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Re-imagining IP Justifications

# From abstract IP towards digital artefacts

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# IP justifications

## Utilitarian

IPRs are a form of government regulation.

## Deontological

IPRs are primarily a requirement of natural law and justice.

# Utilitarian justifications

# Deontological justifications

**... both talk about a good that is allocated to an owner**

- “take a public good that is naturally nonrivalrous and make it artificially scarce” (Lemley)
- “The incorporeal property ... is independent from the property in the material object.” (Art. L. 111-3 French Code de la propriété intellectuelle)

- Re-imagine the subject matter of IPRs (the “ontology” of IP law)
  - and thus the justification of IPRs/IP laws
- Is there an alternative to the current paradigm of the IP object?
  - Yes, an action and artefact-based understanding: IPRs are exclusive rights to copy and otherwise use certain, reproducible artefacts.

- Regulation of technologies to reproduce artefacts in early modern times
  - Feudal privileges to print books etc.
  - “Copyright”: a right to copy, a right in a copy
    - Sir Joseph Yates in Millar v Taylor 1769:  
The proposition of property rights in a “set of ideas” is “very difficult, or rather quite wild.”

- Economic regulation of technologies to reproduce artefacts in the 21<sup>st</sup> century
  - Legislative enactment of property rights in a liberal democracy under the rule of law
  - But IPRs still function as a privilege to reproduce certain artefacts
    - The book/copy of the 21<sup>st</sup> century:
      - **Data**, defined as “**any digital representation** of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording;” (Art. 2(1) EU [Data Governance Act](#), Art. 2(1) EU [Data Act Proposal](#))
      - But see [UK National Data Strategy 2020](#): “Data is notoriously hard to define ... When we refer to data, we mean **information about people, things and systems.**”

- Implications of an activity and artefact-based understanding of IPRs
- Change of perspective: from the allocation of fictitious objects to the real-world regulation of
  - Innovative/entrepreneurial activity
  - vis-à-vis certain resources and technologies
- Normative implications for the regulation of the data economy
  - From data protection to data access/sharing

