

Copyright, property and personality. Note on Hegel*

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Introduction

Until recently, the Anglo-American copyright discourse has been largely driven by a black-and-white choice between two opposing options: on the one side, the approach deriving from instrumentalist, utilitarian arguments and, on the other, the view resulting from author's "natural rights" claims, often expressed in terms of labour-reward justifications. The choice defines a "format" in which both paradigms share the assumption that copyright is concerned with property entitlements over intangible goods, but they diverge over the character and meaning of such entitlements: in one case, they are conceived as state-created instruments to achieve certain goals while in the other they emerge as fully-fledged rights that belong to the author. The conventional wisdom generally considers the natural-rights option as a resort for proponents of strong protection for copyright owners. By contrast, the instrumentalist-utilitarian option is more frequently associated to a sceptical, "minimalist" attitude to copyright. Briefly, the alternative has been hitherto seen as the one between pro-author and pro-users worldviews. As Jeremy Waldron puts it:

If we think of an author as having a natural right to profit from his work, then we will think of the copier as some sort of thief; whereas if we think of the author as beneficiary of a statutory monopoly, it may be easier to see the copier as an embodiment of free enterprise values.¹

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¹ Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property," *Chicago-Kent Law Review* 68 (1993): 841, 842. In a similar vein see James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven & London: Yale University Press, 2008), 17-41 [arguing that justifications that deviate from instrumentalism lead predictably to copyright expansionism]. In a more pugnacious vein, see Mark A. Lemley "Faith-Based Intellectual Property" 62 *UCLA Law Review* 1328 (2015) [arguing that deviations from the utilitarian justification are hopelessly belief-based]. Other scholars have critically observed the dominance of this conventional polarized wisdom: see Hugh Breakey, "Natural intellectual property rights and the public domain", *Modern Law Review* 2010, 73(2), 208, 210 ["Legal commentators, theorists and historians routinely characterise the ongoing legal controversy in intellectual property as being a contest between weak, utilitarian privileges, and strong, natural property rights."]; Laura Byron, "Creative work and communicative norms", in M. van Echoud (ed.) *The Work of Authorship* (Amsterdam: Amsterdam University Press, 2014), 26 ["Not only is the personality theory said to be a creator-centred theory, elevating the importance of the individual author at the expense of both copiers and the public domain, but it is also assumed to lead to stronger protection for copyright owners than other justifications for copyright."]; Abraham Drassinower, *What's Wrong with Copying?* (Cambridge, MA: Harvard University Press, 2015), 147 ["The perception that a rights-based account of copyright cannot provide adequate foundations for the public domain is part and parcel of the widespread view that the instrumentalist view of copyright is theoretically superior."].

Of course, the dominating presence of such polarized choice has not prevented the emergence of a rich and varied landscape of scholarship on copyright legal theory, which has deepened significantly the understanding of copyright foundations well beyond a mere binary option.² Scholars are generally aware that the conventional characterization of the copyright discourse in terms of a sheer choice between “instrumentalism” and “author-centrism” is flawed, and this awareness has inspired impressive research on alternative ways of thinking of copyright in our society.³ However, these attempts to escape the established “copyright format”—as we may call the fixation of the copyright discourse in terms of pre-determined choice between pro-author natural rights and pro-users instrumentalism, and the superiority of the latter over the first⁴—demonstrate precisely my point, namely that such format is a dominating and driving one. In fact, when it comes to make principles operational, and even more to translate these in action, it immediately appears that little room is left for thinking out of the prescribed boundaries. Yet this condition is far from a peculiarity of the Anglo-American discourse and has seemingly become the common playfield for the “copyright wars” worldwide.⁵

In recent years, however, the polarized vision of copyright has been challenged in some important respects. Firstly, legal scholarship has convincingly argued that the conventional bifurcation between “weak” utilitarian and “strong” right-based copyright, despite its long and documented history,⁶ is flawed and largely misleading. On the one side, natural rights arguments are anything but incompatible with robust justifications of the public domain.⁷ On the other side, the instrumentalist-utilitarian account is structurally incapable of providing a coherent recognition of users’ rights and the

² See in particular the seminal article of Justin Hughes, “The Philosophy of Intellectual Property” 77 *Georgetown Law Journal* 287 (1988). The book of Margaret Jane Radin, *Reinterpreting Property* (The University of Chicago Press, 1993) has inspired original research on justifications of intellectual property. Among the most influential studies, see Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property”, 102 *Yale Law Journal* 1533 (1993); Peter Drahos *A Philosophy of Intellectual Property* (New York: Ashgate, 1996); Paul E. Geller, “Beyond the Copyright Crisis: Principles for Change,” *Journal of the Copyright Society of the USA*, vol. 55 (2008), 165-99; William W. Fisher, “Theories of intellectual property” in S. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press), 168–200.

³ See for example Neil W. Netanel, “Copyright and a Democratic Civil Society”, 106 *The Yale Law Journal* (1996) 283; Anupam Chander and Madhavi Sunder, “The Romance of the Public Domain”, 92 *California Law Review* (2004); Julie E. Cohen, “Creativity and Culture in Copyright Theory”, 40 *UC Davis Law Review* (2007), 1151.

⁴ I use the word “format” as in “TV format”: an overall concept of pre-determined set of operations that functions by leaving relative freedom of action to the actors.

⁵ A glance to policy documents of the European Union is sufficient to confirm this impression.

⁶ See Brad Sherman and Lionel Bently *The making of modern intellectual property law* (Cambridge: University Press, 1999); Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham: Elgar, 2006).

⁷ Hugh Breakey “Natural intellectual property rights and the public domain” *Modern Law Review* 2010, 73(2), 208-239.

public domain, and for this reason cannot be relied on as a bulwark against copyright expansionism.⁸ In this connection, perhaps the most disruptive challenge that ever occurred to the Anglo-American copyright discourse, as consolidated in the said bifurcation, comes from Abraham Drassinower's work *What's Wrong with Copying?*, published in 2014.⁹ The book, in its own words, claims to provide "an account of fundamental features of copyright doctrine as a coherent whole".¹⁰ Indeed, it unveils a coherent logic that pervades copyright doctrine as it unfolds in case law and universally acknowledged principles like originality, independent creation and the idea/expression dichotomy. Surprisingly, copyright's logic is neither instrumentalist nor author-centric, but simply extraneous to the alternative between the two. In Drassinower's reading, the subject matter of copyright ought not be seen as "intangible objects" or "things", but rather "acts", namely acts of communication in which authors and interlocutors have *reciprocal* and equally legitimate claims. Accordingly, copyright is primarily a law that protects speech, and more precisely the ongoing dialogue between an author and her readers or interlocutors, who are in turn potential authors themselves.¹¹ "The theory of authorship—says Drassinower—is inherently a theory of the public domain".¹² However, this "theory" and the fundamental consequences that derive are not part of a normative account of how copyright "should be". Rather, they are already deep-rooted in the copyright discourse of the Anglo-American tradition. To recall an eminent Kant's dictum, this tradition was just waiting to be awakened from its "dogmatic slumber".¹³

The third challenge to the Anglo-American copyright discourse is more indirect and "exogenous": it comes from Europe and the recent jurisprudence of the European Court of Justice. The Court may or may not have binding authority on UK courts in the future, but it is reasonable to expect that English copyright will continue to be exposed to its influence. In a recent line of cases on copyright subsistence, the European Court has famously placed "personality" arguments to their central place in copyright, and has excluded any other criteria that national courts may apply to

⁸ Abraham Drassinower "From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law" *Journal of Corporation Law*, Vol. 34, No. 4, pp. 991-1007 (2009).

⁹ Abraham Drassinower, *What's Wrong with Copying?* (Cambridge, MA: Harvard University Press, 2014). See also the special issue of the *Intellectual Property Journal* (2016, 29.1) dedicated to comments and reviews of the book, edited by Lior Zemer and Amit Elazari Bar.

¹⁰ *Ibidem*, 8. See Lionel Bently, "Drassinower's Vision of Copyright", 29 *Intellectual Property Journal*, 19 (2016), 20.

¹¹ As acknowledged by Drassinower himself, this view deeply resonates with the argument developed by Kant on the unlawfulness of reprinting (*Ibidem.*, 16).

¹² *Ibidem*, 9.

¹³ Immanuel Kant *Prolegomena to Any Future Metaphysics*, transl. G. Hatfield (Cambridge: Cambridge University Press, 1997), 10. Interestingly, Kant's own dogmatic slumber was interrupted by an Englishman, David Hume. It is now for a sort of reciprocation that Kant offers to Anglo-American copyright a way to escape its own "dogmatism".

determine originality.¹⁴ Specifically, reference to the author’s personality was explicitly made in the third case of this trilogy on originality. In *Painer v Standard Verlags* the Court held that a portrait photograph attracts copyright if “it reflects the author’s personality”, and this occurs if the photographer was able to make free and creative choices so to stamp the work created with his “personal touch”.¹⁵

The “personality theory” that the European Court has embraced has seemingly no connections with the two poles of the Anglo-American copyright discourse. It is known to be “loosely derived from the writings of Kant and Hegel”¹⁶ and although sharing some common features with Lockean natural right theories it is thought to be associated with systems of moral rights.

The aim of this paper is to explore the following question: can the “personality theory”, as recently emerged from oblivion in the EU, contribute to set off a rethinking of copyright principles beyond the current polarized understanding? To answer the question, an attempt will be made to draw at the sources of the theory in the philosophy of Hegel. Neither the personality theory nor Hegel’s philosophy are unknown, and in fact they have received already a good deal of attention from copyright scholars and legal theorists.¹⁷ My aim is not to give a conclusive or convincing interpretation of the Hegelian argument, or even to prove its “superiority” compared to other justifications of copyright protection.¹⁸ My aim is at the same time more limited and more ambitious: to contribute to set the conditions for a future genuine and free *confrontation* between copyright doctrines, beyond the constraints of the current polarized format.

Author’s personality in Anglo-American copyright

The language of “personality” is customary in civil-law jurisprudence but is almost absent from Anglo-American copyright discourse. In particular, it does not feature in the traditional accounts of originality as key requirement for copyright subsistence. Even when courts expand on the authorial element, as constitutive of originality, this element is rarely expressed by reference to the author as a *person* and of

¹⁴ See Case C-312/10 *Infopaq v. DDF* [2009], § 39 [copyright can subsist in 11-words extracts from journal articles if they contain elements which are the expression of the intellectual creation of the authors of the articles], Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury* [2010] § 44-46 [a graphic user interface of a computer program can receive copyright protection if it is original in the sense of its author’s own intellectual creation], and Case C-145/10 *Painer v Standard Verlags GmbH* [2011], § 92 [a portrait photograph attracts copyright if the photographer has made free and creative choices so to stamp the work created with his “personal touch”].

¹⁵ *Ibidem*. The Court expanded on recital 17 of the preamble to Directive 93/98 harmonizing the term of protection of copyright (now recital 16 of the codified version, Directive 2006/116): “A photographic work within the meaning of the Berne Convention is to be considered original if it is the author’s own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account.”

¹⁶ William W. Fisher, “Theories of intellectual property” in S. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press), 171 (cited in Biron).

¹⁷ See the literature cited in the footnotes accompanying the elucidation of Hegel’s thinking.

¹⁸ Philosophical understandings of copyright are all equal in rank. Their well-founded cannot be tested in terms of “functioning” as a matter of positive law.

author's *personality*. One of these rare occasions is *Bleistein v Donaldson Lithographing Co.*, where the US Supreme Court found that ordinary advertisement posters depicting circus scenes were capable of copyright protection. Justice Holmes, writing for the Court, argued that the fact that the images were taken from life scenes did not preclude copyright subsistence:

The copy [of life scenes] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone.¹⁹

Personality is here synonym of individuality and refers to the unique way in which an individual sees the world and expresses himself accordingly. This uniqueness is to be found in the very fact that a “view of the world” has been expressed, rather than in the final product of the expression: the latter can be modest, trivial, or even factually indistinguishable from existing productions. What confers copyright protection is not the quality of the work, but the fact of being “personal” to the author, meaning that it results from the author's individuality. Seemingly, the reference to personality in Justice Holmes's words is a way to remind the authorial individual character that alone confers originality to the work.

The personality element implanted by *Bleistein* in US jurisprudence did not extend beyond its initial narrow construal, and one can find only sporadic occurrences of the vocabulary of personality in the 20th Century case law.²⁰ In *Jewelers' Circular Publishing v. Keystone Publishing* the District Court of New York found that copyright subsists in photographs incorporated in a directory of jewellers because “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike”.²¹ Here, too, the author's “personal input” functions as sign of individuality rather than a qualitative determination, and it seems to suggest only that copyright subsists whenever the work “points to” an individual author.

Later examples show that the personality language seemingly acquired some distinctive qualitative connotations in cases of copyright in functional works.²² However, the language was

¹⁹ 188 U.S. 239 (1903), 250. See Diane Leenheer Zimmerman, “The Story of *Bleistein v. Donaldson Lithographing Company*: Originality as a Vehicle for Copyright Inclusivity”, in Jane C. Ginsburg and Rochelle Cooper Dreyfuss, *Intellectual Property Stories* (New York: Foundation Press, 2006), pp. 77–108; Oren Bracha, “Commentary on *Bleistein v. Donaldson Lithographing Co.* (1903)”, in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, 2008, www.copyrighthistory.org.

²⁰ Justin Hughes describes *Bleistein* as “perhaps... just a momentary flirtation with the personality justification” (Justin Hughes *The Philosophy of Intellectual Property*”, 77 *The Georgetown Law Journal* (1988) 287, 352).

²¹ *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 934 (S.D.N.Y.1921) (Hand J.). The case is cited disapprovingly by the US Supreme Court in *Feist v Rural* as expressing the classic formulation of the “sweat of the brow” doctrine (although with reference to the copyrightability of the directory, not of the photographs as such).

²² See *Smith v. Paul*, Civ. No. 18372. First Dist., Div. One. Oct. 27, 1959 [Copyright subsists in architect plans, drawings and designs in which “the architect expresses his thoughts and reveals his artistic personality”] and *Dollcraft Industries, Ltd. v. Well-*

substantially abandoned by US jurisprudence in relation to copyright subsistence and infringement, whose vocabulary has been rather tuned on the notions of “creation” and “creativity”.²³ In the last decades, reference to “personality theory” has been made by scholars to denote, and more frequently to distance oneself from, the continental-European “moral rights” tradition. This use finds some resonance in jurisprudence as well. In *Carter v Helmsley-Spear*, a court of appeals denied an injunction to prohibit the removal of an artwork from the defendant’s premises, on the ground that the work was made for hire and hence could not benefit from the moral rights provisions of the Visual Artists Rights Act 1990. The court synthesised the rationale for moral rights as follows:

Moral rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.²⁴

The language used in this occasion is exemplary of the conventional understanding of personality claims in copyright, and not just in the US tradition.²⁵ These claims are customarily described as related to some intangible element that the author transposes in the work he has created. Metaphors of “injection”, “infusion”, “instilment” and the like are frequently used in connection to this process. By creating the work, the author “injects” his personality in it, or, the other way round, the work will result “infused” or “imbued” with the author’s personality.²⁶ The image of injection/imbuement expresses the idea that moral rights claims have to do with an element that belongs to *both* the author *and* the work. As such, this idea is uncontroversial to both proponents and opponents of moral rights: the former will see that element as real and worth legal recognition, the latter as unreal and belief-based. Whether existent or not, the intangible element of personality points to a supposed “link” or “connection” between the author and the work, which is normally characterized as “permanent” and “indissoluble”. Accordingly, the personality theory would claim in essence that whatever is done *to the work* is also done, to a greater or minor extent, *to the author himself*—

Made Toy Mfg., 479 F. Supp. 1105 (E.D.N.Y.1978) [Defendant’s design of stuffed toy bunnies infringed the plaintiff’s design because it “mirror[ed] the plaintiff’s expression and personality interjected into its toy”].

²³ See *Feist Publications Inc. v. Rural Telephone Service Co., Inc.* 499 U.S. 340 (1991): “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity”.

²⁴ *Carter v. Helmsley-Spear, Inc.*, 861 F.Supp. 303 (SDNY1994), Cardamone J citing Ralph E. Lerner & Judith Bresler, *Art Law* 417 (1989).

²⁵ Courts in Europe adopt very similar constructions, although obviously not with a view of debunking moral rights.

²⁶ In line with these metaphors, we can see personality as either a medicine or an herbal tea.

in a sort of counter-movement to what Marx called reification of personality and personalization of things.²⁷

For the purpose of this paper, it is interesting to note how the personality approach has been developed in the US copyright discourse, as characterized by the polarized choice between the utilitarian and the natural-right formats. After an initial feeble attempt to rely on the personality language in the analysis of copyright subsistence, US jurisprudence has later embraced the vocabulary of “creativity”.²⁸ Perhaps not surprisingly, the return of personality notions in connection with moral rights in the last decades has not inspired creative elaboration in the copyright discourse.²⁹ Essentially, formats already in use in continental Europe have been simply re-formatted and transposed in the copyright discourse, where they found their natural placing next to the existing pigeonhole of “natural rights theories”. So, for example, in the influential book of James Boyle on the *public domain* we read:

The Lockean tradition is not the only one, of course. Others believe that the property right stems from the unique personality of each individual [...]. Whatever their moral basis or their ambit, the common ground between these positions is the belief in a rationale for intellectual property rights beyond the utilitarian concerns of Jefferson or Macaulay.³⁰

And few lines later he concludes:

The norms embodied in the moral rights or natural rights tradition are deeply attractive—at least to me. Many of us feel a special connection to our expressive creations—even the humble ones such as a term paper or a birthday poem. [...] Yet even if we find this claim attractive, we become aware of the need to find limiting principles to it.³¹

The argument developed by James Boyle condenses the understanding of personality theories that I have tried to reconstruct in this section by reference to the US copyright discourse. The understanding comprises of four points. First, although personality theories derive from a different tradition than the Lockean one, all the rivers end in the same pond, for they have in common the fact of being both *non*-utilitarian. Second, the personality theory is fundamentally a theory of author’s moral rights. Third, the personality/moral-rights view believes in a special emotional connection between the

²⁷ See for instance Amy M. Adler, “Against Moral Rights”, *California Law Review*, Vol. 97, 263, at 269 (2009): (criticizing the language used by moral rights advocates): “It is as if the work has a magical connection to its maker; hurting the piece will hurt the artist as if you were sticking pins in a voodoo doll.”

²⁸ The historical reasons for this are diverse, and beyond the scope of this paper.

²⁹ For a thorough discussion see Roberta Rosenthal Kwall, *The Soul of Creativity. Forging a Moral Rights Law for the United States* (Stanford, CA: Stanford University Press, 2009).

³⁰ James Boyle *The Public Domain: Enclosing the Commons of the Mind* (New Haven & London: Yale University Press, 2008), 29.

³¹ *Ibidem*.

author and his creative expressions. Fourth: partly for this reason (the “special connection”), partly because it believes in life beyond utilitarianism, personality theory is incapable of finding limiting principles in itself.

In the following, I will attempt to elucidate the fundamental traits of the personality theory of copyright. I will do so by referring exclusively to the philosophical source of the theory, namely the argument developed by Hegel in its *Philosophy of Right*. The purpose is not to be informed on “what Hegel thought of IP”, but to understand how the ideas of property and personality can logically interplay in a coherent copyright doctrine. A close reading of the argument will also provide a basis to test the merit of the conventional understanding of the role of personality in copyright, and whether this role is compatible with a robust public domain theory.

Hegel on intellectual property

Justin Hughes, in its influential essay on the philosophy of intellectual property, presents the personality justification as developed by Georg Friedrich Wilhelm Hegel as the “most powerful alternative to a Lockean model of property”.³² Indeed, the Hegelian argument on the protection of author’s and inventor’s rights is conducted in the framework of property rights as applied to determinations of one’s own personality.³³ However, unlike in the Lockean model, the argument does not rely on labour as a determinant factor in the original acquisition of property titles. As insightfully pointed out by Jeanne Schroeder, Hegel’s rights on works and inventions are not only not natural, they are “unnatural”.³⁴

As we will see, the Hegelian concept of personality and the relevant determination of property rights in works and inventions do not correspond almost at all to the way in which “personality justifications” are commonly addressed in today’s copyright discourse.³⁵ In particular, the principle of

³² Justin Hughes, “The philosophy of Intellectual Property”, 77 *The Georgetown Law Journal* (1988) 287, 330. The Hegelian argument applies to all range of what nowadays call intellectual property rights, possibly including also trade secrets. However, in this paper I will focus primarily on rights in works of authorship.

³³ See Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, 1821 (hereafter GPR), in particular §§ 43 and 64-69, and *Die Philosophie des Rechts. Vorlesung von 1821/22* (hereafter Vorlesung) §§ 68-69. For the English translation see GWF Hegel *Elements of the Philosophy of Rights*, transl. by HB Nisbet (Cambridge, UK: Cambridge University Press, 1991) (not including the parts of the *Vorlesung* discussed in this paper). The Hegelian argument is thoroughly address in Justin Huges “The philosophy of Intellectual Property”, 77 *The Georgetown Law Journal* (1988) 287, 331-338; Jeanne L. Schroeder, “Unnatural Rights: Hegel and Intellectual Property”, *Cardozo Law School, Legal Studies Research Paper No. 80* (2004); Christopher S. Yoo, “Copyright and Personhood Revisited” (2012) *Faculty Scholarship. University of Pennsylvania Law School*, Paper 423, Faculty Scholarship. 423.

³⁴ Jeanne L. Schroeder, “Unnatural Rights: Hegel and Intellectual Property”, 60 *University of Miami Law Review*, 453 (2006), 454.

³⁵ Although here I referred almost exclusively to the US discourse, similar considerations can be made with respect to the European legal tradition. It is significant that none of the most important German jurists of the second half of the 19th Century (Gierke, Bluntschli, Kohler) took Hegel into consideration in their influential treaties on *Urheberrecht*. The theory of *Persönlichkeitsrecht* has been largely developed in “loose connection”, at best, with Hegel’s philosophy. See Wilko Bauer “Hegels Theorie des geistiges Eigentums”, *Hegel Studien* (41) 2006.

the author's and inventor's rights is not obtained from the circumstance that products of the mind show some kind of "permanent link" with the person who created them. On the contrary, it is precisely because the work is capable of *detaching* itself from the person, that it can become object of certain exclusive rights. Although not denying that determinations of one's own personality are by definition unique to one individual, and cannot be separated and alienated to another, Hegel does not draw conclusions on subsistence and scope of property rights over products of the mind from this circumstance. Rather, the right of the author (as well as the right of the inventor) is essentially understood as a temporary right to reserve a *particular use* of the work once copies of the work have been transferred to others. Subsistence and scope of this right is deduced from the specific nature of the "things" that are transferred in this transaction, namely works of authorship and inventions, and the conditions upon which they become transferable in the first place.

In the following, we will construe the Hegelian view on author's and inventor's rights, starting with the very notion of "person". But before moving on, it is worth pondering for a moment the meaning of this determination. Every philosophical position, and in general any understanding of what constitutes rights and wrongs, implies a determination of the essence of human being. Such a determination can be expressed or implied. For instance, the utilitarian-instrumentalist approach to rights presupposes a determination of the human being as, essentially, a carrier of interests. This assumption is mostly implicit, and when it is made explicit is mainly in the form of operational definition. Only because this trait has been elected as the driving trait of human nature (either implicitly or as operational definition), the utilitarian-instrumentalist approach can see the world as essentially a playground of "individual" and "public" interests, and interpret the role of law accordingly as an exercise of balancing conflicting interests. Yet the very idea of "interested living being" cannot be deduced empirically by observing the human nature at work. Rather, the idea *presupposes* any empirical observation of the world.

Instead of assuming the human being as a (self-)interested living being, Hegel's philosophy of right assumes the human being as a "person". However, in case of Hegel this assumption is explicit and explicitly grounded; in other words: it is a *philosophical*, not merely operational assumption. In the Introduction to the *Elements of the Philosophy of Right*, Hegel touches upon the difference between a philosophical and a non-philosophical method in the analysis of right:

The science of right is a part of philosophy. It has therefore to develop the *idea*, or what comes to the same thing, it must observe the proper intimate development of the thing itself. As part of philosophy, the science of rights has a determinate *starting point*, which is the *result* and truth of what *preceded* it, and what preceded it is the proof of that result. Hence, the concept of right

[...] falls outside the science of right; its deduction is presupposed here and is to be taken as *given*. [In contrast] the first thing which is sought and required by the non-philosophical method of the sciences is the *definition*. However, the positive science of right cannot be much concerned with definitions, since its aim is to determine *what* is right. This is the reason for the warning “*omnis definitio in iure civili periculosa*” [in civil law every definition is hazardous]³⁶

Accordingly, the analysis of property will not start with a definition of the concept of *persona*. Rather, it starts with developing the idea of *persona* as such.

Person and personality

The term *persona* and its centrality in the legal discourse derives from Roman law, where it denotes the human being in its capacity to “act” and thereby to be subject of rights and duties.³⁷ Hegel inherits this concept from the classical tradition and transforms it in an essential determination of the human being that transcends the sphere of positive law as such. The “person”, in Hegel’s system, is the human being in its concrete finitude, knowing himself as free and disposing of free will. This self-knowledge and freedom, as well as all other essential determinations that derive from them, are not simply “given” as a brute fact. Unlike other living beings, humans do not have their essential determinations immediately as a pure contingency: humans must *be* their own determinations or, otherwise put, they must *become* what they *are*. The person is the human being in his task of becoming what he is. “The highest achievement of a human being—writes Hegel—is to be a person”, but this achievement consists in having to support a “contradiction” between infinite freedom and purely finite determination:

Personality is at the same time the highest and the wholly lowest; it includes this unity of the infinite and the utterly finite, of determinate limits and the thoroughly unlimited.³⁸

As an achievement, personality is all but “natural”, and as a matter of fact “nothing in the natural realm could endure this contradiction”.³⁹ The human being as a person is not something like a natural human condition.⁴⁰ So, it is not even correct to claim that the human being is free “by nature”, as freedom cannot be inferred by regarding the human being as a natural being.⁴¹

³⁶ GPR, § 2.

³⁷ A. Berger *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953.

³⁸ Hegel, GPR, § 36, *addition*.

³⁹ *Ibidem*.

⁴⁰ Hegel negates natural rights as nature is not free. On this point see Jeanne L. Schroeder, “Unnatural Rights: Hegel and Intellectual Property”, 454.

⁴¹ § 57. The consequences for the theory of property are thoroughly examined by Schroeder: “Hegelian theory emphasizes that property is a legal right enforceable against legal subjects with respect to objects, not a natural relationship between subject and object” (*Ibid.*, p. 457).

On the basis of this re-interpretation, which excludes both the formalistic definition of positive law (the person as carrier of rights and duties) and the construal given by natural law (person as natural human condition), Hegel can regain the traditional notion of *persona* as pivotal to the system of right:

Personality contains in general the capacity to have rights and constitutes the concept and the (itself abstract) basis for the abstract and hence *formal* right. The imperative of right is therefore: *be a person and respect others as persons*.⁴²

As seen, personality is the capacity to *posses* rights, and not only to be subject to legal relationships. As such, this capacity is not “natural”, nor it is acquired once and for all, but has to be achieved, and “individuals and peoples do not have personality insofar as they have not yet achieved the pure thought and knowledge” of themselves as free beings.⁴³ The first, immediate way in which individuals and people acquire knowledge of themselves and experience themselves as free is to overcome the limitation of being merely “subjects” opposed to the nature that they encounter before them. This occurs—as far as the ethical and legal dimension of existence is concerned—by placing their will into something, the abstract manifestation of which is *possession*.

Personality and possession: intellectual accomplishments as “things”

Possession, as the first manifestation of personality, has a variety of meanings: I can possess “things”, but I also possess qualities and characteristics, including physical appearances and my body, and my own life in general, but I also possess skills, abilities and knowledge acquired through experience and education. Moreover, as a person I “possess” freedom, dignity and morality. What I do not and cannot possess, however, are other persons as such.⁴⁴ How are all those possessions and prohibitions of possession dealt with in a system of rights?

The whole point with possession in a legal meaning is the fact that is recognized by others *as* exclusive entitlement of the possessor. The claim that something is “mine” has no reality unless and until it is based on mere priority of volition, i.e. something of the kind of “I wanted it first”.⁴⁵ To an extent, the claim based on mere volition acquires objectivity with occupancy, since by taking possession of the thing I make my volition at least “factual”. However, “first occupancy” is just a contingent

⁴² Hegel GPR, § 36.

⁴³ GPR, § 35.

⁴⁴ Slavery and in general the use of persons as “things” is incompatible with the idea of person, as it negates the essential determination of personality as something free in itself (§ 57).

⁴⁵ See § 51. “It often happens that children emphasize their prior volition when they oppose the appropriation of something by others; but for adults, this volition is not sufficient.” (Ibid.)

manifestation of will and is not sufficient to substantiate the claim of possession.⁴⁶ The latter subsists only when the existence of my will over something is recognized by others.

The question of how possessions in general become recognized objects of rights is relatively straightforward when it comes to objects that have an “external” existence with respect to the person. “External” are beings that do not and cannot have themselves as objects, and in this sense are external not only to the subject but also to themselves—for instance space, time and objects that are simply “in” there like land and the animals that graze it.⁴⁷ These beings and objects are external also in another sense, namely that they do not have an end in themselves, but as something external to themselves. With respect to such objects:

To appropriate means basically simply to manifest the supremacy of my will in relation to the thing and [thereby] to demonstrate that the thing does have an end in itself. Such manifestation occurs through my conferring to the thing an end other than the one it immediately possesses.⁴⁸

Possession of things is demonstrated (albeit not originated) by conferring an end to the thing other than that it has “by nature”. For example, by cultivating the land, training the animal, etc.⁴⁹ However, the question is less straightforward when it comes to “things” that are not external in this sense, most notably determination of one’s own personality.

Intellectual accomplishments, skills, sciences, arts, even religious matters (sermons, masses, prayers and blessings at consecrations), inventions etc., become objects of contract. In the way in which they are bought and sold etc. they are treated in the same way as recognizable *things*. It may be questioned whether the artist, the scholar etc. are in legal possession of their art, science, ability to preach a sermon, to hold a mass, etc., that is, whether such objects are *things*. One hesitates to call such skills, knowledge, abilities etc. *things*, for on the one side, such possessions are objects of commercial negotiations and contracts, yet on the other they are inmost and intellectual instances. Consequently, when it comes to define their legal status, the understanding finds itself in troubles, because it sees only the alternative that something is *either* a thing *or* not a thing [...]. To be sure, knowledge, sciences, talents etc. are attributes of the free mind, and are inward rather than outward instances; however, the free mind can, by uttering them, give them an outward and external existence and “let them go”, i.e. *dispose* of them (see

⁴⁶ “The first is not the rightful owner because he is the first, but because he is a free will, because it is only the fact that another comes after him that makes him the first.” (§ 50).

⁴⁷ § 42.

⁴⁸ § 44.

⁴⁹ Importantly, this is just the way in which possession is manifested, not the way in which it is acquired (difference with Locke). On this point see Jeanne L. Schroeder, “Unnatural Rights: Hegel and Intellectual Property”, at 469-470.

below)⁵⁰, and in this way they come under the determination of *things*. Thus, they are not at the outset something immediate and contingent, but they become so only through the mediation of the mind, which reduces their inward internal character to contingency and externality.⁵¹

This long passage contains all the building blocks of the Hegelian understanding of author's and inventor's property rights. The first element is the question of whether "intellectual accomplishments etc"—which in another passage are termed collectively *geistiges Produktion* (intellectual production)⁵²—are "things" in the same fashion as other objects of purchase and sale. Copyright scholars may see here a contrast with the argument developed by Kant on the unlawfulness of reprinting.⁵³ In the Kantian argument, sermons and the like are not primarily "things" but rather "acts", namely acts of speech in one's own name. As such, they are not, rigorously speaking, possible objects of property. The contract between the author and the publisher cannot be seen as a purchase-and-sale contract, but is rather a "mandate" given to the publisher to speak to the public in the author's name.

However, viewed from the Hegelian perspective of the human being as a person, a sermon appears in a different light, namely as an accomplishment of the free mind which can attain an external existence and be handed over to others. In this respect, a sermon can become object of purchase-and-sale contract in the same way as other "things" recognized as such. The key point here, for Hegel, is to overcome the unilateral understanding that something either is a thing or is not. "Things" are not just those instances that are external in themselves, but also instances that are reduced to externality by our free mind. In Hegel's perspective, the essential trait of a sermon is not (as in Kant) the fact of being addressed to others, but rather the fact of being "uttered" by a person. This utterance gives the externality that is required to treat a sermon "like an acknowledged thing", and explains the fact that "we speak of property in a legal sense also by reference to the mind."⁵⁴

Property in products of the mind: taking possession, use and alienation

⁵⁰ Namely, in §§ 67-69 (which we, too, will discuss below).

⁵¹ § 43.

⁵² See § 68 (discussed below).

⁵³ See Immanuel Kant, *On the Unlawfulness of Reprinting* (Berlin, 1785), in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, 2008, www.copyrighthistory.org and Immanuel Kant, "Metaphysik der Sitten," in *Kants gesammelte Schriften*, ed. Königl Preuß, Akademie der Wissenschaft (Berlin-Leipzig: De Gruyter, 1907), vol. 6, 404. For a discussion of Kant's argument on copyright, see Abraham Drassinower, "Copyright Infringement as Compelled Speech" and Laura Biron "Public Reason, Communication and Intellectual Property" in *New Frontiers in the Philosophy of Intellectual Property*, ed. Annabelle Lever (Cambridge, UK: Cambridge University Press, 2012), Maurizio Borghi, "Copyright and Truth," *Theoretical Inquires in Law* 12, no. 1 (2011); and Anne Barron, "Kant, Copyright and Communicative Freedom," *Law and Philosophy* 31, no. 1 (2012).

⁵⁴ Vorlesung, § 43. In the *Vorlesung* Hegel makes this distinction: "1. Things that are merely external, 2. The natural existence, which is also external but at the same time is incontrovertibly mine, 3. *Geistiges* [intellectual instances], but of the kind that are reduced to externality only through myself." (Ibid.)

The property of “products of the mind” acquires its precise legal determination in the subsequent analysis, where Hegel addresses the relationship of person and thing. This relationship consists of three moments: taking possession, use and alienation.⁵⁵

As far as possession is concerned, the analysis of products of the mind is somehow redundant, as these products are immediately possessed by the free mind who generated them; the question, if anything, is what happens to them once the free mind has reduced them to externality. Taking possession is concerned with *physical* seizure of things. However, there is a point in which intellectual skills become determinant in taking possession: it is when the free mind “gives form” to external instance—the most obvious examples of which is the cultivation of fields and the training of animals:

By *giving form* to something, the determination that something is mine receives a *self-standing* outward (external) character.⁵⁶

At the same time, as recalled before, the external “natural” thing, which as such has no end in itself, receives an end “other than the one it immediately possesses.” *Giving form* to something is thus a fundamental way of manifesting possession in which intellectual skills and talents play a fundamental role. This occurs in two ways: by altering the thing and by giving it a new purpose or end. In its abstract determination, this alteration and repurposing is not sufficient to establish property. However, the more I give form to something, the more the thing becomes recognized by others as “mine”. In this respect, giving form is a constitutive (albeit not unique) way of demonstrating possession.

The second moment of property is the *use* of the thing. Here the possession of the thing is placed in the dimension of *time*, as possession subsists only if is *continuous* possession, namely if it keeps on manifesting itself as possession to others. “Use” is nothing but this continuity, without which the property of the thing is lost. In Hegel’s analysis, “prescription” is not just a norm for the sake of certainty of right, as it is commonly assumed in the civil law tradition. On the contrary, prescription (i.e. termination of rights) is based on an essential “determination of the *reality* of property, of the will’s need to express itself in order to possess something”.⁵⁷ Accordingly, also property of intellectual production is limited by reference of use.

Public monuments are national property, or more precisely, like works of art in general with regard to their *use*, is their indwelling soul of remembrance and honour which gives them vigour as

⁵⁵ § 53. These three moments correspond to the classical “trinity” of property rights: possession, enjoyment and alienation, as historically rooted in the doctrines of authors like Grotius and Pufendorf (see Adam Mossoff, “What is Property? Putting the Pieces Back Together” 45 *Arizona Law Review* (2003), 371, 391-2).

⁵⁶ GPR, § 56.

⁵⁷ GPR, § 64.

living and self-standing ends; but if they are abandoned by this soul, they are then in this respect ownerless and become subject to contingent private possession, as, for example, the Greek and Egyptian works of art in Turkey. The *right of private property* which an author's family has in his productions is subject to prescription for similar reasons; they become ownerless in the sense that, like public monuments (but in an opposite way), they become universal property and, depending on the particular use that is made of these productions, they become subject to contingent private possession.⁵⁸

The reference to use introduces an important limitation to the property right in intellectual products, most notably authorial works. Authors' works become part of a people's "soul" by walking a path which is in a way opposite to that of public monuments of ancient civilization: they break into the "externality" as utterances of their authors and soon take on life of their own by way of being incorporated, so to speak, in the people's soul. The use made by other persons transforms gradually a private property into a universal property—or as we would say today a "public domain". Once turned into universal property, works can be appropriated and "used" by anyone to the fullest extent.⁵⁹ The author's property is essentially, and not just accidentally, limited by time.⁶⁰

The author's property receives its full determination and limitation when Hegel addresses to the third moment of property, namely *alienation*.

As seen so far, Hegel affirms that possession subsists not only on one's own skills and talents, but also on the form and shape that is given to external things through them. These universal instances are "mine" initially only in the very specific sense that they cannot belong at the same time anyone else. Thus, what is possessed in this sense cannot be transferred to others in any respect: it is an inalienable and non expiring right of property in "my own" determinations. So, while I can relinquish the property on "external things", by leaving such things unowned by me or by passing them over to the possession of another, I cannot relinquish "those goods, or rather substantive determinations [...], which constitute my own person and the universal essence of my selfconsciousness in the deepest sense, such as my personality in general, my universal freedom of will, my morality and my religion".⁶¹ Hegel refers to these "substantive determinations" also as "attainabilities" (*Möglichkeiten*), namely: instances that the human being *attains* in the process of fully accomplishing his own personality. While there is a

⁵⁸ GPR, § 64.

⁵⁹ As it will be discussed in the next paragraph, the author's and inventor's right is precisely a right to reserve a certain *use* of the work or invention when alienated to others.

⁶⁰ The argument that "the longer a work has been published, the lesser copyright protection does it deserve" has been developed by Joseph P. Liu, "Copyright and Time: A Proposal", 101 *Michigan Law Review* (2002) [proposing to adjust the scope of copyright protection by considering time as a factor in fair use analysis].

⁶¹ GPR, § 66.

constitutive ownership on both physical and intellectual attainabilities, so that they cannot be alienated without neglecting the very essence of the human being, once these receive a limitation they become subject to transferability.

There are two elements in the Hegel's approach that must be clarified: the first one is the non-transferability of the ownership in the "universal instances" which constitute my own personality; the second one is the transferability of the same instances once they receive a limitation.

Inalienable work, alienable works

The difference between inalienable and alienable instances is essential to the Hegel's argument. As a matter of fact, the issue of the right of the author is entirely an issue of the principle upon which the author remains in possession of certain rights *after* the property of the work, or of one of its physical embodiments, has been alienated. If human skills and talents are not as such transferrable—not even in the sense that they can be put at the service of another person—what happens when "intellectual products", i.e. the outcomes of those inalienable determinations, are alienated? In familiar copyright terms the issue is seemingly the difference between "work" as verb and "work" as substantive: the first defines a sphere of possibilities that cannot be alienated, the second an externalisation of such sphere which attain an independent life and can be handed over to others.

To understand this difference, we have to consider the conditions upon which a "thing" in general is transferrable in the Hegelian system. As it is explained in § 65 of the *Grundlinien* ("Alienation of property"), things can be handed over only insofar they are, in themselves, detached and detachable from a particular owner. In a way, when someone alienates his property on a thing, he is implicitly relying on the externality of the thing, namely the fact that the thing as such is unconstrained to any fixed possession. A piece of land can be owned by myself or by anyone else. Skills and talents do not have this externality, in the sense that they are not isolated and independent from the individual that takes possession of them. They subsist only to the extent that someone has *entered into possession* of them, and this confers to them a peculiar non-external character.

The right to such inalienable things is imprescriptible, for the act whereby I take possession of my personality and substantial essence, and whereby I make myself a responsible, moral and religious being capable of possessing rights, removes from these determinations that externality which alone made them capable of passing into the possession of someone else.⁶²

⁶² GPR, § 66.

For this reason, essential determinations of one's personality cannot be transferred or alienated. To be sure, examples where such alienation *de facto* occurs abound. Nothing prevents me from alienating and even "selling" essential elements of my personality, such as my free will, my ethical and religious choices, my moral integrity and so on. For instance, I can adhere by contract to a particular credo, or I can voluntarily renounce to my freedom of thinking, or I can even bind myself to commit a crime, stealing or murdering (so-called *pactum sceleris*). The reason why these contracts are void is not only because they aim to achieve an end which is illegal or morally questionable, but because they alienate something which is in itself *impossible* to alienate. They are unreal contracts, even if *de facto* subsist. By handing out an essential determination of my own personality "either I have handed out what I myself did not possess, or I am handing out what, as soon as I possess it, exists in essence exclusively as mine and not as something external".⁶³ By entering in such contracts, the person dispossesses his personality and negates himself as such, thus making the contract in itself contradictory—even though possibly factually subsistent. To an extent, alienation of essential determinations of personality degrades the person to a state of self-inflicted slavery, since it allows others to take possession of the persona as a "thing".

The inalienability of personality as such does not prevent, however, the alienation of *individual products* of these substantive determinations of personality. As discussed before, these products acquire "externality" by virtue of being uttered by a free spirit, and as such they can also be possessed and used. In this respect, there is no contradiction in making them objects of contracts as other "things"; however, as a matter of abstract right, the conditions of possibility of their alienation must now be determined according to their peculiar character of products *of personality*. Alienation is thus subject to specific conditions:

I can *alienate* to others *individual products of my particular physical and mental skills* and [in general] attainabilities of my activity, and a use thereof *for a limited time*, insofar as, providing they are subject to such limitation, they acquire an external relationship to my *totality* and *universality*. By alienating the *whole* of my time, as made concrete through work, and the totality of my production, I would be making the substantial quality of my work and production, i.e. my *universal* activity and actuality, i.e. my personality, in the property of someone else.⁶⁴

The alienation must be consistent with the acquired externality of the "things" in question: the more the thing as acquired externality, the larger the latitude of the possible alienation. So, alienation of the use of my own work, as expressed through my own physical and intellectual skills, is subject to the

⁶³ GPR, § 66.

⁶⁴ GPR, § 67.

strict condition that it can only be for a limited time—or the use of my skills would not be distinguishable from the skills themselves. Therefore, by alienating the use of my whole time I would make my person “property of someone else”, i.e. I would reduce myself to a non-person, as in the ancient condition of slavery.⁶⁵ In contrast, products of my skills have already acquired externality and hence their alienability is subject to less strict conditions: however, by alienating the *totality* of my production I would, in a way, remove from them the acquired externality and make them akin essential attainabilities of my personality. I can alienate *individual* products of my ingenuity, but not whole of my present and future production.

Transfer of property and the twofold use of the work

What happens when property of products of the mind is alienated? The question brings us to the core of the Hegelian argument on property of intellectual products. The peculiar trait of these “things” is that they consist, to a greater or minor extent, in purely external qualities that can, in turn, be produced by others. For instance, in case of a literary work, “the form which makes it an external thing” is of a purely “*mechanical kind*”, so that anyone with ordinary skills can re-produce it. In case of works of craftsmanship and art the external form is not made of purely mechanical signs and can be reproduced only by means of special skills, but in any case *without possessing the same skills* of the one who has originated it. Here there is a spectrum of products which have in common a similar element: by acquiring the “thing” (the copy of the literary work, the object of artistic craftsmanship, etc.) the acquirer enters into possession of *both* the thoughts that are communicated or the inventive concept that is embodied, *and* the universal way of so expressing or producing objects with that same form.⁶⁶ On which grounds can the author and the inventor retain the latter possession while relinquishing the other? In other words, can someone who legitimately acquires a book (or a chandelier, or a mousetrap) be refrained in his ability to take full advantage of all possible uses of the product, including re-producing it in the same identical manner? The essence of the author’s and inventor’s right is just this: an entitlement to retain certain uses of the work while transferring the property to others:

Since the person who acquires such a product possesses the full use and value of his single exemplary, he is complete and free owner of that one exemplary, but the author of the work or the inventor of the apparatus remains owner of the *universal way* and manner of multiplying such produces.⁶⁷

⁶⁵ The status of slave does not depend on the quality of the job but on the nature and scope of the job’s alienation: “The Athenian slave perhaps had easier tasks and more intellectual work to perform than our hired labourers normally do, but he was nevertheless a slave, because the entire scope of his activity had been alienated to his master.” (Ibidem, *Addition*).

⁶⁶ GPR, § 68.

⁶⁷ GPR, § 69

On which ground can this “schism” in the property of the intellectual product be justified? To answer this question, Hegel takes care of excluding the conventional shortcuts represented by the “pragmatic” and “natural-law” arguments respectively.

On the one hand, the core element of the right of the author and of the inventor cannot be found in the assumption that, when the author transfers his work (or copies thereof) to others, makes this transfer “subject to the *condition* that the others do not enter into possession of the capacity to reproduce the work”.⁶⁸ The foundation of the author’s and inventor’s rights cannot be found in a unilateral act, which would rightly appear as purely arbitrary to the person who has legitimately acquired the work. There is nothing in the form of the transaction that can justify general limitations to the full enjoyment of the property.⁶⁹ Such limitation could be imposed by either a unilateral act of the author or a discretionary power of the State. In both situations, its legal foundation would remain obscure.

On the other hand, the restriction cannot be deduced from a supposed enduring legal relation between the author (inventor) and the work (invention). This relation, says Hegel, “is not of the kind of the *accessio naturalis*, like the procreation of animals [*foetura*]”⁷⁰—which means: the author does not possess the multiple instantiations of his work in the same way as the owner of cattle is proprietor of the offspring of his cattle, such as in the Roman law concept of “natural accession”. Again, once the author has alienated the possession of the work, he has no longer claims over the fruits or offspring of his work.

Indeed, any limitation in the use of the work or invention can only be inferred from the nature of the thing itself. Hegel presents the key issue as follows:

The first question is whether such a separation between the ownership of the thing and the capacity, which comes with it, to produce the thing in the same way [...] is admissible in concept and does not remove the full and free ownership of that thing.⁷¹

This “separation” appears legitimate if we look more closely at the two distinct *uses* that the product enables: the first use consists in appropriating the thoughts that are communicated with the work—which, in case of literary productions, represents “the sole destination and the value”⁷² of the product—or to enjoy its artistic form or to utilize the inventive concept embodied in it. The second possible use is to reproduce the instance in the same way. While the former use corresponds to the very

⁶⁸ GPR, § 69.

⁶⁹ As a norm, the transfer of property exhausts *all* rights of the initial proprietor.

⁷⁰ GPR, § 69.

⁷¹ *Ibidem*.

⁷² GPR, § 68.

purpose and function of a work or an invention, the second one is “a use which remains distinct and separated from the use to which the instance is directly purposed”.⁷³

The Hegelian divide in the uses of the work parallels the dichotomy of expressive form and ideational content, as recognized as landmark in modern copyright law almost universally.⁷⁴ Interestingly, Hegel obtains the dichotomy not from the angle of the creative act of the author, but from that of the *use* that is expected to be made of the work. In the *Lectures*, Hegel formulates this divide in terms of “exploitative use” (*Gebrauch*), which is retained by the author after the alienation of the work, and “use by appropriation” (*Verbrauch*), which is passed on to the acquirer with the copy of the work. The restriction on the exploitative use does not deprive the legitimate owner of the copy from “disposing over the entire intrinsic value of the work itself”.⁷⁵ In fact, the exploitation of the work (by mechanical reproduction or other means of dissemination) has the sole purpose of enabling the use by appropriation: the work is exploited so that it can fulfil its inherent destination of being appropriated by others. This is to say that the use of one’s own property (the lawfully acquired copy) is not restricted or limited, since this use qualifies *ab origine* as “appropriative” and it can never be construed as exploitative. In this respect, it is not correct to say that the acquirer is “limited” in the use of the work, as in fact he acquires the full extent of the only use that is consistent with the nature of the “thing”:

Indeed, the product of the mind has the destination of being apprehended by other individuals and appropriated in their own representations, memories, thoughts, etc. Hence, the utterances by means of which, in turn, they make *what they have learned* (since learning means not just learning the path of words by memory—the thoughts of others can be apprehended only by thinking, and re-thinking is also learning) into an *alienable thing* will always be likely to have some distinctive *form*. For this reason, they can regard the chattels that flow from it as their property and claim their rights in such productions.⁷⁶

The appropriation of what has been apprehended from the work is consistent with what we have previously characterized as *permissible* “use by appropriation” of the work, and indeed Hegel makes clear that the destination of a work is precisely to communicate the thoughts that are uttered in it. The repetition of what has been apprehended is likely to generate a product of the mind with a distinctive form. If this is the case, then the user is entitled to claim rights over the exploitative use of the resulting

⁷³ GPR, § 69.

⁷⁴ The landmark foundation is due to another German philosopher, Johann G. Fichte (see *Fichte: Proof of the Unlawfulness of Reprinting, Berlin (1793)*, transl. by Martha Woodmansee, in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org).

⁷⁵ Vorlesung, § 69.

⁷⁶ *Ibidem*.

work. Although formally correct from the point of view of abstract right, it may be difficult to determine to what extent a repetition of thoughts becomes a new and distinct alienable thing, upon which an individual can claim his own “property”, i.e. exclusivity on the exploitative use, rather than an exploitative use in disguise. Interestingly, for Hegel this determination cannot be made as a matter of law: “Plagiarism ought therefore to be a matter of *honour*, and honour should deter people from committing it”.⁷⁷

Between the two uses enabled by the work—to apprehend it and to exploit it—there is a space where law has no and cannot have effect. It would be inaccurate to define this space as a grey area where rules do not exist: indeed, the use of the work is subject to strict albeit *unwritten* rules, whose legitimacy cannot be measured in terms of the effects they capable of producing. As Hegel observes, the fact that the expression “plagiarism” is no longer heard as an offence, may have an opposite meaning: either that the unwritten rules of honour has had the effect of suppressing plagiarism, or that plagiarism has become an accepted use of the work and has ceased to be seen as dishonourable. Whatever it may be, the laws against breach of author’s rights can secure a “determined, though very limited protection to authors and publishers”.⁷⁸

Copyright infringement as misuse of the author’s work

The Hegelian argument on property of intellectual productions is part and parcel of his doctrine of property as primary manifestation of human personality. So, infringement of “intellectual property” is in principle not different than infringement of property as such, whose principle is expressed in the general negative form “*not to violate* personality and what ensues from personality.”⁷⁹ However, as we have seen, the scope of the rights deriving from this kind of property is far from unlimited and boundless. On the contrary, it is subject to strict internal limitations and conditions. Rights in intellectual products are limited in time and scope—not *despite* the fact that they are externalization of one’s own personality determinations, but *because* they are so.

Violation of the author’s property occurs when the work is used in a way that exceeds and is not consistent with the purpose for which it was alienated. It is a wrong of *misuse* of the work. However, it is not in the power of the author to determine what the permitted use of the work should be. Hegel’s argument does not provide support to the idea that the author should have control over the various external uses of the work. In particular, there is no support to the argument that the author has a right to choose which uses should be made of his work. Both the person who alienates the work and

⁷⁷ GPR, § 69.

⁷⁸ Ibidem.

⁷⁹ GPR, § 38.

the person who receives it are bound by the inherent destination of the “thing” that is alienated, namely—in case of works of thought—to be apprehended and appropriated by learning, or—in case of functional works—to make use of the inventive concept embodied in it, and so on. The pivotal element in determining use and misuse is the nature of the work as such: not the will of the author or the interest of the public.

And what are works? Knowledge, sciences, talents, or other essential determinations of a free mind that have been uttered and given external, independent existence. The “externalization” or, to use the conventional copyright language, the “expression” of one’s own personality, is the formal condition of their alienation. As long as personality has not made “external”, no alienation is possible according to the system of right—although it may well be possible under other regimes, for instance a system of *interests*. In fact, view through the lenses of interests, alienation is not subject to internal limits, as long as “utility” is provided to the parties. Why would not be possible to alienate my own freedom of will or my freedom to think, if this results in an increased utility to both myself and the acquirer? Under the system of rights, such a contract would be void because the object of contract *has no existence* as an external (alienable) thing detached from what I am, from my persona. No such limit can be inferred under a system of utility.⁸⁰

Does this imply that inalienable rights still subsist when the work has been transferred by the author to the public? In other words: can a system of inalienable moral rights be inferred from Hegel’s analysis? The connection, if existing, is at best loose: the work can be alienated precisely because it has been given external existence, detached from the persona of the author, and destined to be appropriated by others. No special or even non-special “emotional connection” with the work has legal bearing here.⁸¹ It is only when detached from the person that property in the work takes on its peculiar legal meaning. As said, this is a right to keep possession or control of a particular use, namely reproduction for dissemination, while disposing of the work. Between legitimate use and use that violates the author’s property there is a whole range of intermediate steps, and it seems reasonable to assume that uses that violate integrity and attribution are not consistent with the destination of the work. However, it would be too much to infer that inalienable and imprescriptible rights are necessary part of this system. As a matter of fact, the appropriative use of the work causes the work to become gradually part of a “universal property”, i.e. the people’s “soul”. The distinction between uses that are

⁸⁰ The non-existence of the thing is not a limit for utility. In a sense, utility can be found also in entities that are logically impossible and, as such, non-existent. In a fragment of the *Will to Power*, Nietzsche explains: “[The will] *needs an aim*, and rather than *not* willing, it wills to will *the nothing*. (KSA 5/339) (see Ivo De Gennaro, “Nietzsche: Value and the Economy of the Will to Power”, in I. De Gennaro (ed.) *Value. Sources and Readings on a Key Concept of the Globalized World* (Brill, Leiden-Boston: 2012), 201).

⁸¹ As far as “emotions” are concerned, Hegel writes: “If the feelings of the heart, personal attitudes and sentiments are generally excluded from the determination of positive rights and law, even more so cannot philosophy recognize such authorities.” (GPR, § 3).

consistent or not with the destination of the work is eventually beyond law and it involves the human ethical sphere in a broader sense. So, as a matter of positive law, there may be legal systems that recognize “moral rights” and others that do not do it explicitly, and each of them form a coherent system on their own merits.⁸² The ways in which positive law evolves according to “the particular *national character* or people”⁸³ are unpredictable and all rightful in principle. No national system of positive law, as long as it articulates a system of rights, is “better” than another.

Seen through the lenses of misuse, copyright infringement is primarily a matter of making distinctions between wrongs and rights. The plagiarist is committing a wrong not only to the author, but to himself: by replicating the work without appropriating it, he acts essentially as an unfree being.⁸⁴ More than a “thief”, legally speaking he is a self-inflicted “slave”, no matter how much utility he derives from his actions.

Hegel’s argument, compared to other classical determinations of author’s rights in Kant and Fichte, is less focused on *demonstrating* (logically deducing) the illegitimacy of reprint than at *explaining* its logic. In its clarity, it invites copyright doctrines to focus on the *use* of the work as such, and in this sense it resonates deeply with doctrines that have been developed in the common-law tradition to operate the distinction between legitimate and illegitimated uses of authorial works—or, as Drassinower puts it more specifically, permissible and non permissible copying. These include for instance the doctrines of colourable variations, *animus furandi* and substantial taking, that all together define the scope of property rights in a work. Most notably, Hegel’s argument resonates with the doctrine that addresses specifically the use of the plaintiff’s work, namely fair use. It is remarkable that the legal tradition that has shaped the notion of fair use and fair dealing has left the question of what a “use” of the work is largely implicit.⁸⁵ Yet, as I discussed elsewhere,⁸⁶ the question becomes paramount in our times, as technology enables uses of copyright works that, albeit entailing copying of works on an even mass scale, do not fit squarely within our common understanding of uses that invade the author’s “property”.⁸⁷ In this connection, the Hegelian insights into copyright, property and personality are a never-expiring invitation to keep questioning the fundamentals of copyright in our age.

⁸² I agree with Schroeder that “a Hegelian *property* analysis cannot legitimately be used to justify the *droit morale* or other enhanced rights with respect to intellectual property.” (Jeanne L. Schroeder, “Unnatural Rights: Hegel and Intellectual Property”, 457). However, the Hegelian analysis does not preclude the recognition of moral rights either. For example, the right of integrity can be seen as a norm interpreting the general wrong of “misuse of an author’s work”.

⁸³ GPR, § 3.

⁸⁴ The word *plagium* originally denotes the buying or selling free men as slaves

⁸⁵ On the point of use and non-use of the work see Drassinower *What’s Wrong with Copying?*, 85-110, and my comment in Maurizio Borghi, “Copyright Use and the Many Faces of Property”, 3 *Intellectual Property Journal*, 77 (2016)

⁸⁶ *Ibidem*, 79, and Maurizio Borghi & Stavroula Karapapa, *Copyright and Mass Digitization* (Oxford: Oxford University Press, 2015), 45-56.

⁸⁷ A rich case law on technical reproduction by search engines and the like (from *Arriba Soft* to *Google Books* and beyond) illustrate this point.

