



9-1-2011

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Recommended Citation

Mario Biagioli, *Genius against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting*, 86 Notre Dame L. Rev. 1847 (2011).
Available at: <http://scholarship.law.nd.edu/ndlr/vol86/iss5/3>

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GENIUS AGAINST COPYRIGHT: REVISITING
FICHTE'S *PROOF OF THE ILLEGALITY*
OF REPRINTING

*Mario Biagioli**

This essay is dedicated to the memory of Keith Aoki, dear friend and colleague.

INTRODUCTION

The “romantic author” or “romantic genius” has been central to the history and critique of copyright for a few decades now.¹ A figure of radical individuality, genius was mobilized between the end of the eighteenth century and the middle of the nineteenth century to conceptualize a new kind of property authors could claim in their texts and other works deemed expressive. Drawing a sharp conceptual separation between the content of a work and the unique and therefore original form adopted by the author to express such content, the

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1 See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); THE CONSTRUCTION OF AUTHORSHIP (Martha Woodmansee & Peter Jaszi eds., 1994); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES (1998); MARK ROSE, AUTHORS AND OWNERS (1993); Keith Aoki, (*Intellectual*) *Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1299 (1996); Peter Jaszi, *Toward a Theory of Copyright: Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 462–63; Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 342 (2008); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

romantic genius is seen as the direct ancestor to the foundational notion of “personal expression” in modern copyright.²

Genius functioned as a remarkably effective legal fiction rather than an accurate description of the process of literary or artistic production. Some authors may describe or experience their work as coming together unexpectedly, in a creative flash, by divine inspiration, or in a dream, but that does not erase the fact of the inevitable borrowings, collaborations, and extensive labor that goes into any form of cultural production. I do not wish, however, to expose the mythical nature of the romantic author and the way it denies visibility to the many social dimensions of creativity by casting it an instantaneous and seemingly natural process. That critique has been articulated well and often already.

My point is quite different: whether or not genius has functioned well in the past as a foundational myth of literary property, the kind of creativity attributed to that figure can in fact easily undermine the very notion of property it is deemed to have established. More precisely, it is not that some elements of the figure of the romantic genius support the notion of intellectual property while others play against it,

2 There have been challenges to the “romantic author,” especially when used to account for modern or contemporary legal scenarios. See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 879–904 (1997) (reviewing BOYLE, *supra* note 1), where he sharply critiques the explanatory power that James Boyle attributes to the “romantic author” to explain the drastic expansion of IP in the age of the “information society” in his *Shamans, Software, and Spleens*. Lemley is convincing when pointing out the shortcoming of the “romantic author” to account for modern developments like corporate authorship, or the legal conceptualization of insider trading and blackmail. However, by not engaging at all with the role that the “romantic author” played in the historical conceptualization of copyright and its key notions, he substantially underestimates the conceptual continuities between early modern and contemporary copyright scenarios, and the problems attached to such continuities. More recently Oren Bracha has argued that the radical originality associated with the romantic author has played an uneven, and ultimately disappearing, role in U.S. copyright history, from the Constitution to present. See Oren Bracha, *The Ideology of Authorship Revised: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192–97 (2009). Simon Stern has also critiqued the centrality of the role attributed to the romantic author in histories of eighteenth-century British copyright. See Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, in ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT 69, 69–101 (Reginald McGinnis ed., 2009). While I agree with much of the evidence presented by Bracha and Stern, some or much of their critique reflects misunderstandings over the meaning of “creativity” between them and the proponents of the “romantic author.” Much smoke would be cleared on both sides by taking the romantic author to be a figure of irreducible expressive individuality rather than a creator *ex nihilo*, and by downplaying discussions of the relationship between originality and literary or artistic value.

but rather that the very same dimensions that make genius into such a powerful tool for establishing copyright are also capable of undermining it. Genius is copyright's *pharmakon*—simultaneously a cure and a poison.³ This paradox has been hiding in plain sight for a couple of centuries, nicely spelled out in the Romantic text frequently credited for having established the modern idea/expression dichotomy: Johann Gottlieb Fichte's 1793, *Proof of the Illegality of Reprinting*.⁴

I. TRAJECTORIES AND TIMELINES

It was claimed in eighteenth-century British debates over the existence of literary property that works should be initially owned by their authors because they embodied some imprint of the author's creative agency—a pattern that made them distinguishable from all others. A shared strategy was to distinguish a work's "form," "style," and "sentiment" from its content so as to argue that a book or an engraving was more than a material paper object. The patterns in which its letters, characters, or lines were arranged on the printed surface actually conveyed something more ineffable than ideas, things, facts, and knowledge.⁵ That formal stylistic quality (much easier to grasp as a pattern

3 To the best of my knowledge, only Friedemann Kawohl and Martin Kretschmer have noticed a tension between Fichte's notion of genius and modern copyright law: "One might say that modern copyright was born not out of the romantic notion of genius, but despite it." Friedemann Kawohl & Martin Kretschmer, *Johann Gottlieb Fichte, and the Trap of Inhalt (Content) and Form: An Information Perspective on Music Copyright*, 12 INFO. COMM. & SOC'Y 205, 214 (2009) (citation omitted) (citing Woodmansee, *supra* note 1). On the concept of the *pharmakon* as used here, see JACQUES DERRIDA, DISSEMINATION 66–141 (Barbara Johnson trans., Univ. of Chi. Press 1981) (1971).

4 See Johann Gottlieb Fichte, *Beweis der Unrechtmäßigkeit des Büchernachdrucks. Ein Raisonement und eine Parabel [Proof of the Unlawfulness of Reprinting: A Rationale and a Parable]*, 21 BERLINISCHE MONATSSCHRIFT 443, 443–87 (1793) (Martha Woodmansee trans., 2008), translated in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds.), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22d_1793%22. On Fichte's role in copyright history, see DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 106–21 (1992); Maurizio Borghi, *Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment*, in 5 NEW DIRECTIONS IN COPYRIGHT LAW 197, 197–222 (Fiona Macmillan ed., 2007); Kawohl & Kretschmer, *supra* note 3, at 205–28; Martin Kretschmer & Friedemann Kawohl, *The History and Philosophy of Copyright*, in MUSIC AND COPYRIGHT 21, 21–53 (Simon Frith & Lee Marshall eds., 2d ed. 2004); and Woodmansee, *supra* note 1, at 444–46.

5 William Warburton explored the problem in *A Letter from an Author to a Member of Parliament*, trying to distinguish between form and doctrine. See William Warburton, *A Letter from an Author, to a Member of Parliament, Concerning Literary Property* (1747), reprinted in 12 THE WORKS OF THE RIGHT REVEREND WILLIAM WARBURTON 405, 405–416 (R. Hurd ed., London, Cadell & Davies 1811), reproduced in PRIMARY SOURCES

than to spell with any clarity) functioned simultaneously as the mark of authorial agency and as the boundary mark of the author's work and property—however hazy that boundary may actually turn out to be. As Francis Hargrave put it in 1774:

Every man has a mode of combining and expressing his ideas peculiar to himself. The same doctrines, the same opinions, never come from two persons, or even from the same person at different times, clothed wholly in the same language. A strong resemblance of stile, of sentiment, of plan and disposition, will be frequently found; but there is such an infinite variety in the modes of thinking and writing as well in the extent and connection of ideas, as in the use and arrangement of words, that a literary work *really* original, like the human face, will always have some singularities, some lines, some features, to characterize it, and to fix and establish its identity; and to assert the contrary with respect to either, would be justly deemed equally opposite to reason and universal experience.⁶

The connection between authorial originality or genius and copyright bloomed a few years later among German Romantics, triggered not by Hargrave's text but by a slightly older English work of literary criticism: Edward Young's 1759 *Conjectures on Original Composition*.⁷ Young's text had little noticeable impact on British copyright debates but received extraordinary attention in Germany, where its celebration of natural genius and critique of literature stemming from the

ON COPYRIGHT, *supra* note 4, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1747%22. And William Blackstone, arguing in *Tonson v. Collins*, stated that "style and sentiment are essentials of a literary composition." Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, REPRESENTATIONS, Summer 1988, at 51, 76 (citing *Tonson v. Collins*, (1761) 96 Eng. Rep. 180, 189 (K.B.)). Analogously, an anonymous author stated that "the Productions of modern Authors, [there are] very few . . . whose Sentiments are new or original. Authors who seek Redress for Invasion of their Property, must prove the Originality of their Sentiments." WILLIAM WARBURTON, AN ENQUIRY INTO THE NATURE AND ORIGIN OF LITERARY PROPERTY 12 (London, Flexney 1762), *cited in* Stern, *supra* note 2, at 83–84.

6 FRANCIS HARGRAVE, ARGUMENT IN DEFENCE OF LITERARY PROPERTY 6–7 (London, W. Otridge 1774), *reproduced in* PRIMARY SOURCES ON COPYRIGHT, *supra* note 4, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1774a%22, *and cited and discussed in* Rose, *supra* note 5, at 72.

7 *See, e.g.*, M.H. ABRAMS, THE MIRROR AND THE LAMP 189–213 (1953); JOHN LOUIS KIND, EDWARD YOUNG IN GERMANY (1906); MARTIN WILLIAM STEINKE, EDWARD YOUNG'S "CONJECTURES ON ORIGINAL COMPOSITION" IN ENGLAND AND GERMANY (1917); EDWARD YOUNG, CONJECTURES ON ORIGINAL COMPOSITION (London, Richardson 1759); Michael Beddow, *Goethe on Genius*, in GENIUS, 98 (Penelope Murray ed., 1989); James Sambrook, *The Psychology of Literary Creation and Literary Response*, in 4 THE CAMBRIDGE HISTORY OF LITERARY CRITICISM 614, 630 (Hugh Barr Nisbet ed., 1989).

imitation of the classics resonated with the Romantics' emphasis on the creative individual self and the organic (rather than mechanical or rule-based) nature of both knowledge and artistic production.⁸

In 1791, Fichte refashioned Young's and his fellow Romantics' notion of genius to make a case for an indelible trace of the author's creativity in his/her work—a trace he identified with the unique personal expression the author was bound to present ideas, images, and content: "Each individual has his own thought processes, his own way of forming concepts and connecting them."⁹ It was a response to what he saw as the unacceptable but widespread practice of reprinting in the German lands.¹⁰ Reprinting is commonly identified with piracy, but in eighteenth-century Germany it was an effectively legal practice rooted in the fragmentation of political power over many different independent towns and territories—about three hundred of them. Because the scope of printing privileges was local and typically limited to small geographical jurisdictions, printers who operated in a nearby town under a different privilege-granting authority could legally print a book protected by a privilege issued by a different town, though one that may be just a few miles away.¹¹

Fichte condemned reprinting as a practice, but objected even more forcefully to seeing such practice conceptualized and judged through the lens of the privilege system.¹² Printing privileges were

8 See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 23, 37 (1967); ROSE, *supra* note 1, at 117–32; Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715, 730 (1981); Woodmansee, *supra* note 1, at 445; Mario Biagioli, *The Author as Vegetable*, REPRESENTATIONS (forthcoming Winter 2012).

9 Fichte, *supra* note 4, at 450. This quote is substantially edited, but is reproduced in full in a later section in this Article. See *infra* text accompanying note 27.

10 The practice of reprinting had recently been defended in Johann Albert Heinric Reimarus, *Der Bücherverlag, in Betrachtung der Schriftsteller, der Buchhändler und des Publikums abermals erwogen* [*Book Publishing with Regard to Writers, Publishers, and the Public*], DEUTSCHES MAGAZIN, Apr. 1791, at 383, reproduced in PRIMARY SOURCES ON COPYRIGHT, *supra* note 4, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22d_1791%22. Fichte presents his article as a direct response to Reimarus. See Fichte, *supra* note 4, at 443.

11 See Martha Woodmansee, *Publishers, Privateers, Pirates: Eighteenth-Century German Book Piracy Revisited*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY 181 (Mario Biagioli et al. eds., 2011).

12 Printers would be financially harmed by the reprinting of their works by other printers in neighboring or nearby cities, but they could do the same with those publishers' titles, thus possibly breaking even. The authors' predicament was quite different, however, as they could see their work reprinted in the town next door, without any retribution from that printer, while not being able to take any advantage from printing other authors' works. While for the printers it was a "win some, lose some"

treated and deployed as tools for economic policy, and their legal status was that of grants, that is, exceptions to civil or natural laws.¹³ Opposing that approach, Fichte sought a right-based argument for the existence of an author's property in the work so as to shift discussions of reprinting from the realm of utility and damages to that of justice:

[I]f we can simply prove the existence of such a perpetual ownership of the text by its author, then . . . we will not need to respond to . . . demonstration of the utility of reprinting, since this will no

predicament, there was little silver lining for the authors, except publicity. According to Fichte:

Mr. Reimarus, then, has not demonstrated, nor attempted to demonstrate, that no such perpetual ownership by the author is possible. He has rather just said that no one has so far demonstrated its existence, and he has presented a number of proceedings that in his opinion contravene the generality and thus inviolability of such a right based on ownership. Thus we need not follow him step by step and meet each of his arguments separately. For if we can simply prove the existence of such a perpetual ownership of the text by its author, then what Mr. Reimarus requires will have been provided and he himself may undertake to reconcile his examples with the proof. Furthermore, we will not need to respond to his demonstration of the utility of reprinting, since this will no longer be relevant; for whatever is plainly illegal ought never to occur no matter how useful it may be.

Fichte, *supra* note 4, at 444–45.

13 “By definition a privilege is an exception to a generally valid natural or civil law. Up until now there has existed no civil law concerning the ownership of books.” Fichte, *supra* note 4, at 469. But then he goes on to argue that printing privileges were a misnomer because they did not entail the suspension of any natural right to copy—a right he claimed not to exist. While printing privileges were not proper privileges (as they implicitly recognized the author's right not to have his/her work copied), the misnaming was pernicious as it created the opportunity for people to argue that authors did not have rights, and that their protection rested only on an ad hoc exception to the universal natural right to copy:

Hence a book privilege must be an exception to a natural law. A privilege of this sort says that a certain book is not to be reprinted. It thus presupposes a natural law that would have to read as follows: everybody has the right to reprint every book. Is it really true though that the right to reprint is recognized as a generally valid natural right even by those into whose hands humanity has entrusted the safekeeping of its rights, i.e., the governing authorities; is it really true that even scholars recognize this as a natural right? For what else after all can the request for a privilege mean than, “I acknowledge that, from the day of publication of my work, whosoever wants to has the undisputed right to appropriate my property and every possible use thereof, but I request for my own benefit that the rights of humanity be restricted.” Has anyone ever accepted having to have a permit to pass by highway robbers unharmed?

Id. at 469–70.

longer be relevant; for whatever is plainly illegal ought never to occur no matter how useful it may be.¹⁴

His *Proof of the Illegality of Reprinting* did precisely that. Key elements of Fichte's text were either adopted or mirrored in the *Prussian Statute Book* of 1794. While not recognizing literary property as a concept, that law nevertheless stated the author's life-long right to control the publication of his or her work without the need to file for a privilege.¹⁵ Fichte's ideas were subsequently referenced in the articulation

14 *Id.* at 445. And also:

For however often we could show that neither the author nor the publisher suffers any harm—that it is even to the author's advantage to be frequently reprinted and that his fame is thereby spread through all the German lands, from the towers of learning to the remotest hamlet in the provinces, from the scholar's study to the artisan's workshop - would this make just what is unjust? Do we have a right to act in someone's interest when it is against his will and rights? Everyone is perfectly entitled to cede nothing of his rights, however much this may harm him. When will people ever develop a feeling for the noble idea of justice, without any regard for utility?

Id. at 460.

15 See ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN [ALR] [PRUSSIAN STATUTE BOOK] 397, 399 (1794) (Friedemann Kawohl trans., 2008), translated in PRIMARY SOURCES ON COPYRIGHT, *supra* note 4, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22d_1794%22. The law of 1794 was not limited to printed books but included "maps, copper engravings, topographical drawings, and musical compositions." *Id.* It required publishers to enter into contracts with authors to produce editions (and new re-editions) of their works, and authors could break such contracts under certain circumstances. *Id.* at 400, 402. Members of the committee that drew up the 1794 law were associated with Fichte and Kant (and actually published their articles on reprinting and literary property in their journal, the *Berlinische Monatsschrift*). However, because the 1794 law had been in the making for years prior to Fichte's publication, it is not clear which text influenced which. A point of important conceptual overlap between Fichte's *Proof* and the 1794 *Statute Book* (which may reflect a convergence between Fichte and the positions of one of the *Statute Book's* drafters—Carl Gottlieb Svarez) is the fact that the author always retains right in his or her work:

Looking back at these provisions from the perspective of modern German copyright discourse, we can say that the author does not sell the copyright per se to the publisher: rather, he retains his author's right - which is not conceived as a *property* right - and transfers only a clearly demarcated right to use the work for the specific publication of a certain number of copies. Thus, the non-transferability of authors' rights within the German nineteenth- and twentieth-century tradition had its origins in the ALR provisions, rather than in any possible influence exerted by the French Literary and Artistic Property Act of 1793.

Friedemann Kawohl, *Commentary on the Reprinting Provisions in the Prussian Civil Code* (2008), in PRIMARY SOURCES ON COPYRIGHT, *supra* note 4, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22d_1794%22.

of the first Prussian Copyright Act of 1837.¹⁶ British Romantics like Coleridge and Wordsworth then introduced (or reimported) genius-based arguments into British nineteenth-century copyright debates.¹⁷ The idea/expression dichotomy has since become part of US law, the 1991 European software directive, the 1994 TRIPS, and the 1996 WIPO Copyright Treaty.¹⁸

II. AN ORIGINAL PATH TO ORIGINALITY

Compared to previous (mostly British) arguments for the existence of literary property, Fichte's demonstration of why reprinting violated the "perpetual ownership of the text by its author"¹⁹ stands out for *not* starting with an image of what the object of the "perpetual ownership of the text by its author" was. In Britain, for instance, some copyright proponents tried to legitimize the emergent and hard-to-conceptualize notion of literary property by analogizing it to landed property, or by casting the author's mind as a field in which fruit and flowers grew as in a farm or garden. Others tried to integrate literary property within Lockean property theory by expanding the notion of labor to include the "mental labor"—the sweat of the brain—that authors expended to produce their works. Fichte, instead, offered neither metaphorical bridges between old tangible property and new

16 Kretschmer & Kawohl, *supra* note 4, at 24 (quoting Philipsborn, Preliminary Paper to the Prussian Copyright Act, *quoted in* E. Wadle, *Das preußische Urheberrechtsgesetz von 1837 im Spiegel seiner Vorgeschichte*, in *WOHER KOMMT DAS URHEBERRECHT UND WOHIN GEHT ES?* 55, 65 (R. Dittrich ed., 1988)); *see also id.* ("Significantly, the drafters of the Prussian Copyright Act included the term 'property' in the title, referring to Fichte's concept (albeit without citing his name): 'The buyer of a book gets by the purchase the physical property in his copy and the right to use and to process the expressed thoughts in his particular manner. What inviolably remains the author's and can be identified as the real intellectual property [*das eigentliche Geistes-Eigenthum*], is the particular form, in which he has expressed his thoughts. These principles are not new, they already have been laid down in the 90s of the last century by learned men who made an effort, to develop the particular matter of reprint out of its own nature.'").

17 Fichte's arguments were then reinjected into nineteenth-century British debates over copyright by romantic poets like Wordsworth, Shelly, Blake, and Scott. *See* Rose, *supra* note 5, at 70, 76.

18 "Fichte's essay proved hugely influential. . . . Over the next 200 years, the so-called idea/expression dichotomy became an integral part of US jurisprudence and found its way into the 1991 European software directive, the 1994 WTO TRIPS Agreement and the 1996 WIPO Copyright Treaty. The wording of TRIPS and WIPO Copyright Treaty is identical: Copyright protection shall extend 'to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'" Kawohl & Kretschmer, *supra* note 3, at 214 (footnote and citations omitted).

19 Fichte, *supra* note 4, at 445.

intangible property, nor did he follow the instrumental logic of the U.S. Constitution that, just a few years earlier, had justified the granting to “Authors and Inventors the exclusive Right to their respective Writings and Discoveries” as a way to “promote the Progress of Science and useful Arts.”²⁰

He opened, instead, with an axiom and a question: “We are the rightful owners of a thing the appropriation of which by another is physically impossible. This is a proposition that is immediately self-evident and needs no further proof. And now to the question: Is there anything of this sort in a book?”²¹ What mattered to him was that such property be inalienable, not whether it was tangible or intangible, nor how it might have been produced. His argument was structured like a test: *if* there is something in a book that could not be in any way alienated from its owner, *then that something* must qualify as property—perpetual property—no matter what kind of thing it may turn out to be. Fichte’s nonessentialist stance was as elegant as it was astute. The intricate and never-ending British eighteenth-century *querelles* over the definition of literary property demonstrated all too well how intricate and contestable those arguments could be, *even after* the 1710 Statute of Anne²² had legitimized the notion of authors’ rights.²³ He seems to allude to this predicament when he writes:

The difficulty of demonstrating that an author has perpetual property in his book arose from the fact that we have nothing [in property law] comparable to books and that things that appear to be more or less similar differ a great deal on many accounts. This explains why our proof will unavoidably have a somewhat sophistical appearance²⁴

Sophistical or not, Fichte’s definition of property did not need to spell out its object to justify its protection. It was, so to speak, the property-equivalent of the Cartesian “cogito”—a rock-bottom stage from where the existence of authorial property becomes clear and distinct, no matter what legal taxon that property could be found to fit, or what

20 U.S. CONST. art. I, § 8, cl. 8.

21 Fichte, *supra* note 4, at 446.

22 An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 1710, 8 Ann., c. 19 (Eng.).

23 See generally RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY (2004) (charting the movement of copyright law in eighteenth-century Britain); ROSE, *supra* note 1 (discussing the historical development of copyright law in eighteenth-century Britain).

24 Fichte, *supra* note 4, at 445–46.

human institution would be in charge of administering and protecting it.²⁵

Despite its logical simplicity, or perhaps because of it, Fichte's definition came with a paradoxical side effect: if you can demonstrate that the author has a property in her work and that this property cannot in any way be alienated from her, then why would the author need the law to protect something that has been determined to be inalienable and thus, one would assume, in no need of protection?

III. INALIENABLE, NOT INTANGIBLE

If his framing of the question of authorial property stems from a desire to avoid articulating analogies and differences between traditional tangible and new intangible property, Fichte's answer follows from the role of genius played in his philosophy. Unlike Young and other literary theorists who focused on textual *objects* (on what made certain literary works original), Fichte was concerned with *process* (with how individuals produced thoughts and works in general). Consequently, while Young saw genius as a rare agency that produced equally rare and valuable works, Fichte treated genius as a trait shared by everybody's thought processes. In this Fichte was close to the modern U.S. copyright concept of "personal expression"—a mark of irreducible individuality that does not necessarily need to be associated with aesthetic qualities or outstanding novelty. As Justice Holmes put it in 1903:

The copy 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. That something he may copyright unless there is a restriction in the words of the act.²⁶

25 Fichte did see his proof of the existence of authorial property as a "principle":

There are after all a good many maxims in circulation on this subject that all informed and thoughtful people with no vested interest in the opposite view accept and according to which they judge others' and their own actions. Now, if all of these maxims can be easily and naturally deduced from the principle we will be asserting, then this will serve as a test of its validity, and it will become clear that it is this very principle that was at the root of all our judgments in these matters, however obscure and undeveloped they may have been.

Id. at 446. Also: "And now to apply these principles—which have been *a priori* proven" *Id.* at 456.

26 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903). See generally Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing*

Similarly Fichte argued that all humans are bound to think individually, that is, differently:

Each individual has his own thought processes, his own way of forming concepts and connecting them. . . . All that we think we must think according to the analogy of our other habits of thought; and solely through reworking new thoughts after the analogy of our habitual thought processes do we make them our own. Without this they remain something foreign in our minds that connects with nothing and affects nothing. It is more improbable than the greatest improbability that two people should ever think about any subject in exactly the same way, in the same sequence of thoughts and the same images, when they know nothing of one another. Still, this is not absolutely impossible. What is absolutely impossible, however, is that someone to whom ideas must first be imparted by another should ever assimilate them into his own system of thought in exactly the form in which they were given. Now, since pure ideas without sensible images cannot be thought, even less are they capable of presentation to others. Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.²⁷

As shown in this long quote, the analogy between Fichte's position and modern copyright law extends beyond the "personal expression" to the notion that it is extremely unlikely and yet not inconceivable for two different authors to independently produce the same work. That eerily modern consonance ends, however, quite abruptly with Fichte's statement that an author's property is not simply not appropriable, but that the author cannot "be willing to hand over this form in making his thoughts public."²⁸ There is no equivalent claim in today's copyright.

Fichte is not just claiming the empirical impossibility of finding a plagiarist with skills fine enough to imitate somebody else's work, but rather that the original author cannot alienate his or her property to anybody, under any circumstance. This might look like an extreme version of the "moral rights of authors" doctrine, but in fact is quite different, and morality has nothing to do with it. Fichte is not propos-

Company: *Originality as a Vehicle for Copyright Inclusivity*, in *INTELLECTUAL PROPERTY STORIES* 77 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006) (providing background on *Bleistein*).

²⁷ Fichte, *supra* note 4, at 450–51.

²⁸ *Id.* at 451.

ing to give the author some kind of “parental” rights and responsibilities that remain tethered to the work even after its sale, but is simply stating that the work is literally inalienable. The work is not the author’s “child” but more like the author herself.²⁹ There can be neither buyers nor sellers for an author’s intellectual property. What can be copied, bought, and sold are only books and artworks—tangible property.

Fichte’s identification of inalienability and property structures his entire conceptualization of an author’s work: “The right of the buyer to reproduce his purchase extends as far as does the physical possibility of appropriating it, and this decreases the more a work depends on the form, which we can never appropriate.”³⁰ His view of the different elements of a printed text amounts, in fact, to a taxonomy of the different kinds of property one can find in a book arranged by degree of alienability: alienable, potentially alienable, and unalienable:

We can distinguish two aspects of a book: its physical aspect, the printed paper, and its ideal aspect. Ownership of the former passes indisputably to the buyer upon the purchase of the book. He can read it and lend it as often as he likes; he can re-sell it to whom-ever he wishes, . . . he can tear it to pieces or burn it—and who could quarrel with him? But since people seldom buy a book for such purposes, even less seldom just to display its paper and print or to paper the walls, they must assume that when they buy a book they are also acquiring a right to its ideal aspect. This ideal aspect is in turn divisible into a material aspect, the content of the book, the ideas it presents; and the form of these ideas, the way in which, the combination in which, the phrasing and wording in which they are presented. It is apparent that simple transfer of the book to us does not yet confer ownership of the former, for ideas cannot simply be handed over or bought for cash. They do not become ours just by our picking up a book, carrying it home, and putting it in our book-case. In order to appropriate the ideas a further activity is necessary.³¹

While the book is fully alienable and, when sold, “ceases to be the property of the author . . . and passes exclusively to the buyer,”³² the ideas contained in the book become only potentially ours: “By purchasing the book . . . we acquire the possibility of appropriating

29 Fichte’s position may actually be more radical than that. While an author may alienate his or her body, she cannot give somebody else her “personal expression”—a you-can-have-my-body-but-cannot-take-my-soul scenario, so to speak.

30 *Id.* at 468.

31 Fichte, *supra* note 4, at 447–48.

32 *Id.* at 449–50

the author's ideas; but to transform this possibility into reality, we must invest our own labor."³³ This is not just labor in the Lockean sense, but labor guided by the form of the reader's intellect: "We must read the book, think through its content—insofar as it goes beyond common knowledge—look at it from various points of view, *and in this way assimilate it into our own pattern of thought.*"³⁴

In sum, the idea contained in a book that has been sold are no longer the property of the author (who in any case owned only the new ideas he or she had contributed to it), and are potentially appropriable by the reader (with the deployment of appropriate labor and understanding).³⁵ Those ideas that had not been invented by the author of the book were already common property (or at least potential communal property, pending the readers' understanding of them).³⁶ But if the physical book is fully alienable and its content only potentially so, the author's "personal expression" is utterly inalienable: "What, on the other hand, can absolutely never be appropriated by anyone else, because this is physically impossible, is the form of the ideas, the combination in which, and the signs through which they are presented."³⁷ This follows from Fichte's assumption that to appropriate entails to understand, and to understand means, literally, to make a work one's own. If you really understand an author's "form" it means that you have changed it by the very act of understanding it. You have "mentally metabolized"—not "stolen"—it. Conversely, if you don't understand that form, you have stolen nothing because it is only by understanding it that you can "possess" it. Either way, there are no

33 *Id.* at 448.

34 *Id.* at 448 (emphasis added).

35 Fichte's notion of possession-through-understanding seems like a mental version of property-by-occupation.

36 Fichte, *supra* note 4, at 449–50 ("As soon as the book is sold, the former ceases to be the property of the author (whom we can still consider here as the seller) and passes exclusively to the buyer, since it cannot have more than one lord and master. The latter, however, the book's content, which on account of its ideal nature can be the common property of many, and in such a manner that each can possess it entirely, clearly ceases upon publication of the book to be the exclusive property of its first proprietor (if indeed it was so prior to publication, which is not always the case with some books nowadays), but does continue to be his property in common with many others."); see also *id.* at 455–56 ("No instructor would tolerate someone printing his lectures, and yet none has ever objected to his listeners attempting to appropriate his ideas and principles and spread them in oral or written form. What is this distinction based on? In the latter case, people present his ideas, which have become theirs through their own reflection and through assimilation into their particular pattern of thought. In the former case, they take possession of his form, which can never become their property, and they thereby encroach upon his absolute right.").

37 *Id.* at 450.

conditions of possibility for stealing somebody's personal expression—the only “thing” an author owns and cannot not own.

Unlike the understanding of a book's ideas, capturing the form in which an author presents ideas amounts, so to speak, to solving a cipher. Because the key used for this kind of “encryption” is as complicated as the indefinitely long series of differences (big or small) that make a person an individual different from all other individuals, only the author itself holds it, consciously or unconsciously. Engaging with an author's “personal expression” cannot break the code but only produce a new kind of encrypted work—the reader's.

What sharply separates Fichte from modern copyright doctrine is the attribution of personal expression to both authors *and readers*. It is not that he is “democratic” and thus dislikes representations of authors as active original producers and readers as a passive consumers, but that he acknowledges that we all both read and write or speak and listen, and that we are “active” when we do either. We cannot not be active when we write or read because we are individuals who can make sense of the world only by arranging images and concepts in patterns and orderings that are as individual as we are. This is not at all analogous to Roland Barthes's statement that “the birth of the reader must be at the cost of the death of the author,” but rather that both authors and readers are always already active in the way they produce or grasp works.³⁸ There is no conceptual space for “to copy” in Fichte's framework, nor for the concept of producer (of an original) as opposed to consumer (who simply “copies” what s/he reads).

IV. WHAT IS ORIGINAL ABOUT A WORK?

Fichte's radical a priori argument for the author's property did apply to any technology used to produce or reproduce a work, but did not translate into an expansive scope of protection.³⁹ To the contrary, precisely because Fichte's definition was so sharp and absolute, it

38 Roland Barthes, *The Death of the Author* (1968), translated in ROLAND BARTHES, *IMAGE MUSIC TEXT* 142, 148 (Stephen Heath trans., Fontana Press 1977).

39 See Fichte, *supra* note 4, at 463 (“Those who would like to own the book in a handwritten copy, or the copyist himself, ought to negotiate directly with the author.”). Fichte did not think that the introduction of the printing press or the existence, at different times in history, of different norms of attribution, sharing, or reproduction had any impact on his argument:

If the authors of old failed to give consideration to the possible usufruct of their authorship, or, being uninterested in exercising their rights, they left the option open to anyone who wished to do so to make copies of their books, giving their approval by their silence, nonetheless they had the absolute right—as does everyone—to relinquish their rights. Had they so

could construe only verbatim reprinting as illegal. Most of the works that modern copyright law would call derivative were instead original according to Fichte—originals that were produced by, and therefore belonged to, adapters and active borrowers:

Engravings of paintings are not reproductions: they alter the form. They end up as engravings and not paintings; but whoever wants to see them as equivalent is quite at liberty to do so. Even an engraving of a previous engraving of a painting is not a reprint, for each artist gives his engraving his own unique form. It would only then be a reprint if someone took possession of someone else's plate and printed from it.⁴⁰

It goes without saying that Fichte would have treated translations as separate works, as any translator would have had to translate a work into his or her “patterns of thought” in order to be able to transpose it into a different language. And if an engraving of a painting is not seen as infringing the painter's rights, then we can assume the same would apply to the translation or adaptation of a novel into a play or film, etc. In general, modern notion of infringement through “substantial similarity” would have been unthinkable in Fichte's scheme of things, which focused exclusively on identity—necessarily so.

His very narrow definition of protectable work may go a long way toward explaining why copyright law has latched with gusto on to the first part of Fichte's argument—that about the author's unique personal expression—while failing to notice the other half about the reader's personal expression. If the second half were accepted (as I think it should be, given that it is the necessary consequence of the first half of the argument), I believe it would have made copyleft people happy. All transformative borrowings would have been legalized while leaving untouched other aspects of copyright law crucial to free software and open source licenses.⁴¹ Fichte might have made Jack

wished, however, they could just as well have exercised their rights, as do our contemporary writers; for what is just today was always so.

Id.

⁴⁰ *Id.* at 468. Engravings of paintings became derivative works in the 1837 Prussian Copyright Act, but not in Fichte's original text, indicating the quick dilution or broadening of the “personal expression” right after its formulation—a trend that has only picked up pace in later years. On the relationship between early modern painters and printers, see generally Evelyn Lincoln, *Invention and Authorship in Early Modern Italian Visual Culture*, 52 DEPAUL L. REV. 1093 (2003).

⁴¹ Fichte's doctrine would not in any way weaken GPL-like licenses because they involve the licensing of verbatim copies of a work. More complex is his position about what we would now call “fair use”:

We make an exception [from the prohibition of reprinting] in the case of citations. And we make it not only for the type of citation which merely

Valenti smile (by declaring any kind of verbatim copying to be unjustifiable piracy), but also cry (by denying any conceptual basis for the notion of corporate authorship).⁴² And if he defined the author's property to last as long as he or she does—a length that could have raised many eyebrows in the eighteenth century—that term looks quaintly short today that copyright protection has grown, depending on the case, to seventy years after the death of the author, ninety-five years from publication, or 120 years from creation.⁴³ Pace the critics

reports that a writer has discovered, proven, or presented such and such a thing and, without either appropriating his form or propounding his ideas, simply builds upon them; we also make an exception for citations that employ the author's very own words. In the latter case we actually take possession of the author's form, but without passing it off as our own, so this is of no matter. The authorization for this seems to be based on an unspoken agreement among writers to cite each other by direct quotation of their own words. But even here no one would approve of anyone copying out particularly long passages where it was not very evidently necessary. Finally, we are only half-justified in including among the exceptions the anthologies, the witticisms (esprits)—collection of which generally does not require much wit—and other such little pilferings which go quite unnoticed, since they neither help nor harm anyone very much.

Fichte, *supra* note 4, at 455.

42 Even in the unlikely case one could come up with a notion of "corporate expression" able to account for a work's "corporate individuality," the fact remains that corporations are not stable entities. People are hired and fired, or move on voluntarily. This would pose a serious challenge to Fichte's logic of authorship and property that hinges on a one-to-one relationship he posits between author and work. In the corporate case, the corporate work might remain stable well after its production, but the corporate author is virtually certain to change in time, thus invalidating the connection (if there could have been one) between one work and one author.

43 In England, rights in copies were effectively permanent under the seventeenth-century system set up by the London Stationers, but since the 1710 Statute of Anne, 8 Ann., c. 19 (Eng.), copyright was given term limits—limits that were challenged by those who saw copyright as a common law right. The debates on term versus permanent copyright protection up to *Donaldson v. Becket*, (1774) 1 Eng. Rep. 837 (H.L.) 843–47, are analyzed in Rose, *supra* note 5, at 51–85.

Given the necessary relation between the work and the person in Fichte's theory of authorial property, it would be difficult to imagine why or how an author's literary property could be extended beyond the death of the author, or passed on as inheritance. Tangible property is about things the owner acquired or held since birth, but things that are always in some way "external" to the owner, even in a Lockean scenario in which a person creates property by mixing labor with external things in the state of nature. But Fichte casts authorial property as being exclusively about personal expression. Materiality does not count, only the individuality of the person. So when the person is gone, that property ought to end with that person, in the same way that there cannot be property in a corpse. Moreover, how could one "pass" one's authorial property to heirs? Fichte's logic would suggest that only the usufruct, not the property could be in any way alienated. But this would be an usufruct for a property

of the romantic author, Fichte may have looked surprisingly progressive today.

V. SIMULTANEOUSLY INEXPUGNABLE AND VULNERABLE?

One meaning of the title "Genius Against Copyright" is that the very same features of Fichte's notion of "personal expression" that allowed it to function as the conceptual foundation of copyright law should also drastically reduce the scope and term of its protection, while also denying the possibility of corporate authorship. The title, however, has a further meaning, one that relates to a more conceptual question: can romantic genius be really used to justify *intangible* property? Fichte claims that the personal expression constitutes inalienable property, but it remains quite difficult to determine whether or in what sense that property can be said to be "intangible" or "intellectual."

That the form of an author's work cannot be physically appropriated does not mean the authors are not vulnerable, as nothing prevents pirates from copying the physical book and thus damage the author's income and perhaps reputation through unauthorized reprinting. Fichte's point is that the author's property in his text makes reprinting illegal, and yet reprinting does not amount to an appropriation of the author's intellectual property because that property is physically inalienable. While these two things—the illegality of reprinting and the existence of author's property—are obviously linked, they are also one step removed from each other. Unlike what we find in modern copyright law, unauthorized copying is not illegal because it amounts to the appropriation of intellectual property.

We may call the author's property "intellectual" in the sense that it is constituted by the irreducibly individual features of the author's mind, but the object that Fichte wants to protect is not intellectual property at all:

that does not exist anymore, or a property that has become communal property of society? Fichte, however, does not express himself clearly on the subject, mentioning only in a brief rebuttal to Reimarus:

And now to some of Mr. Reimarus's examples! "Just who," he asks, "has the usufruct of the author's perpetual property in the case of writers of old; who, for Luther's translation of the Bible?"—When the owner of a particular thing and his heirs and successors are deceased or cannot be located, then society becomes the inheritor. If the latter wishes to relinquish its right and let the thing become the common property of all, or if this is what the owner himself wishes—who can prevent it?

Fichte, *supra* note 4, at 462.

[The reprinter] takes possession not of the author's property, not of his ideas (for the most part he is incapable of this, for if he were not an ignoramus he would pursue a more honest trade), and not of the form in which the ideas are expressed (this he could never do even if he were not an ignoramus), but rather of the usufruct of the author's property. He acts in the name of the author without any mandate from him, without having reached some agreement with him, and appropriates the benefits inherent in this representative function. He thereby usurps a right to which he is not entitled and hinders the author in the exercise of his absolute right.⁴⁴

His use of the Roman Law notion of "usufruct" is quite telling. Because the author always has (and cannot relinquish) her "naked property," the reprinter can only appropriate the use and profits (*usus et fructus*) stemming from that property. What differentiates good printers from bad reprinters or pirates is that the former have lawfully received the usufruct from the author while the latter have not:

The publisher, then, does not acquire ownership of anything at all through his contract with the writer, but rather under certain conditions only the right of a particular usufruct of the writer's property, that is to say, of his ideas in their particular form of expression. He is authorized to sell to whomever he can and wants, not the author's ideas and their form, but only the possibility of appropriating the former thanks to their appearance in print. In all respects, then, he acts not in his own name but in the name and by mandate of the author.⁴⁵

This seems nice and simple, but brings up a paradox, some of which persists even if we accept Fichte's view that there is no contradiction between the inalienability of the author's property and its simultaneous vulnerability. Categories of usufruct and naked property concerned tangible property, that is, scenarios in which the physical inalienability of the property would also prevent appropriation of the usufruct. If you cannot access or take my land away from me, how can you steal its usufruct? And if you steal the fruit that grows on my land, that action would amount to theft, not appropriation of usufruct.

Setting aside questions about the feasibility of notions of naked property and usufruct to model scenarios described by Fichte, a tension remains between the intellectual nature of the property that he establishes (in order to prove the illegality of reprinting) and the utter materiality of its objects. He does not say that a book contains the author's property, and is quite careful in picking the words to describe

44 Fichte, *supra* note 4, at 459.

45 *Id.* at 457.

the relationship between the personal expression and the physical book. (If the author's property were to be physically alienable together with the book, that would void his overall argument). Fichte simply says that we can "detect" in a book an "ideal aspect" having to do with "the form of these ideas, the way in which, the combination in which, the phrasing and wording in which they are presented"⁴⁶—or what elsewhere he calls the "indescribable yet perceptible form of the presentation."⁴⁷

The author's personal expression, therefore, is not in the book or in a painting (the difference between mechanically reproduced objects and handmade originals is not relevant to Fichte). It is us the readers who "detect" certain "aspects" or phenomenological patterns through an active process of perception and understanding—patterns that are relations we reconstruct between certain characters, brushstrokes, or other traces we pick out in the book or on the canvas. In this sense, therefore, the work does not even contain the "ghost" of the author's personal expression. The work is not a fetish but a material thing with material traces, some of which we can read for what they are (the ideas), and some others (the form) that we can only metabolize—transform and absorb through our own intellect.⁴⁸

If so, then what does intellectual property have to do with this? What's intangible here? The copies that Fichte wants to declare illegal are thoroughly material—not only phenomenologically but also conceptually. They are material because Fichte has evacuated the author's intellectual property from them in order to construe it as property—property that is property by virtue of being inalienable, that is, something that cannot be transferred as an object or with an object.⁴⁹ This is a peculiar construct: a property that is simultaneously inalienable and vulnerable, defined as purely intellectual (so as to be physically unreachable and unreproducible), but instantiated through

46 *Id.* at 447

47 *Id.* at 468.

48 I do not believe that Fichte sees the relationship between personal expression and the work as one between Aristotelian form and matter—an image fruitfully deployed in ALAIN POTTAGE & BRAD SHERMAN, *FIGURES OF INVENTION* 12 (2010). While the Aristotelian notion of substance hinges on the copresence of form and matter, it seems to me that in Fichte's case the form may be "reflected" in the work, but not present in it as an agent that gives shape to the work. A book is only a copy of an original that, as Fichte tells us, cannot be copied. The personal expression is therefore more like a Platonic idea than an Aristotelian form.

49 The only other reading I can think of (though more as a theoretical possibility than an actual one) is that Fichte is thinking of the personal expression being present in the book, but in an undecipherable encrypted form. In this sense, it would be present but fully unreachable, and thus effectively absent.

purely and necessarily material objects, ascribed to genius but aimed at prohibiting the crudest of copying—verbatim reprinting.

A further puzzle is that Fichte's "personal expression" seems to be strangely external to the business of deciding what is or is not an infringing work. It is a bit the proof of God's existence that Descartes put forward to ground his method for knowledge-making. But once the method is legitimized, he does not have any real role left for God to play. Similarly, Fichte invokes the personal expression to prove the illegality of reprinting, but once that proof is established, the personal expression does not have much of a role in the daily practice of what we now call intellectual property. That is because of the narrowness (or purity) of Fichte's definition of the personal expression or genius that is so closely and fully identified with the author's individuality. Because of the individuality of that figure (and the radical individuality it projects on the work) only verbatim copies can be construed as illegal. All other derivative works become in fact original works of the adapters, reflecting their own individuality.

In sum, it is not only that a book or painting does not contain an intangible personal expression, but that the personal expression is rendered "unemployed" by having done its job so well. Because the authors' property cannot ever be appropriated, and because piracy can only be mechanical verbatim reproduction, the authors' property appears to be intangible because, once it has been affirmed, no one needs to determine, find, or use it as a benchmark for deciding what's original and what's a copy. The meaning of "copy" has already been limited, *a priori*, to a verbatim reproduction of the original.

Paradoxically, it is only by watering down originality—making it less specific through the doctrine of "substantial similarity" so as to cover more than the literal original instantiation of a work—that the "personal expression" ceases to be an absent or remote principle for the legitimation of the author's property and the illegality of reprinting (something like Descartes's effectively absent God). It is only by becoming "impure" and by moving a bit away from the figure of the genius that originality can become invoked as a benchmark—a reference that, while still ineffable and apparently intangible, it is also effective as a parameter for legal decisionmaking.

Without such a "watering down" of genius and creativity, the figure of the Romantic genius would not only drastically reduce the extent of copyright protection (while being effectively evacuated from the protected objects themselves), but it would also become invisible (and quite useless) to the practice of the law.

CONCLUSION

It is not my project to determine why jurists and legal scholars have failed to notice the symmetry of Fichte's argument about the idea/expression dichotomy, and have thus attributed a "personal expression" only to authors. It also remains an open question how the law has managed to avoid Fichte's claim that, if you take the notion of personal expression seriously (even in Justice Holmes's moderate version of it) then you ought to conclude that is indeed inimitable. What the law seems to have done as it moved away from Fichte's radical but compelling logic, is to cast the personal expression as *imitable* (and therefore vulnerable) by collapsing it with its material medium. It is by saying that the personal expression is bound up in a book that the law transforms it into something that is liable of copying. This is, in effect, a process of fetishization—to cast an object as holding something that is not there. But Fichte did not fetishize the work in order to construe it as an object in need of legal protection. He did not say that it "contained" anything that belonged to the author. But in demonstrating the illegality of reprinting he also exposed some intractable tensions in the relationship between tangible and intangible property. He also showed, inadvertently, the fact that genius does not and cannot constitute the "origin" or "root" of copyright law, but is rather its *pharmakon*.

If one takes "personal expression" to be foundational to copyright, then she ought to take seriously the other "unnoticed" half of Fichte's argument about the reader's personal expression, and the radical ways in which it would both restrict and destabilize copyright law. Alternatively, if one were not to uphold the centrality of the "personal expression," what would then be left of copyright law?

