests under various tort and trademark theories.¹⁵⁹ That said, scholarship in the United States has indicated a lack of universality regarding domestic moral rights under a personality theory.¹⁶⁰

C. Utilitarian Philosophy

The utilitarian philosophy views intellectual property laws as a legislatively created means to an end. This theory is reflected in the works of Hegel and Hohfeld.¹⁶¹ Hegel did not view property nor

155. Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 74-75 (2007); Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.’s New Performances Regulations*, 24 B.U. INT’L L.J. 213, 218-20 (2006).

156. Rigamonti, *supra* note 155, at 77.

157. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82-83 (2d Cir. 1995).

158. CAL. CIV. CODE § 987 (West 2008); *see also* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1, 2 (1980) (discussing the Art Preservation Act).

159. *See generally* Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14, 24-25 (2d Cir. 1976); *see also* *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 512 (2d Cir. 1977).

160. *See generally* Clint A. Carpenter, *Stepmother, May I?: Moral Rights, Dastar, and the False Advertising Prong of Lanham Act Section 43(A)*, 63 WASH. & LEE L. REV. 1601, 1607 (2006); Kimberly Y. W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 107 (2006); Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 2 (2005); Sarah Kutner & Holly Rich, *Dirty Dancing: Attributing the Moral Right of Attribution to American Copyright Law: The Work For Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham*, 22 HOFSTRA LAB. & EMP. L.J. 325, 344-50 (2004).

161. *See* GEORG HEGEL, *The Philosophy of Right and Law*, in *THE PHILOSOPHY OF HEGEL* 221, 280-84 (Carl J. Friedrich ed., J.M. Sterret trans., Modern Library 1954) (1821); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20-25 (1913).

intellectual property in terms of natural law.¹⁶² To Hegel, the state of nature was chaotic and lacked freedom.¹⁶³ To achieve freedom, humanity needed civil society.¹⁶⁴ Hegel theorized that freedom is best obtained through intersubjective relations in civil society.¹⁶⁵ Property enhances intersubjective relations through recognition of rights in positive law, not natural law.¹⁶⁶ Simply put, people need recognition by other people. Legal rights in objects allows this recognition.¹⁶⁷ Objects are merely a means to obtain recognition.¹⁶⁸ Accordingly, the rationality of property is derived from the human need for recognition. Civil society may or may not enact intellectual property laws or other types of property laws to meet this need. In essence, Hegel saw various types of property laws as permissive, but not required.¹⁶⁹

The Hohfeldian theory,¹⁷⁰ based on the works of Hume and Bentham, that property rights are a collection of rights that establish the legal relationship between the property holder and the world at large is a further refinement of the utilitarian theory that property is a means to an end.¹⁷¹ Under this theory, copyright is legislatively created to serve the interests of the public, and not just the creator.¹⁷² The public and creator are served through intersubjective relations. The existence of the object is not personified; rather it is utilized for personal or social purposes. Accordingly, the essence of property is merely a human conceived tool fashioned to meet social needs and, thus, cannot be universal.

Again, U.S. intellectual property law provides an example of this philosophical theory. The Constitution itself describes the basic objective as one of “promot[ing] the Progress of Science,”¹⁷³ i.e., knowledge and learning. The Clause exists not to “provide a special private benefit,”¹⁷⁴ but “to stimulate artistic creativity for the general

162. HEGEL, *supra* note 161, at 241-51; Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 454, 457 (2006).

163. HEGEL, *supra* note 161, at 245; *see also* Schroeder, *supra* note 162, at 454.

164. HEGEL, *supra* note 161, at 228.

165. *Id.* at 241-42; *see also* Schroeder, *supra* note 162, at 490-91.

166. HEGEL, *supra* note 161, at 243, 275; *see also* Schroeder, *supra* note 162, at 461, 464.

167. According to Hegel, “the rationality of property does not lie in its satisfaction of wants, but in its abrogation of the mere subjectivity of personality”. HEGEL, *supra* note 161, at 241.

168. *Id.* at 246.

169. *Id.* at 244.

170. Hohfeld, *supra* note 161, at 20-25.

171. Lacy, *supra* note 138, at 1544, 1567.

172. *Id.* at 1540-41.

173. U.S. CONST. art.1, §8, cl. 8.

174. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

public good.”¹⁷⁵ It does so by “motiv[at]ing the creative activity of authors” through “the provision of a special reward.”¹⁷⁶ The “reward” is a means, not an end. And that is why the copyright term is limited. It is limited so that its beneficiaries--the public--“will not be permanently deprived of the fruits of an artist’s labors.”¹⁷⁷ Thus, the utilitarian goal is achieved by natural law, fruits-of-their-labor, permitting authors to reap the rewards of their creative efforts.¹⁷⁸ So, while the individual creator may have other philosophical notions, U.S. copyright law recognizes the property right as a means to an end.

IV. SOCIAL PSYCHOLOGY REGARDING A PROPERTY RIGHT IN CREATIVE EXPRESSIONS AND THEIR REPRODUCTION

Western history evidences a possessory interest claimed by creators to expressions and, to some degree, recognition by Western society to such a claim.¹⁷⁹ This recognized and socially acceptable claim of “mine” is the foundation for the legal property right found in most Western states’ domestic copyright law.¹⁸⁰ Philosophical discourse has attempted to justify property in general, and intellectual property in specific, through both positive and normative analysis. But still we are vexed with a lack of consensus regarding why some states accepted the claim of “mine” regarding expression and their copy as a legal property right, while others did not. Some attempts to answer the difficult question of why states embrace property law are found in social

175. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

176. *Sony*, 464 U.S. at 429.

177. *Stewart v. Abend*, 495 U.S. 207, 228 (1990); *see also* *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 545 (1985) (“[C]opyright is intended to increase and not to impede the harvest of knowledge”); *Sony*, 464 U. S. at 429 (“[L]imited grant” is “intended . . . to allow the public access to the products of [authors’] genius after the limited period of exclusive control has expired”); *Mazer*, 347 U.S. 201, 219 (1954) (“[C]opyright law . . . makes reward to the owner a secondary consideration”) (internal quotation marks omitted).

178. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

179. At around the same time the issue of a property right in intellectual property was being explored in England, similar issues were being addressed in France, *see, e.g.*, GILLIAN DAVIES, *COPYRIGHT AND THE PUBLIC INTEREST 73-95* (IIC Studies in Indus. Prop. & Copyright Law, Vol. 14, 1994); Ginsburg, *supra* note 131 at 995-97, and Venice, Italy, *see* 2 GEORGE H. PUTNAM, *BOOKS AND THEIR MAKERS IN THE MIDDLE AGES 342-44*.

180. ARISTOTLE, *supra* note 134, at 2-3; THOMAS HOBBS, *De Cive*, in *MAN AND CITIZEN* (DE HOMINE AND DE CIVE) 117, 125 (Bernard Gert ed., Hackett Publ’g Co. 1991) (1642); JEAN-JACQUES ROUSSEAU, *DISCOURSE ON THE ORIGIN OF INEQUALITY* 44 (Donald A. Cress trans., Hackett Publ’g Co. 1992) (1755).

psychology. While thought provoking, these purported answers are by nature speculative and ever changing.

If we were to address the concept of “mine” from a social psychological perspective, questions arise such as why some creators believe they have a possessory interest or property right in expressions? Why do copyright holders believe they are entitled to a possessory interest in the dissemination of creative works? And why do some believe that creative works belong in the public domain with little to no possessory interests? To some extent the desire to have a possessory interest in creative works and their copy is based upon economics. This economic incentive may be explained by social psychology as part of a desire to acquire. A great deal of research has been conducted by social psychologists as to the impetus behind the desire to acquire material possessions, but no research seems to have been conducted with regard to the desire to acquire an intangible right such as copyright. Still, the research conducted regarding material possessions may be applicable by analogy to intangibles, such as copyright.

The first social psychology theory that may provide an understanding of this claim of “mine” is biological instinct. A popular early social psychological theory was that humans acquired material objects because of an acquisitive, biological instinct.¹⁸¹ Such an acquisitive instinct would be supported by most economic theories regarding copyright as the ability to economically exploit one’s creative works; theoretically, the economic incentive manifests itself in more productivity.¹⁸² Further, the acquisitive theory in social psychology regarding material possessions is analogous to the ability to economically provide a mechanism to acquire more material possessions.¹⁸³

Dissatisfied with the instinct theory, some social psychologists explored a personality theory behind the concept of “mine.” Thus, a Kantian personification of the object links the person to the object as a form of external and internal expression.¹⁸⁴ Perhaps humans desire to have a possessory interest in creative works due to a need to extend oneself through the creative work. Such an extension of self theory

181. HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS: TO HAVE IS TO BE* 20-26 (1992).

182. *Id.*

183. *Id.*

184. Lacy, *supra* note 138, at 1541-42; see Emanuel Kant, *Of the Injustice in Counterfeiting Books*, in *ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS* 227, 229-30 (William Richardson trans., 1798), available at <http://books.google.com/books?id=eZYn5EYifGoC>.

seems to be supported by the right to attribution contained in many copyright laws.¹⁸⁵ This theory would seem to explain, in part, the historical development of copyright law, especially in the pre-copyright law period. However, such a theory does not sufficiently explain the motivation of disseminators seeking payment for dissemination of copies of material that they claim to be their property. This may be explained as a desire by disseminators to control copies in order to increase their profit, which indirectly leads to an ability to acquire and extend themselves through their material possessions.

Finally, this section examines the social constructionist view of possessions. Under this theory, possessions are a socially shared symbol of rules, beliefs and understandings. While objects are not tied to the person as an extension of personality, they are a means of communicating social perceptions. For example, in some cultures value is placed on individual success that, to some extent, is measured by material wealth. In such cultures the creator may seek and gain fame, thus providing the motive for attribution and dissemination. The disseminators may desire to enhance their ability to acquire and fame to enhance their reputation, leading to more ability to acquire.

A. *Biological Instinct: The Selfish Gene*

To address the theory of biological instinct we must first define what we mean by instinct. Although various definitions of “instinct” exist, for purposes of this paper I consider instinct to mean an unlearned tendency or disposition of a species to respond in a particular manner.¹⁸⁶ Within the framework of this definition of instinct we next ask if there is an acquisitive biological instinct in humans? If so, this must mean that such an instinct is universal and would, therefore, cross cultures because it is unlearned and, hence, not influenced by external factors.

Most social psychologist accept that there is a basic level of instinct to acquire necessities to survive.¹⁸⁷ Some philosophers addressing property law have postulated that the acquisitive instinct goes beyond acquiring necessities amounting to hoarding behavior and explains why humans seek society.¹⁸⁸ This societal inclination is part of humanity’s natural inclination of selfishness and limited generosity as humans gain more of that which they seek in society.¹⁸⁹ So humans in the state of

185. See, e.g., 17 U.S.C § 106A.

186. DITTMAR, *supra* note 181, at 22.

187. *Id.* at 20.

188. *Id.* at 26.

189. DAVID HUME, A TREATISE OF HUMAN NATURE 266-67 (T.H. Green & T.H. Grose eds., Longmans, Green, & Co. 1898) (1874), available at <http://books.google.com/books?id=>

nature have at the very least a natural inclination to acquire the necessities such as food and shelter¹⁹⁰ and perhaps as much as a hoarding instinct or the “selfish gene.”¹⁹¹

The notion that there was an acquisitive instinct to possess more than just the necessities of life was a popular notion in the seventeenth to early twentieth centuries and influenced philosophical debate regarding property. For example, the work of Descartes and Hobbes on this subject influenced Locke and his labor theory of property.¹⁹² This belief that acquisition was instinctual was so widely believed that phrenologists held that acquisitiveness was neurological,¹⁹³ and psychologists accepted the desire to acquire and hoard property as instinctive.¹⁹⁴

If we accede to the instinct theory for the acquisition and hoarding of material possessions we can extend that theory to the desire to possess intangibles. As we have seen above, this extension of possessory interests in intangibles was recognized in ancient Rome.¹⁹⁵ For creators there are several property interests involved such as the primary impulse of possession of the creation itself and the secondary intangible property interests such the right to control the copying and dissemination to obtain the means to acquire.

But what about moral rights or, more specifically, attribution? After the creator has sold her creation, is there any reason why she should have a lingering right to maintain that she was the creator and no one else? For purposes of social psychology, is there an instinct impulse that compels the creator to demand attribution? The primary impulse of ownership is gone as far as the creation itself is concerned, but the secondary impulse of obtaining the means by which to acquire more in the future may still exist. Attribution has a value in reputation, which may lead to further demand for the creator’s works. This would enhance the creator’s ability to exchange her creations for other tangible objects.

BWWjkWuuxsQC.

190. ERNEST BEAGLEHOLE, PROPERTY: A STUDY IN SOCIAL PSYCHOLOGY 17. Additional broad categories of instincts that are generally accepted include those relating to self-maintenance, self-perpetuation, and self-gratification. *Id.* at 156.

191. DITTMAR, *supra* note 181, at 26.

192. See Floyd Webster Rudmin, *The Economic Psychology Of Leon Litwinski*, 11 J. ECON. PSYCH. 307, 311.

193. *Id.* at 314 (noting that the phrenologist Johann Spurzheim considered acquisitiveness to be controlled by the temporal lobe).

194. *Id.*

195. See *supra* Part II.B.1.

Accordingly, there may be a secondary impulse, which serves to explain the desire for attribution.¹⁹⁶

The right to control the copying and dissemination of a creation is the intangible right provided by copyright.¹⁹⁷ If there is any instinct impulse that forms a basis for creators to assert this right it is a secondary impulse. As with attribution, the ability to claim a lingering possessory interest over the creation in terms of who may make copies provides the creator with some control over the quality of the copies, which may serve to protect reputation. It also provides the creator with an income flow to obtain material possessions. This is not to say that the concept of copyright is itself an instinctual concept. Rather, it is what copyright represents in terms of the ability to acquire material possessions that is instinctual.

The pure instinct theory has come under attack and has been supplemented or replaced by social psychologists who believe that environment plays an even greater role in explaining the desire to acquire. Additionally, there is the argument that the biological instinct theory makes social inequalities appear natural and acceptable.¹⁹⁸ While such an argument may be politically correct, it attacks the biological theory with an emotional appeal, not a logical appeal. The fact of the matter is that there are some inherent tendencies in society for inequality given the fact that societies are created by people and people are by nature not equal.¹⁹⁹ While such natural inequalities are no justification for socially created inequalities, an argument based on politically correct rhetoric lays on a foundation liable to shift on a moment's notice.

A better argument is that there is no scientific evidence to establish an instinctual propensity for acquisitive behavior.²⁰⁰ While most social psychologists agree that there is a basic instinct to acquire the necessities of life,²⁰¹ there is a dearth of evidence establishing an instinct to hoard.²⁰² Conversely, there is some social psychological

196. This motivation for attribution to enhance reputation, thus leading to a better ability to acquire, is reflected in history, *see supra* Part II.B, and suggested in the utilitarian philosophy, *see infra* Part III.C.

197. 17 U.S.C. § 106; Berne Convention, *supra* note 3, art. 9.

198. DITTMAR, *supra* note 181, at 21.

199. ARISTOTLE, *supra* note 134, at 11-14; JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 166-167 (G. D. H. Cole trans., J.M. Dent & Sons 1923) (1761); ROUSSAEU, *supra* note 180, at 23; SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 42 (James Strachey trans., W.W. Norton & Co. 1961).

200. DITTMAR, *supra* note 181, at 25-27, 36-39 (discussing genetic reductionism theory).

201. *Id.*, at 26.

202. *Id.*

evidence to establish that culture does play a role in acquisitive behavior.²⁰³ Further, a biological instinct theory for intellectual property fails given the lack of universal behavior. Indeed, intellectual property laws as conceived by Western states were pushed onto developing states through international agreements such as Trade-Related Aspects of Intellectual Property Rights (TRIPS) precisely because of this lack of universalism.²⁰⁴

Finally, there is the argument that a biological instinct to acquire does not explain altruistic actions such as gift giving.²⁰⁵ However, pure altruism has been criticized based upon ulterior motives such as reciprocal altruism,²⁰⁶ social responsibility²⁰⁷ and kin protection.²⁰⁸ Even the more optimistic assessments of altruism, such as social exchanging, external rewards, internal rewards, and empathy,²⁰⁹ show a motivating factor such as a desire to feel good or social recognition.

Accordingly, it seems counterproductive to adhere to a pure instinctual reductionism or cultural reductionism position.²¹⁰ While instinct applied in the context of artistic creators may explain part of the motive to create and disseminate, alternative social psychological theories based upon cultural influences may prove more enlightening.

B. *The Personality Theory: Personification of Creations as Justification For a Property Right in the Reproduction of Creations*

Are our creations and material possessions a mechanism by which we convey to others who we are? There are advocates in the field of social psychology who espouse this theory.²¹¹ Indeed, studies conducted by social psychologists do establish a tie between personal possessions and self esteem, which appears to cross cultural barriers.²¹² This section will explore this personality theory view and its possible application to the property right in copyright.

203. *Id.* at 39.

204. Gutowski, *supra* note 153, at 720.

205. DITTMAR, *supra* note 181, at 26-27.

206. *Id.* at 26; DAVID MYERS, SOCIAL PSYCHOLOGY 476 (7th ed. 2001).

207. MYERS, *supra* note 206, at 477.

208. *Id.* at 479.

209. *Id.* at 471-73.

210. DITTMAR, *supra* note 181, at 37.

211. *Id.* at 43-65; BEAGLEHOLE, *supra* note 190, at 134-37; Marsha L. Richins & Floyd W. Rudmin, *Materialism and Economic Psychology*, 15 J. ECON. PSYCH. 217 (1994).

212. DITTMAR, *supra* note 181, at 43, 47; BEAGLEHOLE, *supra* note 190, at 134-37.

1. Anthropological Studies

There have been numerous cross-cultural²¹³ studies that show a tie between personal property and self esteem.²¹⁴ This can be gleaned from some non-Western religions that evidence a tie between an object and the spirit or part of the self.²¹⁵ For example, in the religions of the Maori, Eskimos, and Palaungs, objects were buried with the deceased because the objects were deemed to be attached to the individual and so would have no value to the community.²¹⁶ Further, it is believed by some that the mixing of labor with land creates a psychological tie between the person and land, similar to the tie between a person and a work of art created by that person.²¹⁷ This tie between an object and a person fulfills an expressive desire as well as that of self-esteem.

2. Tie Between Possessions and Self

Social psychologists and legal philosophers alike, at least in Western cultures, have postulated that material possessions play a profound role in the developments of self.²¹⁸ Under this theory, the psychological significance of possessions transcends utilitarianism.²¹⁹ Possessions fulfill the expressive desire to describe to people who we

213. For purposes of this paper, culture is defined as a multi-layered, shared way of solving dilemmas or processing ideas. Culture is created by myriad factors, including history, religion, mythology, climate and geography of a country. Culture is defined by shared values and beliefs, and forms the fundamental assumptions on which the whole society is built. Michael S. Schell & Charlene Marmer Solomon, *Global Orientation: Intercultural Awareness as a Core Business Capability*, in INTERNATIONAL HUMAN RESOURCES GUIDE § 4:7 (Roger Herod ed., 2008).

214. BEAGLEHOLE, *supra* note 190, at 134; Floyd Webster Rudmin *Cross-Cultural Correlates of the Ownership of Private Property*, 21 SOC. SCI. RESEARCH 57, 71 (1992). However, there are inherent uncertainties in cross-cultural studies, such as ethnographies. Such uncertainties stem from the grouping of informed opinion, unknown bias, difficulties in interpreting correlation studies and ethnographies in holocultural samples provided by 19th and 20th century research when people in some cultures were being dispossessed of property by Western culture, and difficulties arising from West being in an ideological split over communism. *See also* Floyd Rudmin et al., *Gustav Ichheiser in the History of Social Psychology: An Early Phenomenology of Social Attribution*, 26 BRIT. J. SOC. PSYCH. 165, 170-71 (1987).

215. BEAGLEHOLE, *supra* note 190, at 134. The term "self" is defined as what one believes about oneself. DITTMAR, *supra* note 181, at 73.

216. BEAGLEHOLE, *supra* note 190, at 136-37.

217. *Id.* at 146-49.

218. DITTMAR, *supra* note 181, at 56; Anita Bernstein, *How Can a Product be Liable?*, 45 DUKE L.J. 1, 17-18 (1995) (citing Hegel).

219. DITTMAR, *supra* note 181, at 63.

are (external self expression),²²⁰ and to perpetuate our perception of who we believe we are (internal self expression).²²¹

With respect to the creator, if we accept the notion that acquisition of material goods is an extension of self, how is that applicable to copyright? The intangible right of copyright provides at least two avenues of possessory interests with which to fulfill the need of extension of self. The first avenue is that of attribution: to the call the work “mine” allows the creator social recognition, the external self-expression.²²² Additionally, the psychological phenomenon of enhanced self-esteem and internal self-expression is cultivated through the godlike process of creating.²²³ The second avenue is through control of copying and dissemination to obtain the means to acquire additional material possessions for the purpose of expression.²²⁴ These qualities should not be underestimated. Psychological data indicates that self-esteem through both external and internal self-expression is beneficial for psychological well-being.²²⁵

Critics of this personality theory argue that it personifies the object.²²⁶ Still, personality theory is a common theory advanced to justify a property right in copyright premised on moral rights.²²⁷ As discussed above, this theory is based, in part, on the works of Kant²²⁸ and holds that intellectual property works are the “embodiment of personality.”²²⁹

C. Social Constructionists

The social constructionists view the world as perceived in terms of a socially shared, common underlying symbolic order of rules, beliefs,

220. See *id.* at 62-63; Bernstein, *supra* note 218, at 18.

221. See Bernstein, *supra* note 218, at 18.

222. See DITTMAR, *supra* note 181, at 62-63; Bernstein, *supra* note 218, at 18.

223. See Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891, 936-37 (2006); Ellen T. Harris, *Integrity and Improvisation in the Music of Handel*, 8 J. MUSICOLOGY 301, 301-02 (1990).

224. DITTMAR, *supra* note 181, at 43-65; BEAGLEHOLE, *supra* note 190, at 134-37; Richins & Rudmin, *supra* note 211, at 217.

225. See FRANK J. LANDY, *PSYCHOLOGY: THE SCIENCE OF PEOPLE* 485-88 (1984); DAVID KRECH ET AL., *ELEMENTS OF PSYCHOLOGY* 775-89 (3d ed. 1974).

226. Schroeder, *supra* note 162, at 499-500.

227. Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 2 (1988); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO L.J. 287, 288 (1988).

228. Lacy, *supra* note 138, at 1541-42; KANT, *supra* note 145, at 229-30.

229. Lacy, *supra* note 138, at 1541-42.

and understandings.²³⁰ Under this theory, possessions represent socially shared symbols for identity.²³¹ Here, identity incorporates self; our internal concepts of who we are, as well as an external expression of how we want to be perceived by others and how others perceive us. Possessions are utilized for this expression to establish one in a social position.²³² This theory has shades of Hegel's theory of intersubjective relationships in civil society.²³³

Examples of the external communication of social position in possessions may be seen in some literary examples, for instance, in Shakespeare's *Hamlet*, Polonius says to Laertes:

Costly thy habit as thy purse can buy,
But not express'd in fancy; rich, not gaudy:
For the apparel oft proclaims the man;
And they in France of the best rank and station
Are of a most select and generous sheaf in that.²³⁴

The American author, James Agee, writes:

He was driving a several-years-old tan sedan, much the sort of a car a factory worker in a northern city drives²³⁵

The women's and girls' clothes and those of the children are made at home . . . There are standard cloths, cheap cotton prints mainly . . . I am sure that Mrs. Gudger feels intense social and perhaps 'spiritual' distinctions between the kinds of cloth in their meanings In this she differs from and is 'above' the 'normal,' as she is too in the designing of the clothes, and in various symbolic reaches into the materials of a 'higher' class.²³⁶

230. DITTMAR, *supra* note 181, at 69.

231. *Id.* at 66; Richins & Rudmin, *supra* note 211, at 218-20, 226. *But see* DITTMAR, *supra* note 181, at 73 (stating that identity does not equal self: identity is what one expresses to others and what others actually perceive, while self is what one believes about oneself).

232. DITTMAR, *supra* note 181, at 73-9; *see also* Gustav Ichheiser, *Real, Pseudo and Sham Qualities of Personality: An Attempt at a New Classification System*, 9 CHARACTER & PERSONALITY [now J. PERSONALITY] 218, 218-26 (1941).

233. *See supra* Part III.A & B.

234. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 3.

235. JAMES AGEE AND WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN*, 25-26 (1960).

236. *Id.* at 275-76.

These examples reinforce the theory that possessions are important for purposes of cultural identity.

If we apply the social constructionist theory to creators we see the possibility for a tie-in between the desire to own the creation, to call it “mine,” and the culturally symbolic perception of self. This is achieved through possession, attribution, and exchange for other possessions. With respect to actual possession of the creation, the creator would use this possession for purposes of cultural identity.²³⁷ As for copyright issues, such as attribution, again, cultural identity will be achieved. The cultural identity is affected by the ego stimulus of fame which “like a drunkard consumes the house of the soul.”²³⁸

Additionally, attribution assists the creator in her desire for society to perceive her in a certain way based upon her creations. If the creator did not care about external perceptions, attribution would not be a priority. However, we have seen that attribution is very important to many creators, and this leads to the conclusion that there is some desire to express one’s identity to others through the creative process.

With respect to the desire to own a creation or the rights to copy and disseminate the creation for purposes of exchange, once again this property interest provides the creator with the economic mechanism with which to purchase possessions through which she may culturally express herself. Accordingly, the creator has an expressive interest in both possession of the creation as well as the intangible right to make copies.

V. CONCLUSION

Perhaps Justice Holmes provided the best explanation regarding the existence of property, and by extension intellectual property, when he was discussing the notion of property by prescription: “It is in the nature of man’s mind.”²³⁹ Things exist and some things are given the essence of property by man’s mind. But this essence of property regarding intellectual property, specifically copyright, is not one of instinct as it is not universal. Rather, this essence has many faces that are formed by culture and need. There have been many attempts to explain and justify property rights based upon a variety of philosophical and psychological theories but little attempt to do the

237. See, e.g., *id.* at 25-26, 275-76.

238. See *Malcolm Lowry*, in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 876 (Emily Morison Beck ed., 15th ed. 1980).

239. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 476-77 (1897).

same with intellectual property. So is there one theory or philosophy that best explains the essence justification for intellectual property law? No; it exists because enough people for a length of time have called expressions and their reproduction “mine.” Perhaps to some this is no answer, so to them I say sometimes “[t]here ain’t no answer. There ain’t gonna be any answer. There never has never been an answer. That’s the answer.”²⁴⁰

240. FORTUNE’S FORMULA: THE UNTOLD STORY OF THE SCIENTIFIC BETTING SYSTEM THAT BEAT THE CASINOS AND WALL STREET 346 (illustrated ed., 2006) (2006) (attributing the accompanying text to Gertrude Stein).