

University of Cambridge, Centre for Intellectual Property and Information Law
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The destruction of an artistic work as an infringement of moral rights

A test case for the ontology of copyright

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- Sec. 14 [German Copyright Act](#)

The author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.

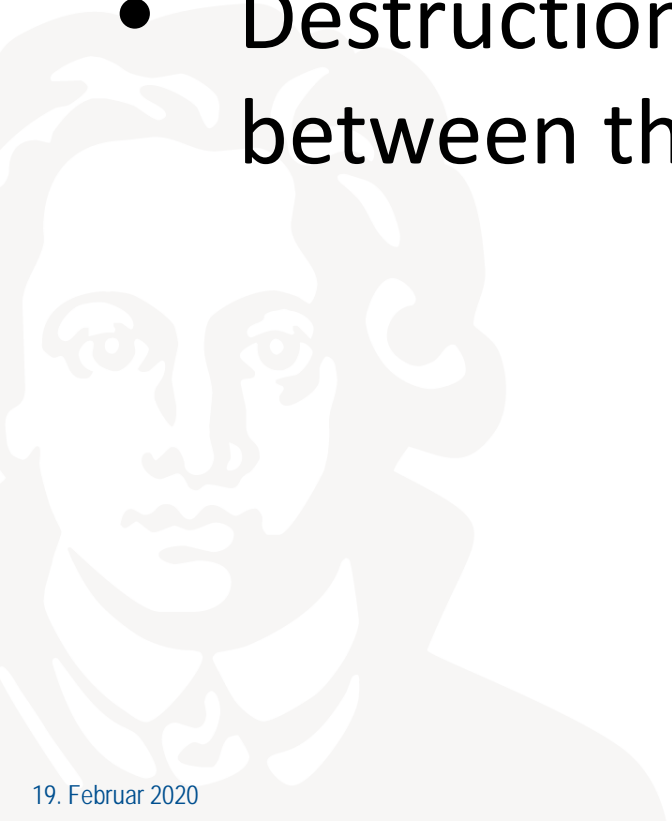
- BGH 21.2.2019, HHole (for Mannheim)
- “Derogatory treatment” covers the destruction of the work



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- Destruction cuts the intellectual bond between the author and the work



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- [BGH 21.2.2019, HHole \(for Mannheim\)](#)
- “Derogatory treatment” covers destruction of the work
- Destruction cuts the intellectual bond between the author and the work
- Sec. 14 allows for the necessary balance between the fundamental rights of the property owner and of the author (freedom of the arts)

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- 1st point of critique: The destruction of an object cannot be properly called its “treatment”
 - Cf. Sec. 80(2)(a) CDPA: “‘treatment’ of a work means any addition to, deletion from or alteration to or adaptation of the work, other than (i) a translation of a literary or dramatic work, or (ii) an arrangement or transcription of a musical work involving no more than a change of key or register”

- 2nd point of critique: What is “treated”?
 - A work exemplar (token)
 - But tangible/corporeal exemplars/copies are not the subject matter of © including moral rights
 - The abstract work (type)
 - But you cannot treat/destroy an abstract object by destroying one token

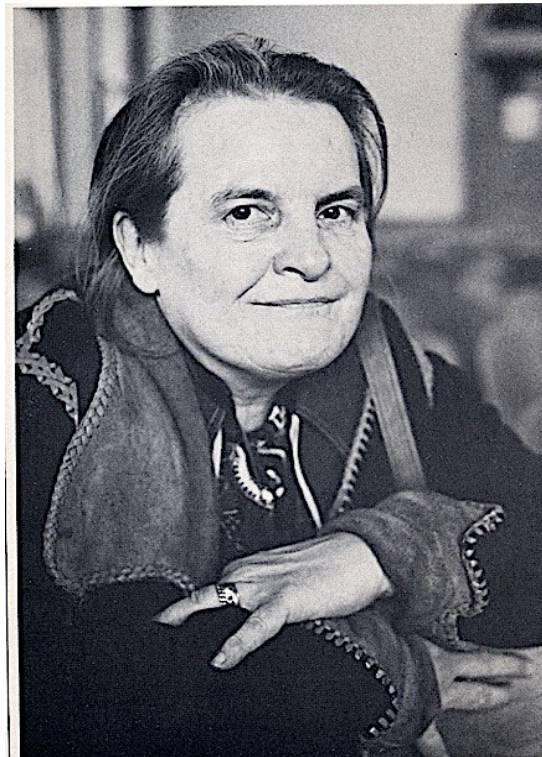
- Thus, an alternative understanding of “the work” is required!
 - [Kant](#) 1785 and [Drassinower](#) 2015:
 - The subject matter of © is not a commodity (opus/IP), but a **communicative act** (opera)
 - Also BGH 2019 HHole (for Mannheim):
 - Sec. 14 German CA protects the intellectual and personal interest of the author to influence the cultural and societal communication process and to live on in the work.

- Application of this theory: Does the destruction of an exemplar distort the communicative integrity of “the” work?
 - Useful distinction according to Nelson Goodman
 - Allographic works (music, writings)
 - Autographic works (paintings)
 - Architecture in particular
 - The communicative impact of the autographic exemplar at stake
 - The interests of the owner of the exemplar
- Result in most cases, including HHole: no!

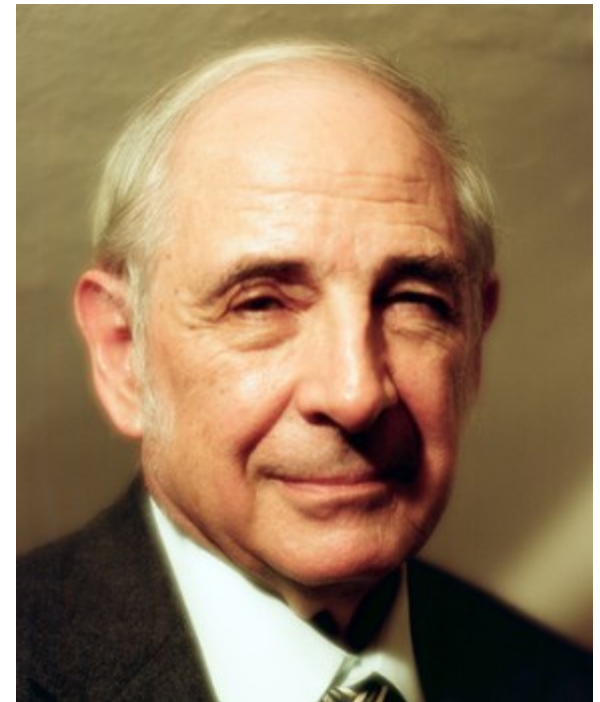
- But questions remain:
 - What is it that communicates: the abstract work, the exemplar, both, or the author?
 - What does it mean that a text communicates?
- An alternative ontology of the © subject matter:
 - A. Peukert, A Critique of the Ontology of Intellectual Property Law, forthcoming 2020/2021, CUP



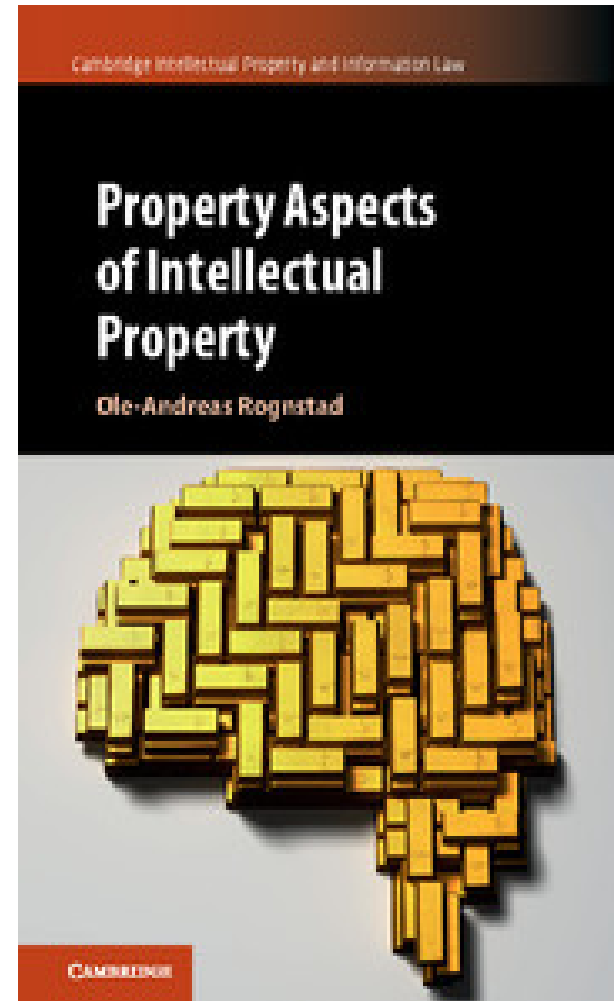
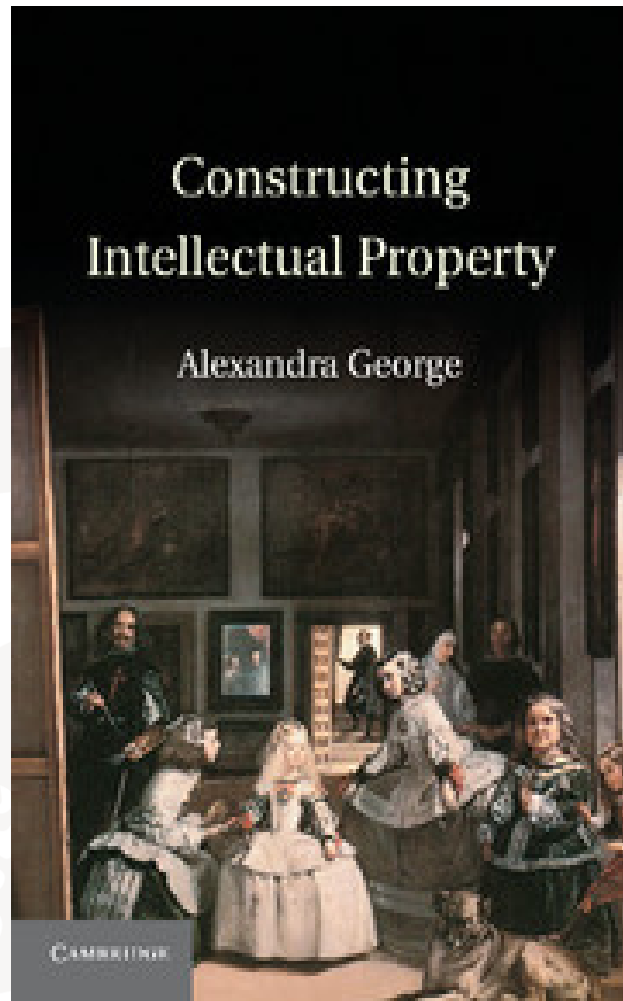
Alf Ross



Elizabeth Anscombe



John R. Searle



“There is only one world and one cognition.”
(Alf Ross)





Brute facts
- tangibles/corporeals
- human activities



Institutional facts

Brute facts

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Institutional facts

- © law

Brute facts

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Institutional facts

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- © **subject matter?**

Brute facts

- tangibles/corporeals

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- The ontological status of the copyrightable “work”
 - The dominant, idealist “IP” ontology
 - Not a brute fact, but an abstract object (type)
 - Institutional fact, which only emerged in the 18th century
 - A realist artefact and activity-based ontology
 - Work is a general term for a multiplicity of sufficiently similar artefacts
 - The Master Artefact and Secondary Artefacts

- Copyright is thus an exclusive right to authorize or prohibit
 - certain uses of the Master Artefact
 - and the production and further use of Secondary Artefacts (including personal performances)

- Is this a useful theory?
 - Descriptive/explanatory power, e.g.
 - The operation of IP law in practice, including in the case HHole (for Mannheim)
 - Physicalist (UK ©) compared to idealist (GER *Urheberrecht*) jurisdictions

- Is this a useful theory?
 - Normative implications: fundamental change in perspective:
 - From property in fictional objects to **privileges to act** regarding certain artefacts
 - Consequence: Elevate the justification requirements
 - E.g. adaptations