Intellectual Property Has No Personality

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Abstract

The moral analysis of Intellectual Property Rights (IPRs) has been dominated in the past couple of decades by American and Anglo-Saxon academic literature. As a result, great weight has been given to either utilitarian or Lockean natural rights justifications for copyrights and patents. The purpose of my article is that of expanding the current debate by critically taking into account the personhood theory of Intellectual Property. My first objective is defining IPRs and providing a conceptual ethical map of the arguments in favor of them, highlighting the particular place occupied by the personhood theory. I proceed to reconstruct the Kantian and Hegelian arguments in favor of a system of copyrights and patents. The main part of the paper is dedicated to a series of problematic aspects of this approach in justifying copyrights and patents. If my arguments are correct, then it would be legitimate to cast some doubt on this approach and maybe employ personhood arguments in relation to other aspects of artistic and scientific creation. My paper ends with such a normative proposal.

Keywords: Intellectual Property, copyright, patent, personhood theory, Kant, Hegel, utilitarianism, Locke.

1. Preliminary Remarks: The Ethics of Copyrights and Patents

With the advent of the knowledge economy, the proliferation of new and emerging technologies and the ever increasing market share of creative industries, the ethical debate surrounding Intellectual Property Rights (IPRs) is more heated nowadays than ever. Before embarking on

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the particular task of this section, namely that of identifying the place that the personhood theory occupies on the map of the ethical arguments in favor of IP, a prior caveat is needed: what are IPRs?

The term ‘property’ is generally predicated on material objects. We can usually assert, without great difficulty, that we are the owners of a house or a car. Talk of ownership, when it has to do with physical objects, seems non-problematic. IPRs, however, have to do with something else, namely with immaterial objects like ideas. As Palmer suggests, IPRs are “rights in ideal objects, which are distinguished from the material substrata in which they are instantiated” (1990, 818). Intellectual Property (IP) is also an umbrella term, covering “several types of legally recognized rights arising from some type of intellectual creativity, or that are otherwise related to ideas”: copyrights, patents, trade secrets and trademarks (Kinsella 2001, 3). While copyrights are rights given to the authors of books, composers, film directors or software programmers protecting the expression of an idea, patents apply to useful inventions. If the owner of a copyright has the right to control the publication and dissemination of artistic products, the inventor who was granted a patent enjoys a limited period of monopoly during which she can exclude others from manufacturing or distributing an invention. To clarify this even further, think about the metaphysical distinction between types and tokens. IPRs (copyrights and patents) are rights in ideal types, not in material tokens. When someone owns an ideal type, she has the ability to control the production and, sometimes, even the distribution of material tokens (Biron 2010, 382-384). Ownership of a token does not imply ownership of the ideal type behind it, in our current legal system.

What is the ethical justification for a property right in the form of a copyright or a patent in an ideal object? In a seminal paper addressing this issue Menell (2000) distinguishes between consequentialist and non-consequentialist approaches in justifying IPRs. In Table 1 I highlighted

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3 The extent of ownership or the ethical and political relevance of property rights are, however, different topics.

4 The ethical debate in relation to IPRs is generally circumscribed to copyrights and patents. Trademarks and trade secrets are somewhat marginal in this discussion and that is why I will not be referring to them in this paper.
the most discussed theories that moral and legal scholars have used in order to justify copyrights and patents.

<table>
<thead>
<tr>
<th>TYPE</th>
<th>NAME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consequentialist theories</td>
<td>utilitarianism; the economic case in favor of IP</td>
</tr>
<tr>
<td>Non-consequentialist theories</td>
<td>Lockean natural rights; personhood theory</td>
</tr>
</tbody>
</table>

Table 1

From a consequentialist standpoint, the utilitarian and economic cases in favor of IP overlap. Both approaches start from the premise that society needs a set of rules that increase the level of aggregate welfare. Copyrights and patents are examples of such rules because they offer creative individuals (artists, producers and researchers alike) an incentive to be more creative, securing a way of protecting their creations and earning a living. In the absence of such protection, utilitarians argue, few would endure the creative process because the private cost of protecting against piracy is too high (Posner and Landes 2003). As a result, we would witness the underproduction of intellectual goods, a process that would have a detrimental effect on society.

On the other hand, the paradigmatic non-consequentialist approach draws upon the Lockean natural rights theory of acquisition: property rights are an extension of our self-ownership rights. We acquire external goods after we mix our labor with something previously unowned that we remove from the state of nature. If mental labor is no different from the physical labor Locke employs in his examples (Spinello 2011, 280) and if the state of nature is similar to the public domain of ideas (Merges 2011, 33-34), then we have arrived at a Lockean natural rights justification for copyrights and patents.

The utilitarian/economic and Lockean approaches are the go-to theories in current academic disputes surrounding the ethics of IP. The

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Menell (2000) discusses a wider range of theories but, for obvious reasons, my decision was that of oversimplifying this ethical map. In addition to this, a really creative non-consequentialist argument in favor of IP is developed by Merges (2011, 102-137) drawing on Rawls.
reason why they have prevailed in the past couple of decades might be that most scholars writing on this topic worked within an American/Anglo-Saxon background. This is not surprising because copyright law in the US is grounded explicitly on utilitarian and natural rights tenets: just like the case of physical labor, the products of mental labor should be considered their creator’s property. An additional reason why an institutional setting that grants an author a property right should be adopted has to do with the increased social utility derived from having more intellectual products on the market (Netanel 1994, 8-12).

Compared to American copyright law, Continental European copyright seems to have a wider spectrum, integrating more diverse aspects. Some argue that, even though in the beginning continental scholars worked in the natural rights framework, by the end of the 19th century they began to subtly move towards incorporating German Idealism. As a consequence, Netanel observes, the “continental doctrine views copyright essentially as the protection of the author’s individual character and spirit as expressed in his literary or artistic creation” (1994, 7).

A literary or artistic work of art, like Ulysses or the Starry Night, can be viewed as inalienable extensions of their author’s personality. Both intellectual creations say something about James Joyce and Vincent van Gogh and, on this ground, they establish a moral right that

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7 Others argue that utilitarian/consequentialist justifications are still a major concern for Continental IP law, at least in the case of French copyright law after the French Revolution: “the French revolutionary laws did not articulate or implement a conception of copyright substantially different from that of the regimes across the Channel and across the Atlantic. The French revolutionary sources themselves cast doubt upon the assumed author-centrism of the initial French copyright legislation. The speeches in the revolutionary assemblies, the texts of the laws, and the court decisions construing the laws, all indicate at least a strong instrumentalist undercurrent to the French decrees of 1791 and 1793” (Ginsburg 1990, 994). My thesis is not that the US and Continental copyright legal frameworks are radically different, but only that Continental regulations seem to explicitly recognize authorship concerns which might be a result of what Kant and Hegel wrote on this topic.
8 Unsurprisingly, the Germans even have a legal term for this: ‘Urheberpersonlichkeitsrecht’; it means “author’s right of personality” (Netanel 1994, 2). My employment of the
novelists and painters have. In our current legal framework such moral rights are copyrights. Naturally, other creations (such as scientific or technological innovations) should be viewed in the same perspective with their consequent IPR, namely the patent.

The gist of the personhood theory (for property rights in general and IPRs in particular) has to do with the fact that, because we can be bound up by external things “in some constitutive sense [...] we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that «thing»” (Radin 1982, 960). In order to achieve self-development we need to be assured that we can control some of the resources in the external world. Property rights seem to be a perfect institutional solution to this problem.

Distinguishing between constitutive and non-constitutive goods, Radin also tries to provide an intuitive view of the strong ties between property and personhood. If someone steals a $100 bill from my pocket, that bill can be easily replaced with a similar one. If the same person steals from me a $100 bill with a creative personal doodle of Ben Franklin, receiving a crisp new bill would not totally replace the lost object. Radin’s own example might provide an even better intuitive grasp of this link: if you lose your wedding ring, the same object bought from the same jewelry store will not relieve your pain. The lost object has a symbolic and personal value to you (having to do, for example, with the particular reaction you had when you received it, with your personal history with it up until the moment you lost it, etc.). It is, in some sense, constitutive to you as a person (Radin 1982, 957).

Recently, the empirical validity of the utilitarian case of IPRs has been critically assessed and (at least partially) debunked (Boldrin and Levine 2008). During the past couple of decades the Lockean/natural rights justification of IP have also been subjected to a series of extensive

structure ‘moral right’ should not be understood as a separate justification for copyrights or other IPRs. I use it so as to capture the relevance of the (moral) claim that authors have on personhood grounds which is rewarded, in the globalized IP legal framework, with a property right in ideal objects.
counterarguments\textsuperscript{9}. The personhood justification for copyrights and patents seems like a promising avenue for IP scholars because it might prove to be a viable alternative to the Lockean approach, an aprioristic argument in favor of copyrights and patents (Schroeder 2006, 453).

2. Towards a Kantian and Hegelian Justification of Intellectual Property

2.1. The Metaphysics of Morals of Intellectual Property

The person who should be credited for the inclusion of Kant in the current scholarly debate about copyrights and patents is Robert Merges\textsuperscript{10}. According to him, Kant has been generally excluded from the academic debate about the ethical justification of IP, even though his work on property rights is “as stimulating and useful to the IP field as those of Locke” (2011, 68).

The starting point of a Kantian argument in favor of property rights rests on the following observation: individuals not only desire, but need resources from the external world. An additional premise is also important for understanding his perspective on ownership: property rights are not about individuals interacting in a world of limited resources. In other words, Kant rejects the Humean social and moral diagnosis that property rights are an institutional mechanism which we stumble upon in our strife to avoid conflict due to the scarcity of resources. No, property rights mean something because some of the external objects have a certain type of importance for us, as persons. We should abandon the Humean jargon dominated by ‘scarcity’ and ‘conflict’ and embrace the Kantian one, focused on ‘individual will’ and

\textsuperscript{9} In my opinion Hettinger’s (1989) critique of the Lockean justification for IP is still the best one available, even in the face of Mossoff’s reply (2012) or of other restatements of the use of labor as a basis for IPRs (Cwik 2014).

\textsuperscript{10} In a review of his book, Gordon Hull (2012) highlights the fact that the inclusion of Kant in the ethical debate about IP is one of the biggest innovations of Merges’ book, Justifying Intellectual Property, due to the fact that most non-Lockean non-consequentialist arguments in favor of IPRs are based on Hegel.
‘autonomy’. What matters for Kant is the fact that we impose our wills on external objects and that this process has an essential role in our life projects. Property rights are, in this sense, an extension of the seminal role that freedom has. In order to be free, though, “people must be able to set all sorts of goals or ends for themselves. And to pursue the ends that they set for themselves, people need stable, durable claims over objects. Out of people’s desire to carry out individual projects on particular objects, according to Kant, the idea of legal possession is born” (Merges 2011, 70).

The first step in reconstructing a Kantian perspective on IP has to be his notes on ownership and property rights from the *Metaphysics of Morals*. Talking about ownership in relation to external objects, Kant distinguishes between two definitions. On the one hand, we have a *nominal* one, which stipulates that the object “outside me is externally mine which it would be wrong (an infringement upon my freedom that can coexist with the freedom of everyone in accordance with universal law) to prevent me from using as I please” (1991 [1797], 71). On the other hand, we have a *real* definition of property: “[s]omething external is mine if I would be wronged by being disturbed in my use of it even though I am not in possession of it (not holding the object). I must be in some sort of possession of an external object if it is to be called mine, for otherwise someone who affected this object against my will would not also affect me and so would not wrong me” (1991 [1797], 71).

For Kant, the essence of property seems to be the following: a property right is, strictly speaking, an individual right. Other individuals have a duty to respect our claims towards external objects because the acquisition of external objects is an exercise of our free will. Moreover, our need to project our will in external objects is essentially linked with our desire to expand our freedom and autonomy. Without going into the specific steps of the original acquisition, a short note on the principle of external acquisition is needed: “[t]hat is mine which I bring under my control (in accordance with the law of outer freedom); which, as an object of my choice, is something that I have the capacity to

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11 Kant distinguishes between apprehension, giving a sign and appropriation (1991 [1797], 80-81).
use (in accordance with the postulate of practical reason); and which, finally, I will to be mine (in conformity with the Idea of a possible united will)” (1991 [1797], 80).

Moreover, as Merges observes, “[f]reedom to appropriate is so basic, so tied to matters of individual will and personal choice, that Kant finds it unthinkable to rule out large categories of things from the domain of the potentially ownable” (2011, 72). He also provides an example that will allow us to understand the Kantian perspective on property. Imagine that Michelangelo has an idea for a new sculpture. For the Renaissance artist to be able to finish his work of art he will need two things. First of all, continued access to the raw material he uses. Secondly, noninterference by others is also a key in carrying out his artistic plans. Without continued access and noninterference it would be impossible for him to assert his personality on the piece of marble that he has in front of him (2011, 72-73).

Moving from property in general to IP in particular, dwelling on the ontological distinction between material and immaterial objects is, from a Kantian standpoint, irrelevant. With the principle of external acquisition in mind, property rights have to be granted not because they might contribute to social utility by decreasing the chances of conflict in relation to external objects, but because we need external objects in order to expand our autonomy and implement our life plans. While some individuals might choose to express themselves with material objects such as lots of land or houses, other would choose intangible, immaterial objects like ideas. As Merges elegantly puts it, the question of what objects can become property is not a “matter of marble versus electrons, chisels versus keyboards, trombones versus synthesizers. The medium is not the message; the individual is. By omitting a clutter of detail, and supplying instead a rich conceptual tableau, Kant’s approach to property is marvelously relevant to the era of intellectual property” (Merges 2011, 74).

The earlier example of Michelangelo’s need for continued access and noninterference with the piece of marble in order to carry out his plan can also be extended towards immaterial objects. Just like a Renaissance artist who works with material objects found in the external material world, a chemist trying to find a cure for cancer works with
ideas from the public domain and tries to transform them using her creativity and talents in order to assert her will and carry out her life plans. For Kant, the ontological distinction between tangible and intangible objects seems to be completely irrelevant.

In the *Metaphysics of Morals* Kant actually discusses certain aspects related to owning a book (1991 [1797], 106-108). His analysis in those passages is nothing more than a restatement of his earlier ideas from a 1785 essay entitled *On the Wrongfulness of Unauthorized Publication of Books*. There, Kant starts from the following usual dilemma: let’s say that you bought a novel from the bookstore and it is in your power to copy and multiply it. Do you have the right to do it? Kant immediately replies in a negative manner: “the author’s property in his thought (even if one grants that there is such a thing in terms of external rights) is left to him regardless of the unauthorized publication” (1996 [1785], 29).

Besides the fact that an author retains a property right in her thoughts behind the novel, there is one additional reason why what we (nowadays) call copyright infringement is morally wrong. To see why we should explore, following Kant’s suggestion, the special relation that exists between an author, her book, and the authorized book publisher. According to Kant, an authorized book publisher acts as an agent of an author. After she finishes a novel, she uses the book to communicate with her public. The authorized book publisher carries out this action by printing copies of the novel but only in the name of the author. The unauthorized book publisher infringes both on the rights of the authorized agent and on the will of the author, presuming her consent for an unauthorized edition of her novel.

The reason? Unsurprisingly, it has to do with personhood concerns: “[t]he author and someone who owns a copy can both, with equal right, say of the same book, ‘it is my book’, but in different senses. The former takes the book as writing or speech, the second merely as the mute instrument of delivering speech to him or the public, i.e. as a copy. This right of the author is, however, not a right to the thing, namely to

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12 Mentioning creativity was entirely deliberate because creativity is closely linked with individual will. Creativity, on the Kantian account, is nothing more than an act of will from an artist or a researcher (Merges 2011, 79).
the copy (for the owner can burn it before the author’s eyes), but an
innate right in his own person, namely, to prevent another from having
him speak to the public without his consent, which consent certainly
cannot be presumed because he has already given it exclusively to
someone else” (1996 [1785], 35).

Before embarking on a similar task (that of reconstructing a
Hegelian case for IP), a short summary is in place. An author’s right (or
any creative individual for that matter) is best understood in the Kantian
perspective, in terms of personality: “an author’s words are a continuing
expression of his inner self [...] An author’s right in his work is thus
fundamentally a personal right” (Netanel 1994, 17). As a consequence,
copyright is best understood as enhancing the autonomy of creative
individuals (Treiger-Bar-Am 2008, 1061). Last but, more importantly, not
least, if IP law should cherish something, than that should be both
human creativity and dignity (Merges 2011, 71).

2.2. The Phenomenology of the Ethics of Intellectual Property

On the subject of property rights, will plays the same role for
Hegel that it did for Kant. Firstly, will is the foundation of our
individual existence in the world. Moreover, our will wishes to
appropriate the external world by imposing itself in external objects. The
real reason why we have property rights, according to Hegel, is not so
we would be better able to satisfy our physical needs, but because
having property rights is closely related to manifesting our personhood.

Jeremy Waldron highlights that Hegel does acknowledge the fact
that human beings are entities with certain physical needs and, on that
basis, they need to use external objects. This does not mean that, on the
basis of our needs for external objects in order to survive, those objects
are, necessarily, our property. Property, Hegel claims, has nothing to do
with the fact that we are biological creatures. Property makes sense only
if we talk about human beings as entities endowed with free will, life
plans and abilities ready to be developed: “Hegel argues that
individuals [...] need to be able to embody the freedom of their
personalities in the external objects so that their conceptions of
themselves as persons cease to be purely subjective and become concrete and recognizable to themselves and others in a public and external world” (Waldron 1988, 353).

Like Kant, Hegel distinguishes in his *Elements of the Philosophy of Right* between three ways in which we appropriate external objects: partly by physical seizure, partly by giving external objects a form and partly in designating the ownership of an object (1991 [1820], 84-88). Regardless of the way we do it, we arrive at a property right, according to Hegel, when an external object plays a quintessential role in the development of our personality. In his own words, “[i]n property, my will is personal, but the person is a specific entity [...] thus, property becomes the personal aspect of this specific will. Since I give my will existence [...] through property, property must also have the determination of being this specific entity, of being mine. This is the important doctrine of the necessity of private property” (1991 [1820], 78).

We might say that, for Hegel, property is the first step we make in order to create our subjective existence. In our strife to achieve recognition from other individuals, we assert our individual wills on external objects. We do it “not for the sake of the objects, but as a means of mediating and achieving intersubjective relationship” (Schroeder 2006, 464).

How does IP fit into the Hegelian framework of property rights? Can intangible objects from the external world be appropriated? In analyzing the mechanisms of acquisition, Hegel employs examples that have to do with material objects like land. He does, however, explicitly refer to intangible goods, like ideas, in his discussion of the alienation of property. His dilemma is similar to the one Kant had: what rights do you have after you buy a book or a technical device? Unsurprisingly, Hegel himself sees ideas as a possible property:

>[s]ince the person who acquires such a product possesses its entire use and value if he owns a single copy of it, he is the complete and free owner of it as an individual item. But the author of the book or the inventor of the technical device remains the owner of the universal ways and means of reproducing such products and things for he has not immediately alienated these universal ways and means as such but may reserve them for himself as his distinctive mode of expression. (1991 [1820], 99)
In order to have property rights, we need to imprint our personalities on external objects. Whether or not those objects are tangible or intangible makes little difference for Hegel and that is why the inclusion of ideas in the realm of appropriable objects is a natural step. Moreover, it might also make even more sense to talk about property in relation to ideas that creative individuals produce, because artistic creations and scientific/technological innovations (to a lesser extent, however) are “clearly receptacles of personality” (Hughes 1988, 341). Creative individuals incorporate their wills, their personalities, in what they produce. It would be impossible, a Hegelian might assert, to separate an artist from his work. That is why the role of copyrights and patents is that of “supporting, shaping and recognizing personhood”, they are what make artists and researchers individuals (Kreiczer-Levy 2017, 775). This is essential because, for Hegel, the person represents an abstract unit of free will and autonomy. He can have a concrete existence only after he acts on the external world: “from the need to embody the person’s will to take free will from the abstract realm to the actual, Hegel concludes that the person becomes real self only by engaging in a property relationship with something external” (Radin 1982, 972-973).

To sum up, drawing on both a Kantian and Hegelian personhood theory of IP, we need a system of copyrights and patents because writers, philosophers, musicians and inventors express themselves in the world by externalizing their autonomous will and their mind through their ideas. Their works reflect what they have at the most personal level, namely their unique skills, insight, passion, genius and hard work. As Resnik eloquently puts it, “[i]f the person has poured him or her ‘self’ into the object, then the object should be his or her property” (2003, 326). This is why, from both a Kantian and Hegelian standpoint, we have all the prerequisites needed to mount a defense for a system of robust copyrights and that would protect the interests of creators against potential infringement. It would undoubtedly protect authors from having their works copied and pirated online via file-sharing through BitTorrent or other similar digital solutions and it would safeguard the limited monopoly that a patent holder has in order to manufacture, use or sell her invention.13

13 Someone might object that my reconstruction of the Kantian and Hegelian arguments in favor of a personhood justification for IPRs avoids addressing the
3. Towards a Pluralist Critique
of the Personhood Theory of Intellectual Property

One potential strategy we can employ in critically assessing the personhood theory of IP could be that of challenging the philosophical presuppositions that Kant, Hegel and other personhood theorists employ when addressing the issue of property rights. The essential fact behind property rights is not that objects reflect our unique personalities and individual wills, a Humean might reply, but that they play a role in minimizing the possibility of social conflict in the context of scarce goods. Ideas are not scarce and, as a consequence, they should not be placed in the realm of appropriable objects. Moreover, property rights emerge not as a consequence of asserting our personality on external things, but only when the benefits of internalizing negative externalities are greater than the costs of maintaining the status quo of common property (Demsetz 1967).

I will not proceed on the road paved by Humean intuitions and institutionalist analysis, even though I consider it the most adequate way to justify property rights in tangible objects and a powerful critique against the possibility of appropriating intangible ‘objects’ like ideas. My aim will be that of providing an internal critique of the personhood theory of IP while accepting the philosophical premises of this approach.

Another general objection against copyrights and patents might also be employed. Remember the earlier distinction I made between types and tokens: a copyright can be viewed as a property right in relation to an ideal type whereas we, as consumers, can only have a property right in relation to a physical token. According to Long (1995), this approach might be fitting if we were to be, alongside Plato, believers in Ideal Forms. Otherwise, if we are to believe that ideas (or, more

differences between the two approaches. The reason why I focused on the similarities has to do with the purpose of my paper, namely that of casting some doubt over what a generalized personhood theory of IPRs might look like as a justification for robust copyrights and patents. In order to do this I have searched for the areas of overlap between the Kantian and Hegelian and, as I have tried to show in this section, we can arrive at a similar justification for them. An in depth comparison between the two should, no doubt, be the aim of further work regarding the personhood theory of property rights.
generally, information) can be someone’s property that would mean that someone might be said to have a legitimate ownership claim to someone’s mind. This would be the case, Long argues, because of the ontological specificity of information: it can be considered a universal (or an ideal type), but: “is not a concrete thing an individual can control […] it is a universal, existing in other people’s minds and other people’s property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people” (Long 1995). If Long is correct, we can make another step in this direction alongside Kinsella (2011): the copyright legal system is nothing more than a framework for negative servitudes.14

3.1. How Should We Respect the Personality of Kant?15

Personhood theorists like Hughes and Merges aim at providing a justification for robust moral rights in the form of copyrights to fend off potential copyright infringement. With the advent of new technologies like the BitTorrent protocol or pirate websites like LibraryGenesis and Sci-Hub (Uszkai 2015b), the dissemination of pirated books is nowadays a ubiquitous phenomenon and, on the personhood accounts of both Kant and Hegel, immoral. Even if we accept the philosophical assumptions of this perspective, is copying a book more immoral than other alternatives?

Let’s take the following scenario: I go into a book store and buy a Romanian translation of Kant’s *Metaphysics of Morals*. Afterwards I return home, where I have the following potential options:

(a) Use the book as a coaster for my glass of wine.
(b) Use the book as a parasol during sunny Romanian summer days.
(c) Throw my copy of *The Metaphysics of Morals*, just for fun, in my hypothetical fireplace.
(d) Copy the book and make it available for poor Romanian philosophy students either as a .torrent file or as a .pdf file on LibraryGenesis.

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14 I will return to this point in the following section.
15 I would like to thank my colleague Emanuel Socaciu for pointing out this potential objection.
According to European or US copyright law and to IP scholars working on the personhood theory of IP, it would be immoral (and illegal) for me to choose option (d) because I would infringe on the authorized agent of Kant, namely the Romanian publisher of his book. From the options listed above however, the first three seem to show, at least from an intuitive standpoint, less respect towards Kant’s personality expressed in his book. While the first two might seem just irreverent, the third one is straightforwardly aggressive.

If the personhood theory of IP aims at providing protection for the personalities of authors and inventors alike, then it should guard their interests against any type of misuse of an intellectual good like a book. Reserving only the right to decide who and when will be able to copy a book or a scientific formula seems to be arbitrary, in the face of other, more irreverent options.

A potential counterargument can be raised against this idea. Copyright infringement in the case of online piracy of artistic products is a paradigmatic example of a harmful activity against creators. The reason why this is a violation of property rights is quite clear: owning an ideal type gives a creator (or any of the subsequent copyright holders) the right to control the process of copying it in physical tokens; it is the explicit aim of copyrights to protect the expression ideas. For a Kantian or Hegelian it might be consistent to argue that using a book as a coaster for a glass of wine or throwing it in a fireplace is harmful for an author. In the same way, it might be harmful to Anne if John makes fun of her old car in front of her friends. However, can we say that these cases are instances in which property rights have been violated?

In my opinion, the answer to this question is contingent on the justification we have for property rights. In a utilitarian or Lockean framework, making fun of Anne’s car is not an instance in which her property right has been violated. Likewise, using *The Metaphysics of Morals* as a coaster for a glass of wine would not be a violation of Kant’s intellectual property right. However, in the personhood framework for property rights (either in tangible or intangible objects) it would be

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16 I thank one anonymous reviewer for pointing this out.
perfectly coherent\textsuperscript{17} to say that those are instances in which someone’s property rights have been violated. It all has to do with why we have property rights in external objects to begin with: they are extensions of our personalities and wills, constitutive to us as persons. We need property rights to protect the individual wills and personalities present in those external objects (regardless of the fact that they are automobiles or philosophy books\textsuperscript{18}) from a wide array of harms. One such harm is posed by the illegal copying of a physical token that we bought from a bookshop and the subsequent distribution of that copy online. In this sense it is clear why, for Kant, Hegel and personhood theorists of IP alike, the property claim that authors have extends also to the physical copy that we (only partially) own after we have bought it from a bookshop\textsuperscript{19}. Other potential types of harm are, however, more detrimental to the personality instantiated in a book, work of art or invention.

If IPRs are inextricably tied with the personalities of authors and inventors, then distinguishing between relevant types of harms is, in my opinion, a futile avenue of philosophical discussion. Making copies of books or throwing those books in a fireplace are both examples of harmful activities for the personality of an author. Property rights in tangible objects protect us not only from having our objects stolen. For example, Anne’s ownership of the car does not just protect her from not having her automobile stolen by John. It also protects her from other harmful activities like having her car scratched with a key by John. Similarly, for personhood theorists it is perfectly coherent to assert that IPRs should not only protect authors and inventors from piracy or illegal copying but also from other, more disrespectful activities, like the

\textsuperscript{17} While it might seem like I am employing a straw man in arguing against the personhood justification for copyrights and patents, I would like to point out that my argumentative strategy in this section is a \textit{reductio ad absurdum}.

\textsuperscript{18} It might be true that the case is weaker in the case of automobiles. This does not pose a serious problem for my thesis because other tangible objects like books have a special ontological status: they are the material substrata upon which ideal objects are instantiated and, as a consequence, it is clearer why they still are an extension of the author’s personality.

\textsuperscript{19} And this is why, as I mentioned earlier, Long and Kinsella’s criticism that IP amounts to a form of ‘negative servitude’ is warranted.
kind I exemplified in the beginning of this section. As a consequence, if the personhood justification for IP is correct, then it justifies not only a copyright and patent system, but also a set of legal norms which would prescribe the correct behavior we must adopt when we acquire objects that are the result of the externalization of the human mind and of the assertion of the personalities of creative individuals. This would be, however, an absurd prerequisite for any system of private property rights.


Needless to say, the personhood approach to IP seems at least intuitively plausible. Artists and researchers alike ‘pour’ their personalities in what they create. On this basis they deserve to be granted some sort of moral right in relation to their creations, shouldn’t they? And why shouldn’t that moral right be translated into something like a property right in the form of a copyright or patent that would allow them to earn a living?

Not all scholars working in the personhood tradition agree that granting creative individuals a copyright or a patent is necessary if you want to be consistent with Kant and Hegel on property rights. Jeanne Schroeder, for example, rejects this notion and adopts a different reading of the latter: “[t]o Hegel, saying copyright is ‘property’ is not to say that society must or should establish a copyright regime. This decision can only be made by pragmatic reasoning. In this sense, Hegel’s theory has a surprising utilitarian twist. Society’s desire to further creativity may, however, be a good pragmatic argument in favor of such a regime” (2006, 464).

Whether or not IP is effective in the sense of increasing social utility is an empirical issue which has been addressed and discussed countless times, so my goal will be that of analyzing whether the effects

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20 It might even be argued that, on the personhood account of copyrights, it would be perfectly coherent to say that authors should be protected from negative criticism or parodies.
of the current IP system are coherent with the personhood approach to copyrights and patents.

Surprisingly enough, most copyrights and patents are not in the hands of creative individuals, artists, authors or inventors. Far from taking into account the distinct creative personalities of individuals, IP law protects nowadays the artificial personalities of corporate agents. Take the case of patents in the United States in 2016. According to a study from the IPO (Intellectual Property Owners Association), the patent market is dominated by big corporate agents like IBM (they gained 8023 patents last year), Samsung (with 5504) or Canon (earning 3865 patents in 2016).

The same holds true for copyrights in artistic or literary production. In the end, IP law offers protection not to the creative personalities of the artists, but to big corporate agents like SONY or Disney, that buy those copyrights from the artists and that lobby governments for everlasting protection. Far from enhancing creative personalities, IP law tends to promote, in the 21st century, a rent-seeking mindset on the artistic and literary market (Boldrin and Levine 2008, 97-119).

If copyrights and patents are treated like any other alienable property right (exactly what the current globalized IP system does) a related moral issue might arise: aren't creative personalities commodified? Whether or not anti-commodification theorists (Anderson 1990; Satz 2010) are correct is, at this point, a separate issue. What does matter

21 From a Coasian standpoint this is far from being abnormal. Taking into consideration the high transaction costs an author of a novel has in order to publish and promote her work, it’s only natural that she externalizes these activities to firms in the business that work in publishing. For more details on the relation between high transaction costs and the existence of firms see Coase (1937, 386-405). It could be argued, however, that the advent of digital technologies has dramatically decreased these transaction costs.

22 The adoption of TRIPS (the Trade-Related Aspects of Intellectual Property agreement) in 1994 made IP a global issue. For more details on the history of IP law see Uszkai (2015, 184-185).

23 It is important to note that I do not see commodification as being in any particular way a serious moral issue. I find the arguments delivered by Brennan and Jaworski (2016) as being decisive against anti-commodification theorists like Debra Satz, Michael Sandel and Elizabeth Anderson.
however is that most arguments raised against the commodification of women labor, for example, have a Kantian flavor. Tackling this issue, Elizabeth Anderson asserts that “the Kantian argument against commodifying persons can be generalized to apply to many other cases. It can be argued that many objects which are worthy of a higher mode of valuation than use are not properly regarded as mere commodities” (1990, 72).

Shouldn’t the personalitites of the greatest artists and researchers be objects of that higher mode of valuation that Anderson talks about? Our current IP law treats, however, patents and copyrights as mere commodities. After an individual sells her patent to a pharmaceutical company, the company can do whatever it wants with that piece of intellectual property, like selling it for the highest bidder. The same holds for copyrightable goods like movies, songs, novels or paintings. Is this the proper way to show respect to the creative personalities who produced intellectual goods? Would not this be a case of commodification that would make it difficult for someone to argue in favor of copyrights from a Kantian perspective in the current IP legal framework?

3.3. One (personality) Size Does not Fit All: Copyrights vs. Patents

Reviewing a wide range of arguments in favor of IP, William Fisher (2001, 171) considers that, from a personhood standpoint, we must have a bias in granting property rights to highly expressive intellectual activities such as art, music or literature, in comparison to other intellectual activities such as scientific and technological research. Even though both cases of intellectual activities involve the imposition of creative personalities on external objects like ideas, they just don’t share the same personal output.

Justin Hughes acknowledges this difficulty for the personhood approach: “the problems for the personality justification do not arise in justifying [...] obvious expressions or manifestations of personality, but with those kinds of intellectual property that do not seem to be the personal reaction of an individual upon nature. Even in the field of copyright these problems arise. While most of the personality-laden categories are protected by copyrights, copyrights protect more than just personality-rich objects” (1988, 342). To paraphrase an example he employs, both a map of
the fictional world of Westeros from R. R. Martin’s world of *A Song of Ice and Fire* and a map of Bucharest are protected by copyright. Only the first map could be properly described as being ‘personal’, because the second one is only a rendition of the capital of Romania at a chosen scale.

The inner tension of the personhood moral justification for IP is even more noticeable if we compare intellectual goods that are covered by copyrights to intellectual goods that are covered by patents. Think about the difference between James Joyce’s *Ulysses* and Edison’s invention of the light bulb. *Ulysses* tells us something about Joyce’s distinct, complex personality. It is a clear expression of his strife of imposing his will and autonomy in the literary world. Could we say the same thing about inventions? Hughes is more than skeptical: “[i]n inventing the light bulb, Edison searched for the filament material that would burn the longest, not a filament that would reflect his personality” (1988, 342).

### 3.4. The Indeterminacy of Artistic Creation

The general process of artistic creation that the personhood theory rests upon might just well be an idealized version of how literature, music or paintings are produced. For the Ancient Greek poets the process of artistic creation was different, because they were the medium through which the Muses spoke: “[s]ince the singer starts his performance by asking his Muse to ‘tell him’ the subject, his composition is in fact being presented to his audience as something that he hears from the very custodians of all stages of reality” (Nagy 1990, 26). Not only poets and singers had muses, but also Greek philosophers, as Calliope and Urania were said to inspire the lovers of wisdom in the Greek Antiquity (Clay 2007, 219).

Of course, nowadays the role of Muses in artistic creation is rather metaphorical, but for the Ancient Greeks it used to tell something about their views on authorship that survived, in Europe, up until the Enlightenment period (Hesse 2002, 26-29). However, while metaphorical (in the sense that people in the 20th or 21st century do not believe in deities like the Muses), it does not mean that the idea behind their role in artistic creation is void. To take just one example, think about John
Lennon’s evolution as an artist after falling in love with Yoko Ono. The influence she had on his music and political views is well-documented beyond any reasonable doubt (Edmondson 2010, 107-127). An artist herself, we might say that she also played the role of a ‘muse’ for the British singer and songwriter. Would this entail that, on the personhood account of copyright, Yoko Ono has a moral right in relation to a song like Imagine? It would surely be the case because that song is also an expression of her individual will, autonomy and personality. If this would be the case, then the current IP system is unable to fully grasp the moral significance of the personality justification for copyright. However, if ‘muses’ do deserve some sort of moral right in relation to an artistic creation they contributed to, how could we determine how much moral a legal recognition they deserve?

I believe that for the personhood theory this represents one of the biggest difficulties presented in this article. It is not the only one in this category. As opposed to the previous centuries, music production seems to have evolved in a way in which an artistic product is not only the end result of one artist asserting her will and personality on the world. The emergence of complex and polished pop icons with a cult following like Lady Gaga tells a different tale about how music is produced in the 21st century in comparison to the period when Kant and Hegel wrote on property rights. As opposed to musical giants like Mozart or Beethoven, Lady Gaga is as much a product of her own individual will as she is a product of her music producer’s genius and creativity and a result of the influence that other previous artists and writers like Queen, David Bowie or Rainer Marie Rilke had on her (Corona 2011, 729-730). In this complex matrix of artistic personalities interacting, who deserves a copyright? For the personhood advocate of IPRs it would be difficult to draw a definitive line.


Earlier this year, in June, Pavo Barišić, a philosopher and former Minister of Science and Education in Croatia resigned amidst a plagiarism scandal even though he had constantly rejected these accusations and, in January 2017, said that he wanted to retain his place
in the Croatian cabinet. He was accused of incorporating, in a paper
published by a local philosophy journal, a blog post written by an
American scholar (Stephen Schlesinger) and also of describing the ideas
of Samuel Huntington without attributing them to the famous political
scientist (Tatalović and Dauenhauer 2017). In the past couple of years,
more and more high ranked public officials have been accused of
plagiarizing their PhD thesis, from the former Hungarian president Pal
Schmitt, to the former Romanian prime minister Victor Ponta
(Schiermeier 2012) or Ursula von der Leyen, a former German defense
minister (Abbott 2015).

Drawing on the works of Kant and Hegel, the personhood theory
aims at establishing a moral right in the form of an IPR (a copyright or a
patent) due to the fact that creative individuals asserted their will,
autonomy and personality in the works they produced. However,
whether or not that moral right should be translated into a property
right is, as I have tried to show, at least problematic. First of all, it is
unclear whether or not the personhood theory would rather justify the
right of an author to control the printing of her novel and not the
particular use of a copy of her book. In the personhood moral
framework we would be unable to justify the current IP system, as
currently artificial persons like corporations own a big part of the
intellectual property on the market. There are also two additional issues.
The first one has to do with the fact that patents seem to be quite
difficult to justify on the personhood account and the fact that artistic
and literary production is actually a more complex phenomenon that it
is usually assumed, leading to an indeterminacy of the personality that
deserves moral recognition.

This does not mean that the arguments developed by Kant, Hegel
and the scholars who employed their ideas are useless. As I previously
mentioned, for Jeanne Schroeder the decision to translate the moral right
of an author or inventor into a property right should be a pragmatic one,
based on social utility grounds. The question regarding what type of
protection (if any) creative individuals deserve should mostly be an
empirical one. However, I do feel that the way in which the relation
between authors and their works is described by both Kant and Hegel
does capture a significant part of how we should approach authorship
as a moral right. It is in this sense that the personhood theory might, in my opinion, shed some light on the ethical implications of plagiarism.

An important caveat is in place here. I am not saying that plagiarism and copyright infringement are the same thing. An encompassing definition of plagiarism can be found in the Publication Ethics Committee of WAME (World Association Medicine Editors). According to WAME, plagiarism represents “the use of others’ published and unpublished ideas or words (or other intellectual property) without attribution or permission, and presenting them as new and original rather than derived from an existing source”. What I want to stress out is that both actions can be regarded as the misuse of ideas which can be protected by a copyright. Of course, plagiarism can also apply to ideas from the public domain which were once protected by an intellectual property right. Hence, plagiarism has a lot to do with authorship and the relation that an author has with her work regardless of the fact that she is still alive or not or of the fact that the work is protected by a copyright or not.

On the one hand, plagiarism is considered to be wrong because it is a deceitful act: we trick our readers into believing that we are the authors of an article, a book or of a revolutionary idea, even though we just copied it from someone else. Plagiarism is about more than this because authorship, in the light of the personhood theory, is about more than just having your name on a book. Even though copyright infringement in the digital age should no be regarded as problematic on personhood considerations (because you do not necessarily derive a property right from them) we can put this theory to a better use in our ethical evaluation of plagiarism. To paraphrase Kant, when we plagiarize the work of an author we just do not show the respect that the creative personality of an author deserves; we treat it only as a means, not also as an end in itself.

REFERENCES


