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The scope of property: why does Kant reject the concept of intellectual property?

Abstract

Although both Fichte and Kant are often included among the intellectual property forerunners, there are at least three outstanding differences between the former and the latter:

1. Fichte bases copyright on the individual originality in the form of expression; Kant does not mention originality at all;
2. Fichte equates copyright with private property; Kant rejects the very possibility of founding the authors' right on a *ius reale*;
3. Fichte believes that copyright violators deserve the same harsh punishment of thieves. According to Kant, the unauthorized printer should simply compensate all the damages he caused to the author or to his authorized publisher.

While Fichte is an intellectual property endorser, Kant is an “enlightened” conservative who supports the Roman law tradition, according to which property applies only to material, touchable things (*res quae tangi possunt*). He accepts the copyright principle, according to which authors are entitled to decide how to publish their works, but describes it as rights concerning only the relationships among persons. The rights of the publishers, besides, are justified only as long as they help authors to reach the public.

Kant's copyright is not property; it has the function to protect authors' freedom to share their texts as they prefer, and to make it easier to communicate them to the public. And, if it has to be seen as a means to foster the publication and the diffusion of texts, its rules should also depend on the prevailing media technology.

Kant mantained almost the same copyright theory both in his 1785 essay *Von der Unrechtmäßigkeit des Büchernachdrucks* and in the *Metaphysik der Sitten* (1797). In 1797, however, Kant bases property on a *possessio noumenon* that is different, as a juridical, rational possession, from the physical possession. Why does Kant reject the very concept of an intellectual property while advocating an intellectual theory of property? Answering to such a question could help us the provide a general understanding of the functions and the limits of property in Kant's thought.

1. Introduction

Just as I was writing this paper, on the 9th August 2008, The Pirate Bay, a major Swedish torrent site, was blocked in Italy after an urgent decree from a deputy public prosecutor. Although the blockade that should make the Pirate Bay's IPs and domain name inaccessible to Italian users is not very effective, it is *prima facie* legal. A recent Italian statute allows to order internet service

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providers to block all the sites that do not comply with Italian laws.
The Pirate Bay reacted by stating that Italy is a country that has a fascist background, a fascist leader and a fascist censorship.
Some of the torrents[2] hosted by The Pirate Bay do point to copyrighted materials that are shared among its users without being actually present on the site. However, some other torrents point, for instance, to documents on Silvio Berlusconi that, in Italy, are hardly able to reach the mainstream *media*.
If we conceive copyright as intellectual property, any attempt to justify its infringement by appealing to freedom of speech would appear specious, even when copyright is *de facto* used to exert censorship. Kant, however, produced a justification of authors' right that does not rely on intellectual property, but on the meaning and the function of both authors and publishers in the public use of reason. Old and neglected as it may seem, such a theory links economic and political justice in an original, refreshing way that can help us to find a mediation between them.

2. Kant: authors right as a personal right

In 1785 Immanuel Kant wrote a short essay, *Von der Unrechtmäßigkeit des Büchernachdrucks*, which is sometimes translated as *Of the injustice of counterfeiting books;*[3] almost the same ideas are repeated in the *Rechtslehre*, § 31, II, contained in *Die Metaphysik der Sitten* (1797). As most scholars, in the field of humanities, take intellectual property for granted, the mistaken representation of Kant like an intellectual property forerunner is still a commonplace.[4]
In Kant's age, the word *Nachdruck*,[5] sometimes translated as “counterfeiting” o “piracy”, had the proper and less criminal meaning of "reprinting". The United Kingdom had passed in 1710 the first European copyright bill, the Statute of Anne,[6] which received a definitive interpretation only in 1774, in the well-known judgment on Donaldson vs. Beckett[7] settled by the House of Lords. In Germany, on the contrary, the continuation of the early modern privilege[8]

2 The torrents contain only the metadata and the tracker that help users to share a file among them, by means of dedicated applications (Azureus, Ktorremt etc.) that run on theirs computers.
3 The Cambridge University site *Primary Sources on copyright (1450-1900)* <http://www.copyrighthistory.org/htdocs/index.html> translates it, more accurately, as "On the Injustice of Reprinting Books".
4 See for instance M. Borghi, *Writing Practices in the Privilege - and Intellectual Property - Systems*, Social Science Research Network Working Paper Series, 2003 <http://ssrn.com/abstract=1031639>.
5 Check its definition <http://germazope.uni-trier.de/Projects/WBB/woerterbuecher/dwb/wbgui?lemid=GN00274> in J. Grimm and W. Grimm. *Deutsches Wörterbuch, Lepzig*: S. Hirzel, 1854-1960 , now at <http://germa83.uni-trier.de/DWB/welcome.htm>.
6 The Statute copyright was no longer a grant from the crown: it was recognized as an original right of the author. It was limited in time, with a 21 years term for all works already in print at the time of its enactment and a 14 years term for all works published subsequently.
7 See *Donaldson v. Beckett. Proceedings in the Lords on the Question of Literary Property,* February 4 through February 22, 1774, in K.-E, Tallmo, *The History of Copyright: A Critical Overview With Source Texts in Five Languages* at <http://www.copyrighthistory.com/donaldson.html>
8 The major difference between copyright and privilege is that the former is a universal right, while the latter depends on a grant from the Crown. The former, in other words, is due to

regime and the multitude of states and jurisdictions facilitated the practice of the *Nachdruck* by further printers after the first publication. And it was highly controversial whether such a practice were rightful or should be considered piracy.

The debate on the *Nachdruck* was not restricted to publishers and lawyers: as the Enlightenment intellectuals were aware of the political importance of disseminating knowledge, major thinkers like Lessing, Kant, Fichte, Diderot, Condorcet took part to it. Kant's ideas, in particular, are worth of a closer scrutiny because he, while arguing against the *Nachdruck*, rejects the concept of intellectual property, and recognizes some rights to the public in general. And nobody of them used to take for granted the concept of intellectual property, even because of the strong European Roman Law tradition, according to which property is only possible on material, touchable things – the so-called *res quae tangi possunt*.[9] The *res quae tangi possunt* are excludable and rivalrous; therefore they present us with the question of who is entitled to use them. On the other hand, the incorporeal, spiritual things do not need private property because they can be indefinitely shared among everyone.

Kant closes his 1785 essay by asserting his endorsement to the Roman Law tradition:

> If the idea of the publication of books in general, built upon here, were well-prepared, and (as I flatter myself it is possible) elaborated with the elegance requisite to the Roman juridical learning: then the complaint against the counterfeiter might well be brought before a court, without first needing to ask on that account for a new law.[10]

If Kant's statement has to be taken seriously, Kant should not be considered as an intellectual property forerunner. However, he reshapes the Roman Law tradition in an original way, which anticipates the continental concept of authors' moral rights.

According to Kant, a book can be seen:

- as a material object (1)
- as a means of conveying thoughts (2)
- as a speech (3)

1. The book as a material object may be reprinted. It becomes a property of whoever buys it. For the very principle of private property, it is not fair to restrain the ways in which its legitimate purchaser may use it.[11]

2. The *Nachdruck,* on the other hand, does not prevent anyone to keep on conceiving his thoughts. They remain a "property" of their author, regardless of their reproduction, because they are not material: properly speaking, ideas cannot be stolen. [12]

3. A speech is an action (*Handlung*)[13]. A person who is speaking to a public is not selling anything to them: he is engaging a relationship with them.

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every author, while the latter derives from a decision of the political power.

9 In the “battle of the booksellers” that raged in England for more than half a century, Roman Law tradition was an important landmark. While the English booksellers argued that copyright was a common law property, therefore unlimited and perpetual, the Scottish booksellers recognized only the Statute of Anne terms (21 years for all works already in print at the time of its enactment and 14 years for all works published subsequently), on the basis of the Scottish Roman Law tradition that denied the very possibility of property on immaterial objects.

10 I Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, Ak VIII, 87.

11 I Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks,* AK VIII 79.

12 *Ibidem*, Ak VIII 79.

13 *Ibidem*, Ak VIII 85-86.

Therefore, such a relation is not a matter of rights on things (*iura realia*), but of personal rights (i*ura personalia).*
In the *Metaphysik der Sitten*, we can find a clear distinction between *ius reale* and *ius personale.* The *ius reale* or *ius in re* is a right on things.[14] The *ius personale* is defined as the "possession of another's choice [*Willkür]*, in the sense of my capacity to determine it by my own choice to a certain deed".[15] In other words, it is a right entitling someone to obtain acts from other persons. As moral subjectivity involves freedom, personal rights cannot be established without the concerned persons' consent.
According to Kant, the *ius reale* cannot be applied to ideas, or, better, to thoughts. because they can be conceived by everyone at the same time, without depriving their authors. Surprising as it may seem, the *ius reale* protects the freedom to copy, if it is taken seriously. If a thing has been purchased in a legal transaction and the purchasers copy it by their own means, they are simply working on their legitimate private property. For the very principle of private property, it is not fair to restrain the ways in which its legitimate purchaser may use it.
For this reason, no *ius reale* can be opposed to the reprinter. If we see the book as a material thing, whoever buys it has the right to reproduce it: after all, it is his book. Furthermore, in Kant's opinion, we cannot derive any affirmative personal obligation from a *ius reale:*[16] a *ius personale* on someone cannot be claimed by simply purchasing some related things without obtaining his or her expressed consent.
Kant, by conceiving the book as an action, adopts a strategy based on the *ius personale* only. By using such a strategy, he concludes that the unauthorized printer has to compared to an unauthorized spokesperson rather than to a thief. Therefore, it is not necessary to go beyond the Roman law tradition, by inventing a new *ius reale* on immaterial things.
Kant's argument goes as follows: when I speak to a public, I engage a relationship with them. The book may be viewed as a *medium* through which authors can transmit their speeches to a wider public. In the age of printing, such a *medium* used to be provided by publishers. Thus publishers can be considered as spokespersons who speak in the name of the authors. But, as such, they need the authors' authorization.[17] Why? Because to speak in the name of another without his authorization is like engaging him in a relationship without his consent. As personal rights. according to Kant, concern relations among free beings, they can arise only from expressed agreements. Hence, the unauthorized printer is like an unauthorized spokesperson, who produces a relation of the author with the public without being entitled to do it.
However, the scope of Kant's justification of copyright is very narrow: it applies only to the publishing of texts, it does not touch th so-called derivative works, and it is justified only as far as it helps the public to get the texts.
Kant does not recognize works of art as speeches. He calls works of art *Werke* or *opera*, i.e. *things* that are produced, while indicating books as *Handlungen* or *operae*, i.e. actions. As the works of art are simply physical objects, we can derive from Kant's assumption that every legitimate purchaser may reproduce them and may donate or sell the copies to others.[18] Every time an object can

14 I. Kant, *Metaphysik der Sitten*, §11, Ak VI 260. The English translations from the *Metaphysik der Sitten* are by M. Gregor: I. Kant, *The Metaphysics of Morals*, Cambridge, Cambridge U.P., 1996.
15 *Ibidem*, §18, A 271
16 I Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks,* Ak VIII 83.
17 *Ibidem*, Ak VIII 79-82.
18 *Ibidem*, Ak VIII 85-86.

be treated only as a product, its legitimate owner may do what he wants with it, because of his *ius reale,* which has to be taken seriously on both sides. Moreover, as the injustice of reprinting books depends on their communication to the public, we can deduce that their reproduction for personal use is not to be forbidden.

As regards as the derivative works, Kant states that, if one shortens, augments, retouches or translates the book of another, he produces a new speech, although the thoughts can be the same Therefore, such works cannot be seen as *Nachdruck* and are perfectly lawful.[19] In other words, in a Kantian environment, everyone may become a "wreader" - a reader and writer at the same time - without being hindered by copyright restrictions

The goal of the transaction between the author and the publisher is conveying his text to the public. The public has a right to interact with the author, if the latter has chosen to do it. According to Kant, the publisher may neither refuse to publish – or to hand over to another publisher, if he does not want to do it himself – a text of a dead author, nor release mutilated or spurious works, nor print only a limited impression that does not meet the demand. If the publisher does not comply, the public has the right to force him to publish.[20] In other words, in a Kantian environment the publisher's rights are justified only when they help authors to reach the public. Copyright should be neither censorship nor monopoly.

In the 1785 essay Kant stated that the mandate of an author to a publisher should be exclusive[21] because the publisher becomes willing to publish a book only if he is certain to earn something from it; therefore, he is interested in avoiding competition. But later, in the *Metaphysik der Sitten,* Kant does not mention the exclusivity requirement at all, perhaps because he has realized that it was based on an empirical contamination, depending on the current state of technology.

In Kant's world the press used to be the *medium* that provided for the widest distribution of ideas. Printing required both specific tools and skills, and specialized and centralized organizations. And as long as the publishers of printed texts provided the only *medium* to convey speeches to a wide public, Kant was inclined to bow to their interest.

However, from a conceptual perspective, there is no reason to deny that an author should be entitled to authorize everyone to distribute his work to everyone else, just like a person may hire more than one spokesperson. Such a practice is now fairly usual on the Internet, when authors choose a Creative Commons License and grant the right to publish their works to everyone, because they are interested in the widest possible spreading of their ideas. In Kant's times such a strategy would not be paying because the major publication technology, the press, was not cheap and easy like the digital reproduction of texts, but difficult and expensive.

In other words, Kant's thesis is based on the technical assumption that publishing requires an intermediation - just as it used to be in the age of print - and such intermediation is lawful only it has the author's consent. Where the intermediation is not necessary any longer, where no one is speaking in the name of another, copyright makes no sense.[22]

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19 *Ibidem*, Ak VIII 86-87.

20 *Ibidem*, Ak VIII 85.

21 *Ibidem*, Ak VIII 81.

22 In a Kantian environment, The Pirate Bay, as it is only facilitating people to copy materials for their personal use, should not be seen as a "pirate" *Nachdrucker*.

3. A term of comparison: Fichte's theory of intellectual property

In 1793 the “Berlinische Monatschrift” published a short essay, *Proof of the Illegality of Reprinting: A Rationale and a Parable*,[23] written by Fichte two years ago. The essay connects originality to intellectual property and advocates the enforcing of the latter by means of criminal sanctions. It is worth mentioning the final parable by means of which Fichte illustrates his thesis, because it contains in itself all our commonplaces on intellectual property.

In the time of the Caliph Harun al Rashid, an alchemist used to prepare a beneficial drug and to entrust the commercial side of the business to a merchant who was the sole distributor throughout the land and who earned a goodly profit by his monopoly. Another medicine merchant stole the drug from the monopolist and started to sell it at a cheaper price. The latter brought him before the Caliph. The former pleaded for his case by arguing that his selling the drug for a cheaper price was useful to the sick persons and to the society at large. What was the judgment of the Caliph? “He had the useful man hanged.”[24]

To be accurate, the medicine merchant of the parable had not copied the drug, but had materially stolen it. Fichte suggested that copying is like stealing. In the 18th century, however, Fichte had to demonstrate the commonplace of today.

According to Fichte, we can distinguish two aspects of a book:

- its physical aspect (*das körperliche*), i.e. the printed paper

- its ideational aspect (*das geistige*)

The ideational aspect of a book is in turn divisible into:

- a material aspect, i.e. the ideas the book presents;

- the form of these ideas, i. e. the way in which they are presented.

All the aspects of a book, except one, can be appropriated by anybody: we can buy the printed paper and assimilate the ideas it conveys. We cannot, however, appropriate its form, because it is strictly personal. And, according to Fichte, it is self-evident that "we are the rightful owners of a thing, the appropriation of which by another is physically impossible".[25] As the form can be only mine, the author is the proprietor of his text and his authorized publisher is its usufructuary.

However sophistical this shift from originality to property may seem, it is not the only seminal element of our commonplaces on copyright contained in Fichte's essay. It is also worth remarking that in the Harun al Rashid parable the alchemist - the author - transfer his rights and disappears from the scene; the most powerful interests are these of a monopolist - the publisher -; only the other medicine merchant - the pirate - pleads for the interests of the public, but his arguments are rejected as criminal; as regards as the Caliph - the government -, he bows to the monopolist's interests without saying a word; and, last but not least, the criminal sanction for piracy - capital punishment - is

23 An English translation by Martha Woodmansee can be downloaded at the URL <http://www.case.edu/affil/sce/authorship/Fichte,_Proof.doc>

24 J.G. Fichte, *Beweis*, p. 482.

25 J.G. Fichte, *Beweis*, pp. 446 ff.

out of all proportion.

The young Fichte believed that his ideas on authors' right were similar to the ones of Kant[26] However, there are at least three outstanding differences between Kant and Fichte:

1. Fichte bases copyright on the individual originality in the form of expression;[27] Kant does not mention originality at all;
2. Fichte equates copyright with private property;[28] Kant rejects the very possibility of founding the authors' right on a *ius reale;*
3. Fichte thinks that copyright violators deserve the same harsh punishment of thieves.[29] According to Kant, the unauthorized printer should simply compensate all the damages he caused to the author or to his authorized publisher.[30]

While Fichte is an intellectual property endorser, Kant is an “enlightened” conservative who supports the Roman law tradition, against the propertization trend. He accepts the copyright principle, according to which authors are entitled to decide how to publish their works. The rights of the publishers, however, are justified only as long as they help authors to reach the public, while the personal use of the texts and the so-called “wreading” should remain free. And, above all, all that can be viewed as a product is, in his opinion, outside the scope of copyright and may be copied without restrictions.

What is, in any, the philosophical meaning of Kant's "conservatism"? To answer such a question, we need to link his ideas on authors' right to his general theory of property, as it is explained in the *Metaphysics of Morals*.

4. What is a thing?

In the *Metaphysics of Morals*, Kant seems to take for granted that the objects of real rights are only corporeal entities or *res corporales:* "Sache ist ein Ding, was keiner Zurechnung fähig ist. Ein jedes Object der freien Willkür, welches selbst der Freiheit ermangelt, heiß daher Sache (*res corporalis*)".[31] Theoretically, however, such a negative definition could have been appropriate to incorporeal things as well.
According to Kant, the rightful possession of a thing should be distinguished from its sensible possession. Something external would be rightfully mine "only if I may assume that i could be wronged by another's use of a thing even though I am not in possession of it" (Ak, VI 245). The rightful possession is an intelligible, not sensible, relation. I can claim that my bicycle is mine only if I am entitled to require that nobody takes it even when I leave it alone in the backyard.
Kant's theory of property is very different from Fichte's principle of property as explained in his 1793 essay, according to which we are the rightful owners of a thing, the appropriation of which by another is physically impossible. For this

26 J.G. Fichte, *Beweis*, ftn. 1. According to Fichte Kant did not intend the *opera* as an action, but as something determined by the author's spiritual form.
27 *Ibidem*, p. 1.
28 *Ibidem*, p. 1.
29 *Ibidem*, pp. 8-10.
30 I. Kant, *Über den Gemeinspruch Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis,* Ak VIII 80.
31 "A *thing* is that to which nothing can be imputed. Any object of free choice which itself lacks freedom is therefore called a thing (*res corporalis*)" (AK, VI, 223).

reason, according to Fichte, the originality of the exposition entitles an author to claim a rightful property on his work.
Is it really so obvious that originality implies property? Property is a comfortable social convention that allows us to avoid to quarrel all the time over the use of material objects. It is so comfortable just because it is physically possible to appropriate things; we do not need to invoke property when something cannot be separated from someone. I say both that my fingerprints or my writing style are "mine" and that my bicycle is "mine". But these two "mine" have a different meaning: the former is the "mine" of attribution; the latter is the "mine" of property. The former can be used to identify someone; and conveys the historical circumstance that something is related exclusively to someone, the latter points only to an accidental relation with an external thing, if we consider it from a physical point of view. On a historical circumstance it is possible to lie, by plagiarizing a text, i.e. by attributing it to a person who did not wrote it. However, properly speaking, no one can steal it: the convention of property is useless, in this case. Besides, if Fichte's principle were the only justification of property right, it would undermine the very concept of it: as it is physically possible to "attribute" my bicycle to another, when I leave it alone in the backyard, everyone would be entitled to take it for himself. As Kant would have said, a legal property right cannot be founded on sensible situations, but only on intelligible relations.

Although he defines things as *res corporales*, Kant determines the rightful possession of a thing as a possession without *detentio,* by ignoring all its sensible facets. Such a possession - a possession of a thing without holding it - is exerted on an object that is "merely distinct from me", regardless of its position in space and time. Space and time, indeed, are sensible determinations and should be left out of consideration. According to the postulate of practical reason with regard to rights, property is justified by a permissive law of reason: if a rightful possession were not possible, every object would be a *res nullius* and nobody would be entitled to use it.

Kant implicitly denies that a *res nullius* can be used by everyone at the same time. His tacit assumption suggests that the objects of property, besides being distinct from the subjects, are excludable and rivalrous as well, just like the *res corporales*-

Kant asserts that something external is mine if I would be wronged by being disturbed in my use of it even though I am not in possession of it (Ak VI, 249). If property is a merely intelligible relation with an object that is simply distinct from the subject, we have no reason to deny that such an object might be immaterial as well, just like the objects of intellectual property.

Kant, as we have seen, does not use the concept of intellectual property. According to him, a speech is an action of a person: it belongs to the realm of personal rights. A person who is speaking to the people is engaging a relationship with them; if someone else engages such a relationship in his name, he needs his authorization. The reprinter, as it were, does not play with property: he is only an agent without authority. Speeches, by Kant, cannot be separated from persons: he has seen the unholy promised land of intellectual property without entering it. Why?

According to Kant, before the acquired rights, everyone has a moral capacity for putting others under obligation that he calls innate right or internal *meum*

vel tuum (AK, VI, 237). The innate right is only one: freedom as independence from being constrained by another's choice, insofar it can coexist with the freedom of every other in accordance with a universal law.

Freedom belongs to every human being by virtue of his humanity: in other words, it has to be assumed before every civil constitution, because it is the very possibility condition of law. Freedom implies innate equality, "that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being his own master (*sui iuris*), as well as being a human being beyond reproach (*iusti*) since before he performs any act affecting rights he has done no wrong to anyone, and finally his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it - such things as *merely communicating his thoughts to them*." (AK VI, 237-238)[32]

In spite of his intellectual theory of property,[33] Kant does not enter in the realm of intellectual property for a strong systematic reason. Liberty of speech is an important part of the innate right of freedom. It cannot be suppressed without suppressing freedom itself. If the *ius reale* were applied to speeches, a basic element of freedom would be reduced to an alienable thing, making it easy to mix copyright protection and censorship.

Property rights are based on the assumption that its objects are excludable and rivalrous and need to be appropriated by someone to be used. We cannot, however, deal with speeches as they were excludable and rivalrous things that need to be appropriated to be of some use, because excluding people from speeches would be like excluding them from freedom.

Therefore, Kant binds speeches to the persons and their actions, and limits the scope of copyright to publishing, or, better, to the publishing of the age of print: the *Nachdruck* is unjust only when someone reproduces a text without the author's permission and distributes its copies to the public. If someone copies a book for his personal use, or lets others do it, or translates and elaborates a text, there is no copyright violation, just because it is not involved any intrinsic property right, but only the exercise of the innate right of freedom. The boundary of Kant's copyright is the public use of reason, as a key element of a basic right that should be recognized to everyone. Kant does not stick to the Roman Law tradition because of conservatism, but because of Enlightenment.

32 Italics added.

33 See H. Williams, *Metaphysical and not just political*, "ECPR general conference" (September 2007)