



# information as property

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**intangible to impractical?**

**History of Information**

April 14 & 16, 2009



# where we stand

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**patents**

**copyrights**

**trademarks**



# so what are we talking about?

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"No good case exists  
for the inequality  
of real and  
intellectual  
property, because no  
good case can exist  
for treating with  
special disfavor the  
work of the spirit  
and the mind"

Helprin

**what *is* property?**

**in what way is information  
property?**



# aspects of property

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"No one shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"

## **what is property?**

rules governing access to material goods

## **kinds of property**

common  
collective  
private

## **properties of private property**

rivalrous  
excludable

## **property rights**

how extensive?  
one right--or a bundle?



Emperor Justinian  
483-565



William Blackstone  
1723-1780

# how acquired?

**occupatio, for property *res nullius***  
--*Codex Justinianus*, 534

**Blackstone's rules for acquisition**

- descent
- purchase
- escheat
- occupancy
- prescription
- forfeiture
- alienation



# property & occupation

## Mr Moore's spleen & 'human ingenuity'

United States Patent  
Golde, et al.

4,438,032  
March 20, 1984

Unique T-lymphocyte line and products derived therefrom

### Abstract

Human T-lymphoblast cell line, Proteinaceous products produced therefrom, messenger RNA and DNA expressing the proteinaceous products. A human T-lymphoblast cell line (Mo) maintained as a continuous culture constitutively produces proteins, including immune interferon, neutrophil migration inhibition factor, granulocyte-macrophage colony-stimulating activity and erythroid-potentiating activity, as well as other proteins produced by T-cells.

Inventors: Golde; David W. (Los Angeles, CA), Quan; Shirley G. (Los Angeles, CA)

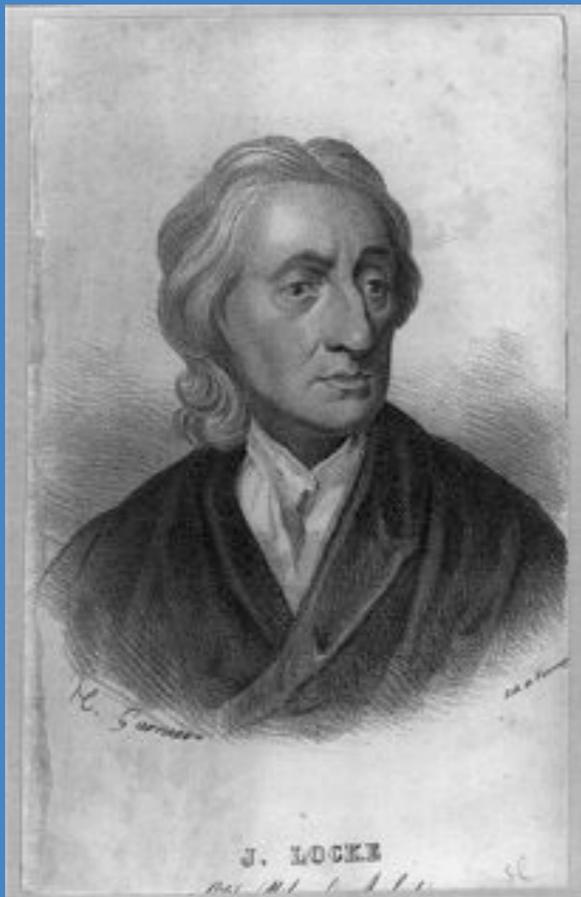
Assignee: The Regents of the University of California (Berkeley, CA)

Appl. No.: 05/456,177

Filed: January 6, 1983



# acquisition



John Locke  
1632-1704

## **Locke's view**

Though the Earth...be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men.

--*Two Treatises of Government*, 1689



## Defoe's view

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Daniel Defoe  
1660?-1731

"A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brains; 'tis as much his own, as his Wife and Children ... [but] these Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity".

--Defoe, *Review*



# Diderot's thoughts

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Denis Diderot  
1713-1784

"What form of wealth *could*  
belong to a man ... if not the  
work of his own thoughts"  
--Denis Diderot



# Locke's limits

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"That any person or company should have patents for the sole printing of ancient authors is very unreasonable ... 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".

--Locke to Edward Clarke, 1682/3



# Johnson vs the nation

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"There seems ... to be in authors a stronger right of property than by occupancy; a metaphysical right, a right, as it were of creation, which should from its nature be perpetual; but the consent of nations is against it, and indeed reason and the interests of learning are against it; for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind, should the proprietor take it into his head to restrain circulation."

--Samuel Johnson



# problems with *iproperty*

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"... no one possesses the less because everyone possesses the whole of it. He who receives an idea from me receives [it] without lessening [me], as he who lights his [candle] at mine receives light without darkening me."

**information**

rivalrous?

excludable?

a public good?



# iproperty for all?

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## **China**

"I transmit rather than create."

--Confucius

## **Islam**

*Shari'a* law against  
"imposture" and "fraud" but not theft

## **Christianity**

"Scientia Donum Dei Est

Unde Vendi non Potest"

--Canon law



# early disagreement

## **Abbot Fennian & St Columba**

560s: dispute over the psalter

"St Columba, sitting up all night . . . , furtively made a copy of abbot Fennian's Psalter. . . the abbot protested . . . and brought an action in detinue . . . for Columba's copy .. King Diarmed .. gave judgement for the abbot, saying *la gache boin a boinin*, . . ."to every cow her calf, and accordingly, to every book its copy."

--Birrell, *Seven Lectures on the Law and History of Copyright*, 1899





# untangling privileges patents & copyrights

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## **regulation**

825: Chinese regulation of almanacs

## **privileges**

1236: Bonafasus' dyeing

1332: Bartholomeo Verde's windmill

## **patents**

1421: Brunelleschi's boat

1441: Eton stained-glass





# Venice's contribution

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**1469: John Speyer, printing patent, Venice**

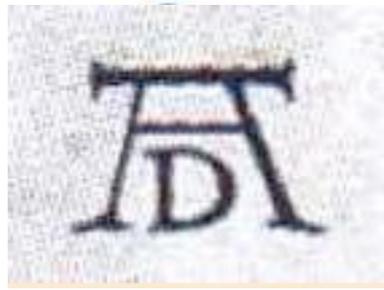
**1474, Venetian patent law**

"whoever makes in this city any new and ingenious device, not previously made within our jurisdiction, is bound to register it at the office of the *Provveditori di Comunas* soon as it has been perfected, so that it will be possible to use and apply it"



**1496: Aldus Manutius' first patent**

**1502: patent on *italic***



"Know ye that we, considering and manifestly perceiving that certain seditious and heretical books rhymes and treatises are daily published and printed by divers scandalous malicious schismatical and heretical persons ... wishing to provide a suitable remedy ..."

## patent privileges

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**1504: William Facques, "King's printer"**

**1504: Guillaume Cop, Paris University**  
signed almanac

**1511: Durer's, patent**

**guild privileges**

Venetian glassblowers

English Stationers' company 1557  
*monopolies on bibles, prayer books,  
almanacs, law books, music, ...*



# patents proper

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All Monopolies and all Commissions, Grants, Licences, Charters and Letters Patent heretofore made or granted or hereafter to be made or granted to any Person or Persons, Bodies Politick or Corporate whatsoever, of, or for the sole Buying, Selling, Making, Working or Using any Thing within this Realm... or of any other Monopolies, or of Power, Liberty or Faculty... are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none effect ... any Declaration before mentioned, shall not extend to any **Letters Patents and Grants of Privilege for the Term of one and Twenty Years, or under, heretofore made of the sole Working or Making of any Manner of new Manufacture within this Realm, to the first true Inventor or Inventors of such Manufactures.**

Statute of Monopolies, England, 1623



# publishing patents

## civil war ends printing privileges

"the old *patentees* and *monopolizers*."

"We must not think to make a staple commodity of all the knowledge in the Land, to mark and licence it like our broad cloath, and our wool packs.

"And though all the winds of doctrine were let loose to play on the earth, so Truth be in the field, we do injuriously by licensing and prohibiting misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"

--John Milton, *Areopagitica*, 1644



John Milton  
1608-1674



# Defoe channels RIAA

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"The law would also put a Stop to a certain sort of Thieving which is now in full practice in England, and which no Law extends to punish, viz, some Printers and Booksellers printing Copies not their own.

"This is really a most injurious piece of Violence, and Grievance to all Mankind ... robs Men of the due Reward of Industry ... robs the Reader, by printing Copies of other Men uncorrect and imperfect, making surreptitious and spurious collections

"...the printing of other Mens Copies...as unjust as lying with their Wives."



# printers' patent to authors' copyright

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## **why copyright in 1710?**

- growing readership  
*the reading nation*
- politics and the public sphere
  - the end of patronage
- 1694/5: end of licensing acts  
*booksellers v printers*



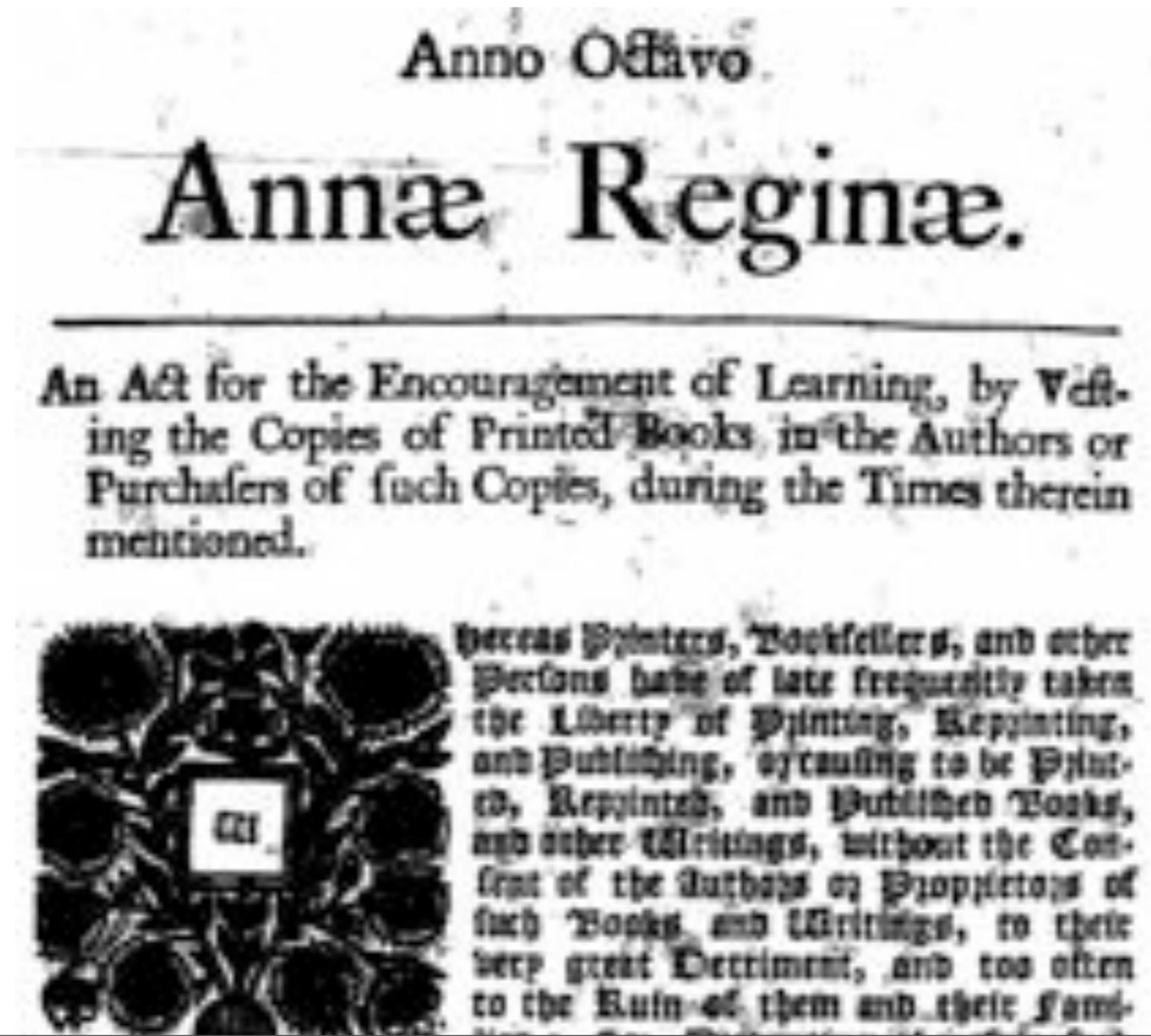
"A new law to give learned men property they had not had before."

--Attorney General Thurlow

whereas ...

"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."

--Defoe, *Essay on the Regulation of the Press*





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## **1710: statute of Anne**

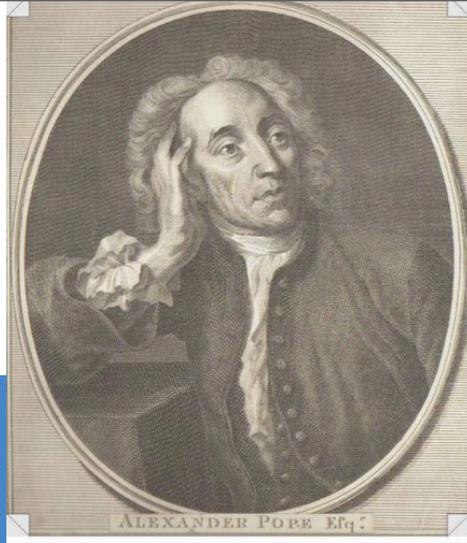
"any books or books already printed ....

"any book ... not printed ...

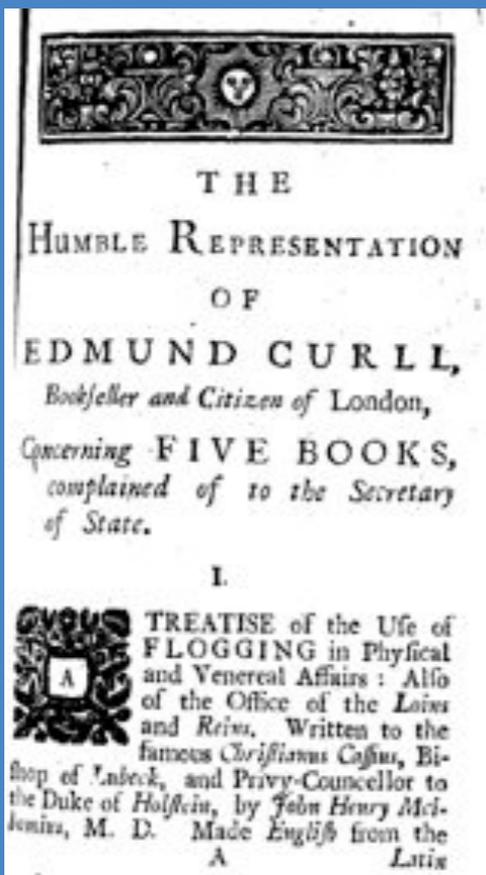
"nothing ... unless the title ... be ...

"if any Bookseller ... sell or expose to  
sell any book ...

"provided that nine copies ..."



Alexander Pope  
1688–1744



# not quite right

## 1741: Pope v. Curl

"it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them."

Lord Chancellor Hardwicke



# defined by style

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"Proper Words  
in proper  
places makes  
the true  
Definition of  
Style"

Swift, 1721

"Manner of  
writing with  
regard to  
language"

Johnson,  
*Dictionary*

"style and sentiment are the essentials  
of literary composition. These alone  
constitute its identity. The paper and  
print are merely accidents, which serve  
as vehicles to convey that style and  
sentiment to a distance. Every duplicate  
therefore of a work, .... if it conveys  
the same style and sentiment, is the same  
identical work ... a duplicate of a  
mechanical engine is, at best, but a  
resemblance"

-Blackstone



# not quite right

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## **1774 Donaldson v Becket**

booksellers defeated

"a metaphysical  
right ... [or]  
consent of the  
nation"

--Johnson

"learning would be locked up in the  
hands of the Tonsons and the Lintots  
of the age, till the public become as  
much their slaves, as their own  
hackney compilers are"

--Lord Camden



## meanwhile ...

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### **at the patent office**

US patent law, 1790  
revised, 1836

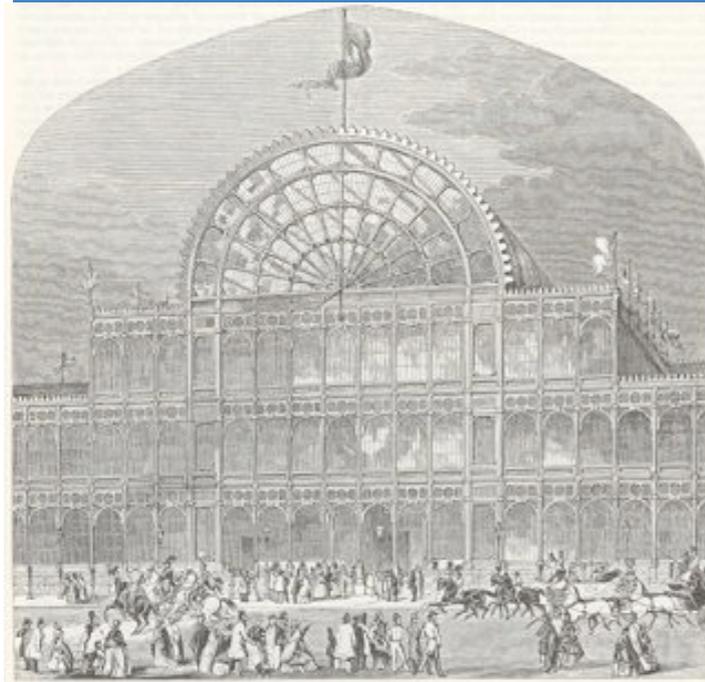
UK Statute of Monopolies, 1623  
Patent Law Amendment Act, 1852  
Patent reform, 1883

France 1791, 1800, 1844

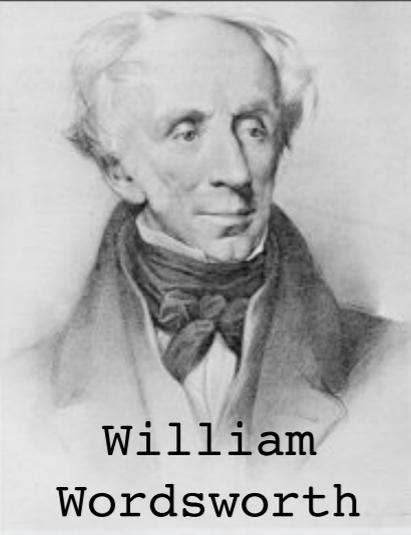
### **patent confusion**

"SDG" [sans garantie du gouvernement]

### **patent resistance**



Crystal Palace  
1852



William  
Wordsworth  
1770-1850

# copyright boundaries



Charles Dickens  
1812-1870

## international trade and © concerns

"vile French pirates"  
--William Wordsworth

## 1842 UK copyright law

containing a provision for making  
reciprocal copyright arrangements



Ernest Renan  
1823-1892



Rev. Isaac Funk  
1839-1912

## US resistance

*American Notes for  
General Circulation*  
--Charles Dickens, 1842

*Life of Jesus*  
--Ernst Renan, 1863



# international agreement

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Victor Hugo  
1802-1885

## **1858 Brussels congress**

## **1886 Berne convention**

Germany, Belgium, Spain, France, Haiti, Italy,  
Switzerland, UK, Tunisia

## **intermediate revisions**

newspapers, translations, performance,  
mechanical reproduction, cinema (1908)  
oral works, moral rights (1928)

## **1988 US joins Berne convention**

no © notice required  
no registration required



## the march of ©

"The United States takes the view that anything made by man, under the sun, can be patented. And they have granted patents for business methods, mainly computer business methods. But as far as I can see, it would cover a new and improved method of stacking oranges on a barrel"

**DRM: Lessig's code vs code**  
**DMCA, 1995; Bono Act, 1998**  
**open source and copyright**  
**software copyright and patents**  
copyright, first sale, and EULAs

"Every change .. tend[s] to advance the producer interest against the consumer" --St Clair, *Reading Nation*

"The course of twentieth century American copyright law ... has been a story of the steady strengthening of the proprietary rights of intellectual property owners at the expense of access and interest" --Carla Hesse, "The Rise of Intellectual Property"



# the missing leg?

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## **trademark law**

France, 1803, 1824, 1857

California, 1862

United States, 1870, 1881, 1906, 1920, 1946

United Kingdom, 1862, 1876, 1905, 1938

### **Pernod Sells Wild Turkey Brand to Gruppo Campari**

By DAVID JOLLY  
Published: April 8, 2009

### **InBev Looks to Expand Budweiser's Reach**

By MARK LANDLER  
Published: July 15, 2008

FRANKFURT — Now that a Belgian brewer has conquered the King of Beers, it wants to take Budweiser global.



# legal determinism

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"The Congress shall have power ...

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"

**1870: revision of patent office**  
registration of trademarks and the "second industrial revolution"

**1879: the trademark cases**  
is it intellectual?  
is it an invention?  
is it progressive?

**-- USSC: NO**

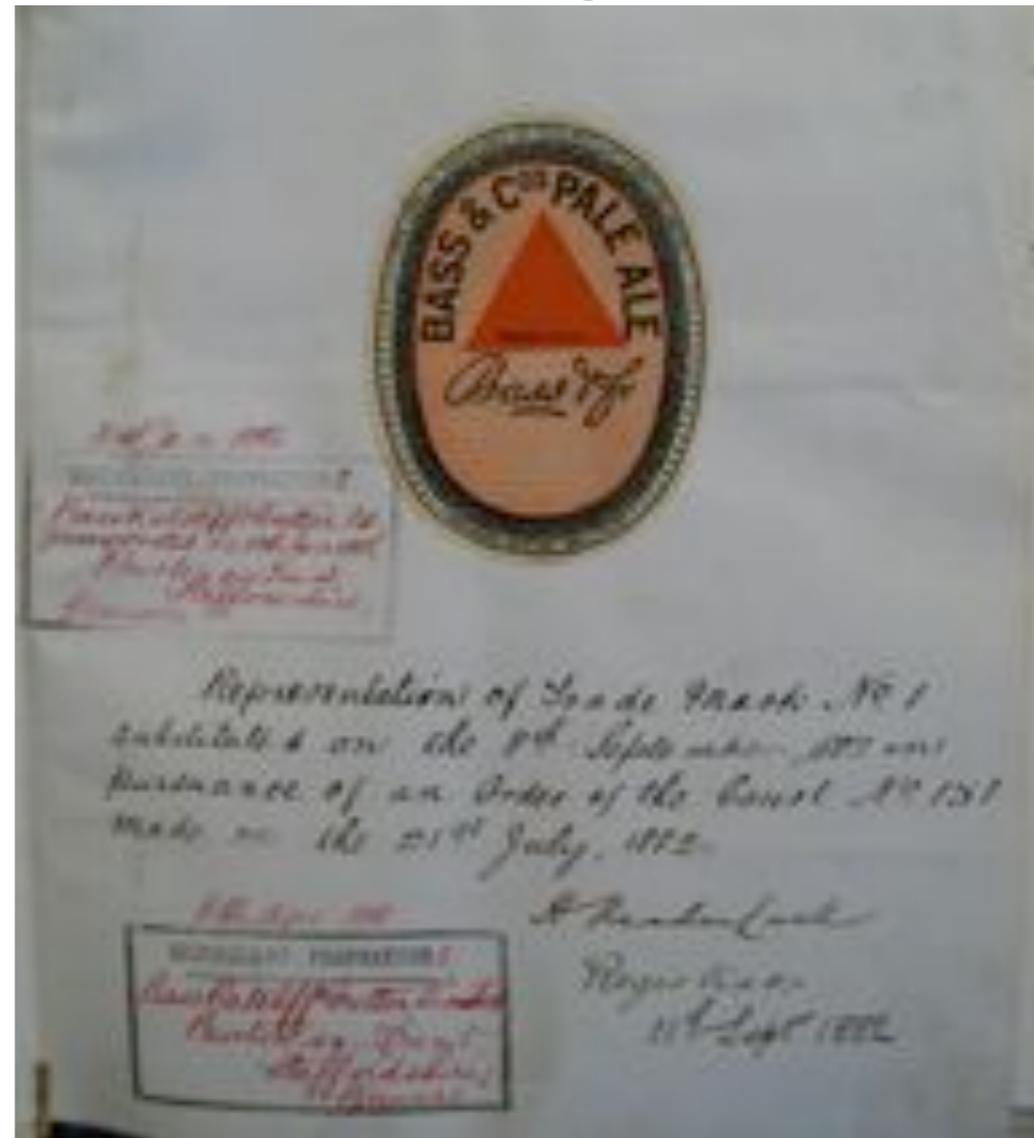
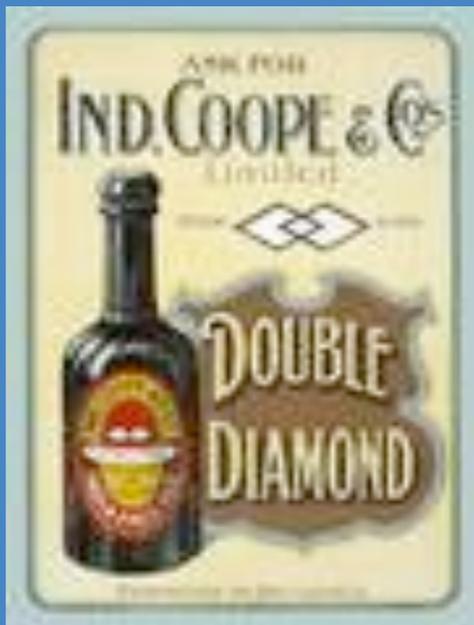
**1881-1906:** foreign treaty and indian tribes

**1906: commerce clause**



# restrictive practices?

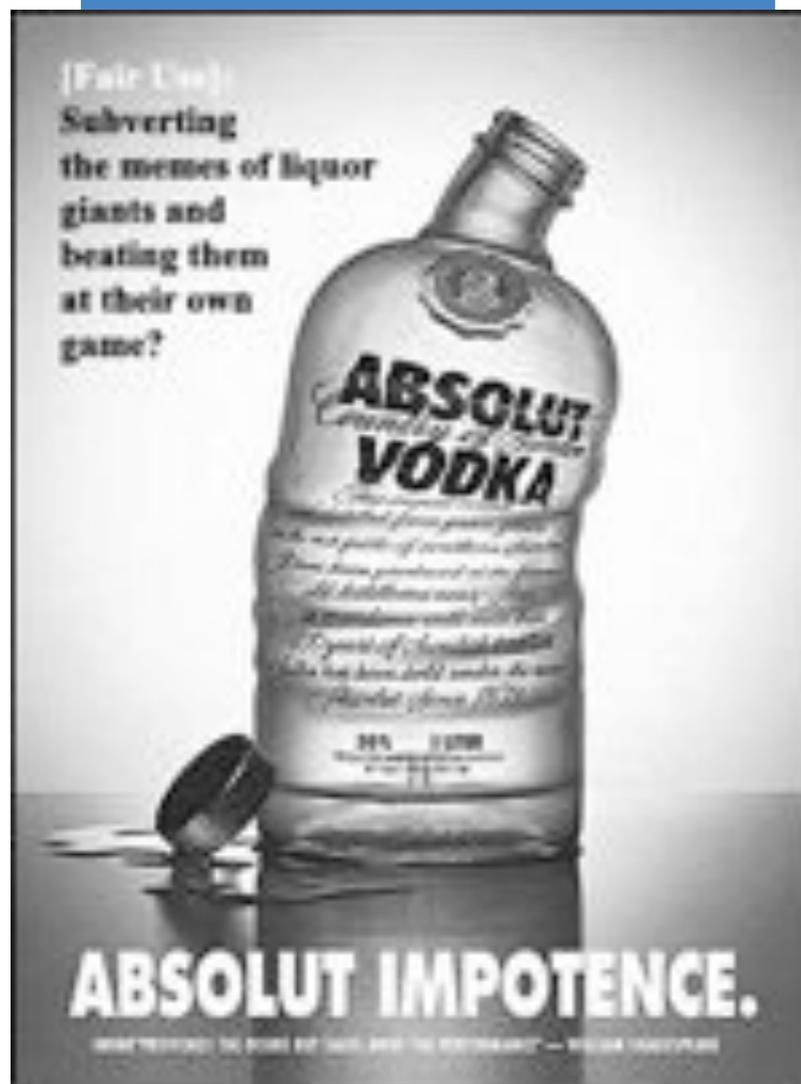
**Bass** "will make no objection ..."





# culture jamming

## and jamming culture jamming





# going global

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## **Bass in Boston**

### **Wendell & Co, Distributors, 1894**

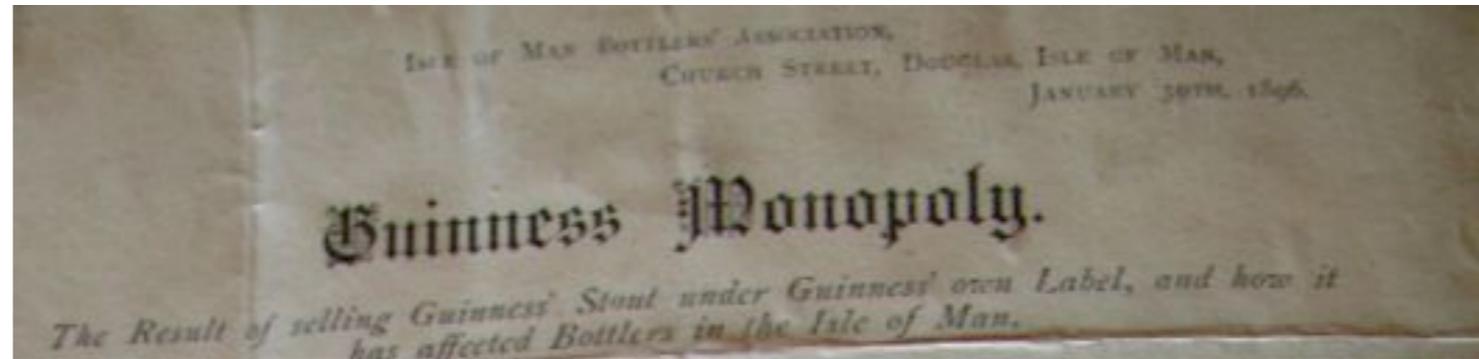
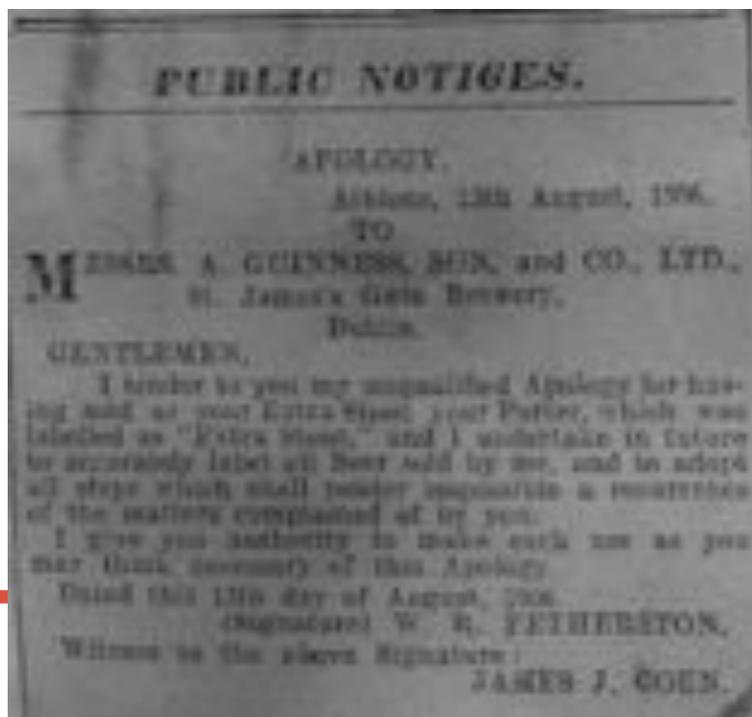
16 Feb: "engaged a reliable man to act as an amateur detective and his Agent is working up the case"

1 Sept: "Employed Detective, \$7 a day and expenses"

18 Sept: "'Jim Stewart" rented desk in Wendell's Place"

23 Sept: "Searched office but found no letters ... feel sure secrets in Warehouse and must find means to get into it"

22 Feb, 1885, Wendell gets 5 months hard labour



# supply-chain struggles



## bottlers, printers, retailers Guinness & San Francisco, 1899

Star Bottling Works	Stanyan & Waller sts	Schomaker bros	4th & Bryant
McGraw bros	401 or 418 Devisadero St	Alper Bros	5th & Clara
Schults, H.A.	Post & Larkin Sts	Wolking & Co, H.	565 Fourth St
Schranz & Waizman	601 Baker st, cor McAllister	Serris, J.	4th & Howard
Schroder, H	220 California St	Pontag	138 Fifth St
Francis, S.	430 6th St	Bennett & Witmer	Cor. Ellis & Stockton Sts
Puvogal, Jno	36 6th St	E&G Gold Rule Bazar	Market Bet 4th & 5th st
Zanganelli	6 Mason St	Edlef Atzroth	336 Fift Street
Grocer, Name unkwn	267-269 Third St	Riechers, F.W.	601 Larkin St
ditto	121 Third Street	Family Liquor Store	871 Larkin St
Tweedie, Daniel	408 Eight St	Shamrock Saloon	923 Howard
Burnell	408 Battery	Miesner, Peter	Cor. Ellis and Taylor St
		Kruse, Fred	1120 Third St



# more chains

## Colman in New York

"excitement among grocers"



### MUSTARD POTTS.

**The Bull's Head Label - Excitement Among the Grocers - Meeting of the Board of Trade - Wholesale Law suits by an English Firm.**

A special meeting of the Importers and Grocers' Board of Trade was held yesterday afternoon at the rooms of the Board, for the purpose of taking action in reference to a large number of suits that have been brought against members of the board by J. & J. COLMAN, of England, through their agents and attorneys, YOUNG & LOCKYER, to receive damages arising from alleged infringements of trade-marks. F. H. YOUNG was called to the chair, and S. H. KERRY acted secretary. The Chairman read the following papers, among which the object for which the meeting had been called:

About four months since we noticed in the newspapers that an international English firm had begun an action at law against HAZELL, CANTON, a label manufacturer, doing business in New York, for manufacturing mustard pots bearing a bull's head, which is among their marks as a trade-mark. During the progress of the suit a report was published that the attorneys for the aforesaid firm had prepared a large number of suits against manufacturers, dealers and grocers for selling pots of mustard bearing a bull's head, which suits would be prosecuted if the action against YOUNG was decided in their favor. As the device of a bull's head had been in use in this country for many years in connection with the manufacture



# the rise of intangible assets

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# the power of brands

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**computer?**

**OS?**

**processor?**

**hard drive?**

2000

6 hard drive companies

196 million disks

0 profit

Dell: 7%

Microsoft: 31%

Intel: 13%



# TM -- why worry?

**Linux.com**  
The Enterprise Linux Resource  
<http://enterprise.linux.com/>

**Title** Behind the Debian and Mozilla dispute over use of Firefox  
**Date** 2006.10.10 15:01  
**Author** StoneLion  
**Topic**  
<http://enterprise.linux.com/article.pl?sid=06/10/09/1434251>

Debian plans to release its newest version, Etch, in December, and wants Mozilla's Firefox Web browser to be part of the distribution. Mozilla, however, [told](#) Debian it couldn't release the software without its accompanying artwork. Now a legal expert says that the existing distinctions between copyright and trademark laws should have prevented this from becoming an issue in the first place.

Larry Rosen, an attorney specializing in intellectual property protection and former general counsel for the Open Source Initiative, told NewsForge, "An open source copyright license can permit you to make any changes you want to certain software, or to make no changes at all. But a trademark license may also be needed before you can apply the original author's trademarks to those changed or original works.

"I don't think that this should be a debate. We merely have to understand that copyright and trademark involve entirely different rights. A license to one of those isn't necessarily a license to the other."

Earlier this year, Mike Connor, a developer with Mozilla, [submitted a bug report](#) to Debian that stated that if Debian intend to call its browser Firefox, it would be required to include Firefox graphics as well, or should plan to find a new name for the browser.



**dilution**

**perpetual property**  
**Philips v Remington**

**which side are you on?**

2000

- April: Rock band Metallica sues Napster for copyright infringement. Yale and Indiana University ban service from campus.
- Dec.: Napster sues an online clothes retailer for allegedly using its cat-like logo without permission on T-shirts and hats for sale.

**Klein v. Economist**



# reputation

"New products associated with old names. This ensures the prospect of a certain quality of the product. The old name is the old reputation."

"Doctors, lawyers, and barbers have high school diplomas, the jurists have a law degree, the Ph.D., the scientists have a doctorate, ... the market mechanism itself creates its own reputation and its own 'names'".

--George Akerlof, "The Market for Lemons: Quality, Uncertainty, and the Market Mechanism," 1970



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