

Publicness and Private Intellectual Property in Kant's Political Thought

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Abstract

Publicness is an essential feature of Kant's idea of republic, because it substantiates his political thesis that only representative democracies can avoid war. If this is the case, the question of copyright cannot be viewed as a marginal interest of Kant, because it affects the public use of reason. An accurate reading of *Von der Unrechtmäßigkeit des Büchernachdrucks* can show two major points:

- Kant does not endorse the thesis that ideas can be privately owned (only physical things can be owned, and their purchasers, as legitimate owners, are free to copy them and even to sell their reproductions);
- Kant's justification of copyright is limited to his contemporary “state of the art” commercial printing.

If we presuppose a different *media* technology that makes it possible a direct communication between authors and the public, Kant's principles can shape a fairly open view of copyright.

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Introduction

The extension of the scope of private intellectual property rights and the harshening of their criminal protection is a major global trend. A meaningful instance of such a trend is the wording of the Directive 92/100/EEC of the Council of the European Communities,¹ which requires that public libraries demand their users a remuneration in the name of the copyright holders, even if they do not lend books for a direct or indirect commercial advantage: the right of the copyright holder “shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works”.² The first European copyright law, England's Statute of Anne (1710) fixed the term of protection for copyrighted works to fourteen years, renewable for fourteen more if the author was alive upon expiration. Nowadays, copyright term is 70 years after the author's death, and its scope has been widely broadened.³

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In Kant's perspective, publicness is the basis of the two transcendental principles of public law. But a contemporary Kant reader has to ask whether the private and commercial quality of the publishing media concerns the public use of reason. Copyright and the very idea of intellectual property – a property of immaterial objects – are the historical result of a travail of two centuries, at the beginning of the Modern Age. In Germany, the best Enlightenment minds perceived the importance of such a question, and were involved in a debate that raged for more than twenty years. Kant⁴ and Fichte were among them.⁵

We have, however, to ask whether it is possible to connect, in Kant's political thought, his argument on copyright with the general political problem of publicness. A few scholars, today, are deeply concerned with some possible political consequences of the privatization of ideas: if representative democracy needs an open sphere of public discussion and information,⁶ a privatized realm of ideas will produce a restricted freedom of speech, and, in the long term, a restricted, privatized democracy. To answer to such a question we have to clarify, first of all, the meaning of Kant's concept of *Publizität*.

1. War, republic and representation

In the first definitive article of *Zum ewigen Frieden* Kant describes republic on the basis of three principles: freedom of each as a human person, dependence of all upon a single common legislation as subjects and equality as citizens. (BA 20). From a formal perspective, Kant asserts that republic springs “from the pure source of the concept of law” (BA 23); however, from a material point of view, he believes that it makes easier the attainment of the goal of peace as well:

...if the consent of the citizens is required in order to decide that war should be declared (and in this constitution it cannot but be the case), nothing is more natural than that they would be very cautious in commencing such a poor game, decreeing for themselves all the calamities of war. [...] But, on the other hand, in a constitution which is not republican, and under which the subjects are not citizens, a declaration of war is the easiest thing in the world to decide upon, because war does not require of the ruler, who is the proprietor and not a member of the state, the least sacrifice of the pleasures of his table.....(BA 24 25)

Kant adds that, from the perspective of the *forma regiminis*, the features of a republican constitution are separation of powers and representation. For this reason a republic is different from a direct democracy, which is without form (*Unform*) and despotic. The identity between the persons who deliberate and the persons who execute the law produces, as a result, a condition comparable with the assimilation of the universal of the major premise in a syllogism and the subsumption of the particular under the universal in the minor premise; in other words, the universal, in spite of having the quantifier “all”, contains a particular or a singular element. In legal and political terms, no legislative act of a direct democracy can be general and abstract: they all are always *ad hoc* provisions (BA 25-27).

As mentioned above, Kant asserts that republic makes war difficult, because it has to be decided by the citizens that are directly concerned.⁷ But how is this assertion compatible with the principle of representation? If we read the footnote, it seems that the consent of the citizens is only virtual: freedom is defined as the privilege to lend obedience to no external laws except those to which I *could have* given consent (BA 21).

But, if this is the case, representatives are in such a position that they may deliberate on war without suffering its consequences, just like *ancien régime* sovereigns.

If we read *Zum ewigen Frieden* only as a proposal of a legal architecture, such an objection cannot be answered. Every day, “real” democracies show us representatives that represent only themselves and their interests, and are sensitive only to the pressure of powerful lobbies. In our recent history, some European

representative democracies took part to a war, without caring about the different advice of a majority of their public opinion. Even if most of the criticism against Kant's project concerns the feasibility and the eligibility of the second definitive article of *Zum ewigen Frieden*, with its world federal project, we must either call into question also the republican faith of the first definitive article, or ask whether our “real” democracies lack some crucial feature that Kant's project, on the contrary, has.

2. The problem of publicness

In *Über den Gemeinspruch 'Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, Kant affirms that we might suppose that a sovereign can never make mistakes only if we describe him as above humanity. Thus “freedom of the pen is the only safeguard of the rights of the people” (A 264-265). Freedom of information, in other words, is indispensable for the life of a political commonwealth of finite rational beings. It is worth observing that Kant, while appealing to such a safeguard, talks about the pen – the communication device of his fellow scientists – and does not mention the printing press of the commercial publisher. The freedom he is describing is something more than an economic and commercial liberty: its meaning is directly political. However, we might think that such a safeguard is only a palliative, because it is included in a comprehensive argument against resistance right: but its very presence indicates that Kant's law exceeds institutions and ritual representation.

Kant's ideas are showed in a clearer way in *Zum ewigen Frieden*, where he adds a secret article to the institutional sketch proposed in the preliminary and definitive articles. He asks that the states will let philosophers publicly and freely talk about the general maxims of warfare and of the establishment of peace. The article is called “secret” because it must not compromise the sovereigns' majesty. Such a secret, however, is not revealed to kings only: Kant publishes it on a printed page, to give it the greatest possible publicness. Kant is not requesting freedom of speech: he is taking it.

That kings should philosophize or philosophers become kings is not to be expected. Nor is it to be wished, since the possession of power inevitably corrupts the untrammelled judgment of reason. But kings or kinglike peoples which rule themselves under laws of equality should not suffer the class of philosophers to disappear or to be silent, but should let them speak openly. This is indispensable to the enlightenment of the business of government, and, since the class of philosophers is by nature incapable of plotting and lobbying, it is above suspicion of being made up of propagandists.⁸

Kant takes for himself freedom of speech, in order to talk both to kings and to “kinglike peoples”: in his perspective philosophy does not end with democracy, to become public opinion and *Kommunikative Handlung*. Because philosophers are independent from parties, they have independent points of view. Although *Zum ewigen Frieden* was written after the French revolution, Kant did not change his mind because of it. In *Beantwortung der Frage: Was ist Aufklärung?* (1784), Kant distinguished between a “private”, restrained use of reason and a public use of it, unrestrained. The public use of reason is the use which a person makes of it as a scholar before the reading public: it cannot be limited, if we want to promote Enlightenment. The scope of such a use is cosmopolitan: philosophers and scholars in general should speak freely, as members of an universal commonwealth, that Kant calls *Weltbürgergesellschaft* – society of the world citizens or world civil society.⁹

Kant's solution of the representation question is not institutional, but philosophical. Freedom of knowledge is the crucial element of a rational politics. It explains as well why there is an asymmetry between the negative and the positive facet of the first transcendental formula of public law, in the appendix II of *Zum ewigen Frieden*: if it is true that “All actions relating to the right of other men are unjust if their maxim is not consistent with publicity” (B 100/A 94), such a condition, however, is necessary but not sufficient. If someone

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is much more powerful than the others, he may tell publicly what he actually wants to do, since the others are too weak to prevent him. Therefore, the second transcendental principle of public law is narrower in scope: "All maxims which stand in need of publicity in order not to fail their end, agree with politics and right combined" (110/A 103). A policy attentive to liberty, rationality and equality should not manipulate people, and should stop when its plans would meet the opposition of the concerned people, if they were publicly disclosed. An expression of agreement, however, is not enough to be sure that a policy is accordant with reason, because it might be the result of fear, spiritlessness or disinformation. Only a policy whose achievement requires that concerned people come to know and share its plans respects their freedom and rationality. In other words, politics can be moral if and only if the information sharing and the goals interconnection is not virtual, but actual. The only way to overcome the weaknesses of representation is publicness, as a condition of possibility of a free and informed cooperation.

Thus, a politics accordant with reason does neither produce only institutional arrangements, nor might be identified with the material deliberations of these institutions, but can be achieved only if it respects the form of publicness.¹⁰

3. Information and politics

In such a perspective, the legal regulation of information is crucial. If information were wholly privatized and its owners might give or deny it arbitrarily, would it actually be possible to debunk unjust political plans and to cooperate wittingly to achieve the just ones?

In *Über ein vermeintes Recht aus Menschenliebe zu lügen* (1797). Kant draws a distinction between two facets of truth: from an objective point of view, truth is a proposition being true or false. From a subjective point of view, on the other hand, truth is a person's truthfulness or sincerity.¹¹

If truth in its first meaning were a proprietary thing, the being true or false of a proposition would depend on the will of the owner.¹² But this cannot be the case: even a libertarian legal system, which is based on an absolute conception of private property, needs that the domain of knowledge and justification of law is immune from individuals property and arbitrary will.

Truth in its subjective meaning, as truthfulness, does not concern the objects of knowledge, but the individual behaviors that grant or deny their accessibility to others. Lie – like political or economic censorship – works as follows: even if I do accept that objective truth cannot depend on my arbitrary will, I assign myself the right to decide who can access it. And it is worth noticing that, in Kant's thought, knowledge subjective accessibility and its objective truth are two separate but intertwined facets: the freedom in the public use of reason is important because knowledge, as such, does not work as a private experience, but as conversation and intersubjectivity.

In Kant's opinion, no one has ever the right to lie, that is to restrain subjectively the accessibility to knowledge. He justifies his thesis as follows: lying would make public law useless.¹³ In Kant's view, public law is founded on a ideal contract of everyone with everyone, whose condition is publicness, as everyone's equal accessibility to what is true and false. The liar violates this condition, because his arbitrary will makes knowledge unequally accessible and undermines the very possibility of a public and common law:

...because truth is not a possession (*Besitzum*), of which we grant a right to one and deny it to another; but specially because the duty of truthfulness – we are speaking only about this - does not make distinctions between persons to whom it is possible to maintain such a duty and persons to whom it is possible to neglect it, but, on the contrary, it is an unconditioned duty that is valid in every situation.¹⁴

Therefore, a proprietary conception applied to knowledge is flawed. It is impossible to establish a legal system valid for everyone while granting access to information in a discriminating way: denying the publicness of information is the same as denying the (public) law itself. Kant is fully aware of the political and legal nature of the right to lie question. He asserts that the obligation to tell the truth can be applied only with the mediation of the political principle of democratic autonomy: ¹⁵ we can be obliged only by the laws to the constitution of which we took part. And he calls such an idea a principle of politics, or, in other terms, a principle for implementing the science of right as a practical reason prescription.

A democracy based on the principle of citizens' political autonomy can be fulfilled only if their agreement is witting and informed. If the accessibility of information were restrained, for any reason whatever, citizens would not take part to political power, because they could not give an actual, informed consent. If a democracy limits the freedom of information, or accepts to restrict it for the sake of someone's commercial interest, it cannot be a Kantian republic.

4. The copyright question

If information accessibility is a crucial condition for the very form of the public law, the copyright question does not affect only the transactions among private individuals, but politics as well. From this point of view, we have to deal with the 1785 essay, *Von der Unrechtmäßigkeit des Büchernachdrucks*. Its historical background is the so-called "Battle of the Booksellers", that raged in England for more than half a century. The English booksellers argued that copyright was a common law property, therefore unlimited and perpetual; the Scottish booksellers, on the contrary, recognized only the Statute of Anne terms, on the basis of the Scottish Roman law tradition that denied the very possibility of property on immaterial objects. Scotsmen, in addition, warned about the dangers of monopolies affecting the realm of culture and mind. ¹⁶ At the end of his essay on copyright, Kant evokes Roman law as a model, showing clearly which tradition he prefers.

Kant draws a distinction between the book as a physical object and the thoughts it conveys. The book as a physical object becomes a property of whoever buys it. For this reason, it is not fair to restrain the ways in which its legitimate purchaser may use it, without his consent. Therefore, if we intend a book as a physical object, we must admit that its buyer may copy it. On the other hand, the thoughts that are published in a book remain a property of their author, regardless of their reproduction, because they are not physical resources: I can continue to conceive my ideas even if they are thought by everyone and their written expressions are indefinitely reproduced. ¹⁷ The question of property makes sense only in the case of physical objects, because they cannot be owned and used by everyone at the same time. On the contrary, ideas can be reproduced and thought by everyone, without depriving their authors. Even the question of the actual paternity of an idea does not properly concern property, but historical truth. Properly speaking, the plagiarist that uses another person's ideas as they were his own, is not a thief, but a liar. "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." ¹⁸

Knowledge is not a physical object exposed to a rivalrous use; for this reason it is senseless to submit it to private property and to forbid the reproduction of ideas. On the other hand, it is equally senseless to forbid the reproduction of any physical object, if it has been purchased in a legal transaction and the purchaser copies it by his own means. Therefore, if we conceive intellectual property as a right on physical objects (*jus reale* or real right), any reservation of copyright is untenable. Kant tries to experiment the perspective of personal rights: a book is not only a physical object, but it is also the *medium* through which an author can transmit his speech to the public. Such a *medium* is provided by a publisher. For this reason, we can say that the publisher speaks in the name of another. But someone may speak in the name of another person only if he has the latter's authorization. And the authorized publisher ought to be only one, Kant argues, because a further reproduction would be useless and would spoil the business of both. ¹⁹ The mandate of the author to the publisher is only a personal relationship that does not imply the acquisition of proprietary rights on the text.

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Furthermore, the goal of this personal relationship is conveying a speech to the public in its indefinite wideness. The author speaks to a public, and the public has a right to his speech regardless to the publisher, whose rights are justified only as long as he provides a *medium* to reach the public. Consequently, the publisher may neither refuse to publish – or to hand over to another publisher, if he does not want to do it himself – a text of a dead author, nor release mutilated or spurious works, nor print only a limited impression that does not meet the demand.²⁰

Kant does not recognize works of art as speeches. He calls works of art *Werke* or *opera*, i.e. things that are produced, while indicating books as *Handlungen* or *operae*, i.e. actions. If the works of art are simply physical objects, we can derive from Kant's assumption that every legitimate purchaser may reproduce them and pass his copies to others.²¹

Kant backs the restriction of the freedom to reproduce a text only in connection with the author as a living person and with his action towards the public. When the author disappears, the public interest for a free circulation of information prevails. And every time a creative work is treated as a proprietary thing, Kant does not see legal hindrances to the freedom of its legitimate owner to reproduce it. He would endorse as legitimate even the so-called piracy, that is to say the reproduction of music, songs, images and films to gift or to sell them to others. Furthermore, Kant would justify even texts reproduction for a personal use: the problem with unauthorized printing is only the circumstance that the printer speaks to the public without a mandate from the author. But if I reproduce a text only to read or to study it by myself, I do not speak to a public in the name of its author.

Kant's position does not rely on pure reason only, but involves a perhaps intentional empirical contamination. In the essay of 1785, the ground for the exclusive nature of the mandate to a publisher is only the interest of the latter to avoid competition.²² In the later, and more theoretical, *Metaphysik der Sitten*, Kant does not mention the question at all.

In Kant's world the press used to be *medium* that provided for the widest distribution of ideas. Printing requires both specific tools and skills, and specialized and centralized organizations. And as long as the publisher of printed texts provides the only medium to convey speeches to a wide public, we cannot avoid to bow to his interest. But the primacy of the publisher's interest is not based on reason, but only on technology. If there is a medium that makes it possible to authors to communicate directly with the public, without relying on publishers, respecting their interests would become senseless. Such a *medium*, today, is the Internet. The interest of science to the public use of reason overlapped with the interests of publishers only provisionally and by chance, because of a past state of art in *media* technology.

Today, publicness can gain a space much wider than the one made possible by the press and the pressmen privileges. Unlike the freedom of the pen, the contemporary freedom of the keyboard does not need any longer to reach a compromise with the business interests of industrial contents production.²³ The public, and authors themselves, are able to distribute texts without its mediation.

If states react to such a revolution in *media* technology by imposing unjustified legal restrictions and proprietary trammels, they will not promote publicness, but smother it. And if we recognize, with Kant, that publicness has a crucial political meaning, we must be worried about the political consequences of the trend towards the privatization of the realms of ideas. In *Beantwortung der Frage: Was ist Aufklärung?*, Kant praised Frederick because he setted free, in the hard shell of his despotism, the public use of reason, as the seed of the vocation to free thinking. He hoped that such a freedom would have eventually affected the principles of government as well (A404). Today, as Kant readers, we should ask again whether the current trend towards a proprietary restriction in the public use of reason may affect back the principles of government. If publicness is a crucial element of a Kantian republic, such an interrogation is a crucial political question.

[1] See the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

[2] Article 1, paragraph 4 of the above mentioned directive; see for instance BAD, *Em defesa do empréstimo público nas bibliotecas públicas*

[3] See M. Rose, *Authors and Owners. The Invention of Copyright*, Cambridge (Mass.), Harvard U.P., 1993.

[4] *Von der Unrechtmäßigkeit des Büchernachdrucks*; the actual object of Kant's essay is not the copy as such, but only the Nachdruck, or, literally, the (unauthorized) reprint.

[5] *Fichte's Beweis der Unrechtmäßigkeit des Büchernachdrucks* (*Berlinische Monatsschrift*, Mai 1793) answered to Johann Albert Reimarus' essay, "Der Bücherverlag in Betrachtung der Schriftsteller, der Verleger, und des Publikum, nochmals erwogen" (*Deutsches Magazin*, April 1791).

[6] See for instance L. Lessig, *The future of ideas. The fate of the commons in a connected world*, New York, Random House, 2001 and *Free culture. How big media uses technology and the law to lock down culture and control creativity*, New York, Penguin Press, 2004.

[7] See for instance R.J. Rummel, "Democracies ARE less warlike than other regimes", *European Journal of International Relations* Vol. 1 (December 1995), pp. 457-479.

[8] I. Kant, *Zum ewigen Frieden*, B 70, A 66

[9] The private use of reason belongs to institutions that are not universal, but particular. Kant suggests as instances the states and the churches, but we might add also corporations and political parties.

[10] See the bibliography edited by Nico De Federicis, *La filosofia politica di Kant*, *Bollettino telematico di filosofia politica*, 2003.

[11] *Über ein vermeintes Recht aus Menschenliebe zu lügen*, A 303-305.

[12] *Ibidem*, A 305.

[13] *Ibidem*, A 305.

[14] *Ibidem*, A 311.

[15] *Ibidem*, A 309.

[16] See M. Rose, *Authors and Owners. The Invention of Copyright*, pp. 67-91.

[17] I. Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, A 79.

[18] T. Jefferson, *Letter to Isaac McPherson*, August 13, 1813

[19] I. Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, A 80-92.

[20] *Ibidem*, A 83-84.

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^[21] *Ibidem*, A 85-86. M. Rose (*Authors and Owners*, pp.1-30) asserts that in the early Modernity text was conceived not as a thing, but as an action. At the times of Tudor, Stationers Company copyright was only an exclusive right to print a particular text, granted by the Crown. When Kant treats text as action, he adopts an early modern perspective, but with a remarkable difference: the right to print is not granted by the Crown, but by the author himself.

^[22] I. Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, A 81.

^[23] See also Jean-Claude Guéron, “In Oldenburg’s Long Shadow: Librarians, Research Scientists, Publishers, and the Control of Scientific Publishing”, *Arl Proceedings*, May 2001.

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