

# Back to the future: authors, publishers and ideas in a copy-friendly environment

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## Abstract

How could scholars survive in a copy-friendly environment jeopardizing the established system of scholarly publishing in which scientific publishers seem to be authors' best friends? A backward itinerary across three German Enlightenment thinkers who took part to the debate on (unauthorized) reprinting shows us ways – usual and unusual – in which culture can flourish in a copy-friendly environment. While Fichte endorsed an intellectual property theory, took the function of publishers for granted and neglected the role of the public, Kant saw authors as speakers and justified publishers' rights only as long as they work as their spokespersons helping writers to reach the public. Eventually Lessing's project was designed to foster authors' autonomy by means of a subscription system that could have worked only on the basis of a free information flow and of direct relationships with and within the public itself. But such a condition can be compared with the situation of ancient *auctores*, with one difference: while the ancient communities of knowledge were educated minorities, because of the limitations of orality and manuscript media system, we have now the opportunity to take Enlightenment seriously.

## Introduction

The Web started life as an attempt to get people to change their behaviour in an important way. Many people create documents, but *pre-Web the assumption was that a document was the private property of its creator*, and a decision to publish was his or hers alone. Furthermore, the technology to allow people to publish and disseminate documents cheaply and easily was lacking. The Web's aim was to alter that behaviour radically and provide the technology to do it: *people would make their documents available to others by adding links to make them accessible by link following*. The rapid growth of the Web, and the way in which this change was quickly adopted in all sectors of Western society have perhaps obscured the radicalism of this step.<sup>1</sup>

The Web, according to its creator, Tim Berners-Lee, is not only a technology enabling writers to publish and disseminate documents in a cheap and easy way: it is also a way to share and to connect documents and to make them accessible and searchable by following their links. The age of printing and of intellectual privilege<sup>2</sup> has accustomed us to think in terms of books as

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1 T. Berners-Lee, W. Hall, J.A. Hendler, K. O'Hara, N. Shadbolt, D. J. Weitzner, *A framework for web science*. Foundations and Trends in Web Science, 1 (1), 2006, pp. 17-18 (italics added).

2 T.W. Bell suggests to rephrase the wording "intellectual property" as "intellectual privilege", to avoid people get accustomed to the idea that copyright is not a temporary, statutory concession but a true private property. See *Intellectual Privilege: A Libertarian View of Copyright*, 2009 <http://www.intellectualprivilege.com/book.html>.

separated units<sup>3</sup> and of authors in terms of creative individuals outstanding the others because of their scientific or literary originality. The web, on the other hand, suggests us the pattern of a knowledge system as an interlinked public space in which documents and data go beyond themselves to become part of a huge, although fragmented,<sup>4</sup> hypertext.

Unfortunately, the pattern of the web as a public hypertext woven by a collective work clashes with our current scholarly publishing and evaluating system, which is a by-product of the age of printing and of intellectual privilege. When – in the early modernity – the [Royal Society](#) and its journal, the [Philosophical Transactions](#), invented the scholarly publishing system, they had to cope with a world that was dominated both by censorship, intellectual privilege and monopoly and, as their shadow, by unauthorized books reprinting and altering.

Whatever their specific methodological approaches, histories of science dealing with this period always cite these achievements as occurring against an assumed background of an ordered, epistemologically neutral print culture, which provided no serious resistance to the virtuosi's efforts. Such an environment, needless to say, did not exist. The Society had to work to create it. Moreover, the problems attendant upon the print culture that *did* obtain meant that within the Society, too, virtuosi needed to be very careful of the criteria by which they assessed incoming works, be they printed or manuscript.<sup>5</sup>

The result of their endeavor was a system based on:

1.a selection (peer review) before the printing process

2.a publishing process so intertwined with the selection that its primary goal shifted from the communication of results and ideas to the bestowing of scientific excellence brands.<sup>6</sup>

The current serial prices crisis is a paradoxical consequence of this overlapping of research communication and evaluation. As the average cost per page published has been declining, there has been a growing mismatch between prices and purchasing budgets that is substantially above the inflation rate.<sup>7</sup> The explanation for such a phenomenon is the oligopoly of the so-called core journals: if some journals are deemed essential because of their branding power, the university libraries would be forced to purchase them in spite of their price.<sup>8</sup> While the Web is giving us the opportunity to disseminate science, the current scholarly publishing is still attempting to enclose our works within the barbed wire of a proprietary system.<sup>9</sup>

3 K. Fitzpatrick, *Scholarly Publishing in the Age of Internet*, 2007, <http://mediacommons.futureofthebook.org/mcpress/scholarlypublishing/>.

4 See for instance the chart of the web in A.Broder, R.Kumar, F.Maghoul, P. Raghavan, S. Rajagopalan, R. Stata, A. Tomkins, J. Wiener, *Graph structure in the web*, in *Ninth International World Wide Web conference*, 2009, <http://www9.org/w9cdrom/160/160.html>.

5 A. Johns, *The Nature of the Book. Print and Knowledge in the Making*, Chicago, University of Chicago Press, 1998, p. 466

6 J.-C. Guéron, *In Oldenburg's Long Shadow: Librarians, Research Scientists, Publishers, and the Control of Scientific Publishing*, ARL Publication, 2001, <http://www.arl.org/resources/pubs/mmproceedings/138gueron.shtml>

7 See for instance the OECD report *Working Party on the Information Economy, Digital Broadband Content: Scientific Publishing*, 2004, <http://www.oecd.org/dataoecd/42/12/35393145.pdf>,

8 J.-C. Guéron, *In Oldenburg's Long Shadow: Librarians, Research Scientists, Publishers, and the Control of Scientific Publishing*, ARL Publication, 2001, <http://www.arl.org/resources/pubs/mmproceedings/138gueron.shtml>

9 I am borrowing this expression from P. Aigrain, *Cause commune. L'information entre bien*

This paper will follow a backward itinerary in the Enlightenment debate on copyright, from Fichte's 1793 article<sup>10</sup> *Beweis der Unrechtmäßigkeit des Büchernachdrucks*, to Lessing's unpublished essay *Leben und leben lassen*.<sup>11</sup> The Enlightenment thinkers, while lacking our powerful communication media, share with our age both the endeavor towards knowledge dissemination and the challenge of a copy-friendly environment. Dealing with them may be revolutionary, both in an astronomical and in a political meaning: going backwards, before the age of intellectual privilege, might help us to go forwards, to rediscover in a stronger way - as human beings, as scholars - something that seemed lost.

## 1. A backward journey across the Enlightenment

During the 18th century, while the literary market was expanding beyond the professional readers,<sup>12</sup> the concept of intellectual property was hardly obvious. In the early modernity, texts were conceived not as things, but as actions. Printing was regulated by privileges<sup>13</sup> granted by the Crown. There was a strong connection of interests between the printers guild and the government: the former took advantage from their monopoly positions and the latter could enforce censorship in an easy way. Privileges used to be perpetual in time, but limited within the borders of the realm of the king who granted them.<sup>14</sup> Beyond those borders, reprinting a privileged book was easy and - apparently - legal, above all in countries that, while speaking the same language, were divided in more than one state.<sup>15</sup>

In 1710 the United Kingdom passed the Statute of Anne, the first European copyright law. The Statute copyright was no longer a grant from the crown: it was recognized as an original right of the author. It was limited in time, with a 21 years term for all works already in print at the time of its enactment and a

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*commun et propriété*, Paris, Fayard, 2005, p. 216, [http://paigrain.debatpublic.net/?page\\_id=160/](http://paigrain.debatpublic.net/?page_id=160/).

10 J.G. Fichte, "Beweis der Unrechtmäßigkeit des Büchernachdrucks. Ein Räsonnement und eine Parabel", "Berlinische Monatsschrift", Mai 1793, pp. 443-482

<http://bfp.sp.unipi.it/hj/editing/showResourcePopUp.php?id=60&download=0>.

11 G.E. Lessing, *Leben und leben lassen. Ein Projekt für Schriftsteller und Buchhändler*, in Gotthold Ephraim Lessing, *Werke*. Hanser Verlag, München, 1970, pp. 784-787, <http://archiviomarini.sp.unipi.it/140/>

12 J.A. McCarthy, "Literatur als eigentum: Urheberrechtliche aspekte der buchhandelsrevolution". *MLN*, 104 (3), 1989, pp. 531-547, <http://www.jstor.org/stable/2905045>.

13 The major difference between copyright and privilege is that the former is a universal right, while the latter depends on a grant from the Crown. The former, in other words, is due to every author, while the latter derives from a decision of the political power.

14 M. Rose, "Nine-tenths of the Law: the English Copyright Debates and the Rhetoric of the Public Domain", *Law and Contemporary Problems*. 2003; (66):75-87. Available from: [http://www.law.duke.edu/shell/cite.pl?66+Law+&#38;+Contemp.+Probs.+75+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&#38;+Contemp.+Probs.+75+(WinterSpring+2003)).

15 In the German states, during the 18<sup>th</sup> century "Even its most vehement enemies called pirate editions as justifiable when the original publisher's prices were increased, their discounts were low, codes of conduct were broken, colleagues as well as the public were damaged, or if pirate editions were only distributed in regions where the original itself was not available." R. Wittman, *Highwaymen or Heroes of Enlightenment? Viennese and South German Pirates and the German Market*, paper presented at the conference "The History of Books and Intellectual History", Princeton, 2004, p. 6, [http://www.princeton.edu/csb/conferences/december\\_2004/papers/Wittman\\_Paper.doc](http://www.princeton.edu/csb/conferences/december_2004/papers/Wittman_Paper.doc).

14 years term for all works published subsequently.<sup>16</sup> However, the Statute received a definitive judicial interpretation only in the 1774 trial *Donaldson vs. Beckett*, as the House of Lords upheld its limited terms and rejected the English booksellers' claims, according to which copyright had to be a (perpetual) common law property. "After 1774, the public domain was born. For the first time in Anglo-American [modern] history, the legal control over creative works expired, and the greatest works in English history - including those of Shakespeare, Bacon, Milton, Johnson, and Bunyan - were free of legal restraint."<sup>17</sup>

During the 18<sup>th</sup> century, while the battle of the booksellers was raging in England, the continental Europe maintained the early modern privilege regime. For instance, the king of France Louis XVI, in a 6.9.1776 letter, justified it as a "grâce fondée en justice":<sup>18</sup> it was fair to give authors the opportunity to earn an income from their works, but such an opportunity had to be based only on a gracious grant from the Crown, not on a right. In Germany, the multitude and fragmentation of states and jurisdictions facilitated the "reprint" of books (*Nachdruck*), even against the will of authors and privileged publishers.

Furthermore, a strong Roman law tradition opposed the idea that immaterial entities could be owned. According to such a tradition, property is only possible on touchable things (*res quae tangi possunt*),<sup>19</sup> which are excludable and rivalrous and therefore present us with the question of who is entitled to use them. But, besides them, there are entities that are common in their very nature. As Lord Camden declared during the mentioned 1774 trial: "Science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water".<sup>20</sup>

The English copyright experience and the rising importance of independent authors and of book trade stimulated a lively discussion among Enlightenment thinkers like Diderot, Condorcet, Lessing, Klopstock, J.A.H. Reimarus, and Immanuel Kant himself.

Nowadays, copyright is challenged because the Internet and the digitizing of texts make it easy to copy and to distribute them. From a technical point of view, such a challenge is undermining the publishers position, because authors can access directly the media and texts can circulate without being printed. As, in the field of humanities, authors reputation is usually linked to publishers fame, such a shift proposes again the question of research evaluation as well.

Besides, in a digitized world, as reading a text implies copying it on one's hard disk, the connection between copying a book and "pirating" it is weakening.

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16 The text of the Statute of Anne can be seen in K.-E. Tallmo, *The History of Copyright: A Critical Overview With Source Texts in Five Languages* at <http://www.copyrighthistory.com/anne.html>

17 L. Lessig, *Free culture*, The Penguin Books, New York, 2003, p. 93.

18 M.-C. Dock, *Étude sur le droit d'auteur*, Librairie générale de droit et de jurisprudence, Paris, 1963, p. 123

19 For instance, on the basis of the Roman Law tradition, the law faculty of Leipzig stated in 1665 that the property of the publisher on a purchased manuscript is only a *ius reale* on it as a material thing. Later, in 1722, the law faculty of Jena declared that the paternity of a text gave the author or his delegate neither a property right on its printed copies nor the right to forbid its *Nachdruck*. See John A. McCarthy, 1989, *Literatur als Eigentum: Urheberrechtliche Aspekte der Buchhandelsrevolution*, MLN, 104, 3: 531-547, pp. 536-537.

20 See *Donaldson v. Beckett*, *Proceedings in the Lords on the Question of Literary Property*, February 4 through February 22, 1774 <http://www.copyrighthistory.com/donaldson.html>

Like in the 18<sup>th</sup> century, we have to deal with a growing media technology that is challenging the current legislation. The major Enlightenment thinkers were aware - as authors - of the connection between the limitation of the freedom to copy and the social and philosophical meaning of their knowledge work and did not consider copyright as a technicality. A backward look to the 18<sup>th</sup> century could help us, as authors, to regain a new - and ancient - awareness.

## **2. Fichte: the birth of a commonplace**

In 1793 the "Berlinische Monatschrift" published a short essay, *Proof of the Illegality of Reprinting: A Reasoning and a Parable*,<sup>21</sup> written by Fichte two years ago. The essay connected originality to intellectual property and advocated the enforcing of the latter by means of criminal sanctions. It is worth mentioning the final parable by means of which Fichte illustrates his thesis, because it sports all our commonplaces on intellectual property.

In the time of the Caliph Harun al Rashid, an alchemist used to prepare a beneficial drug and to entrust the commercial side of the business to a merchant who was the sole distributor throughout the land and who earned a goodly profit by his monopoly. Another medicine merchant stole the drug from the monopolist and started to sell it at a cheaper price. The latter brought him before the Caliph. The former pleaded for his case by arguing that his selling the drug for a cheaper price was useful to the sick persons and to the society at large. What was the judgment of the Caliph? "He had the useful man hanged."<sup>22</sup>

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

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

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

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

- a material aspect, i.e. the ideas the book presents;
- the form of these ideas, i. e. the way in which they are presented.

All the aspects of a book, except one, can be appropriated by anybody: we can buy the printed paper and assimilate the ideas it conveys. We cannot, however, appropriate its form, because it is strictly personal. And, according to Fichte, it is self-evident that "we are the rightful owners of a thing, the appropriation of which by another is physically impossible".<sup>23</sup> As the form can be only mine, the author is the proprietor of his text and his authorized publisher is its usufructuary.

Originality implies property. But is it really so obvious? Property is a comfortable social convention that allows us to avoid to quarrel all the time over the use of material objects. It is so comfortable just because it is

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21 An English translation by Martha Woodmansee can be downloaded at the URL [http://www.case.edu/affil/sce/authorship/Fichte,\\_Proof.doc](http://www.case.edu/affil/sce/authorship/Fichte,_Proof.doc).

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

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



physically possible to appropriate things; we do not need to use it when something cannot be separated from someone. I say both that my fingerprints or my writing style are "mine" and that my bicycle is "mine". But these two "mine" have a different meaning: the former is the "mine" of attribution; the latter is the "mine" of property. The former can be used to identify someone; and conveys the historical circumstance that something is related exclusively to someone, the latter points only to an accidental relation with an external thing. On a historical circumstance it is possible to lie, by plagiarizing a text, i.e. by attributing it to a person who did not write it; but, properly speaking, no one can steal it: the convention of property is useless, in this case. The reproduction of my fingerprints does not undermine their "originality". Likewise, Friedemann Kawohl and Martin Kretschmer have recently found Fichte's argument flawed just because it mixes up something that cannot be taken away by others – and does not need to be protected by property – with something that can.

At the heart of Fichte's approach to copyright infringement is a paradox. The illegitimate copyist takes something that, according to Fichte's theory, cannot be taken. On the one hand, 'form' is a fluid concept of communication and perception; on the other hand, 'form' is an intrinsic quality of the book as a commodity: the former is inalienable expression; the latter is property.<sup>24</sup>

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

Nowadays, all these features sound very familiar. But we need only to move one step backwards, to realize how mistaken is the belief that copyright is based on an obvious, intuitive idea.

### **3. The pirate from Königsberg: Kant and the Roman Law tradition**

Before Fichte, Kant wrote on authors' right in the short essay *Von der Unrechtmäßigkeit des Büchernachdrucks* (1785)<sup>25</sup> and reiterated almost the

<sup>24</sup> F. Kawohl, M. Kretschmer, "Johann Gottlieb Fichte, and the Trap of Inhalt (Content) and Form: an Information Perspective on Music Copyright", *Information, Communication & Society*, 12 (2), 2009, 205-228. The quotation is from p. 17 of the open access version at the url <http://eprints.bournemouth.ac.uk/9252/>.

<sup>25</sup> The Cambridge University site *Primary Sources on copyright* (1450-1900) <<http://www.copyrighthistory.org/htdocs/index.html>> translates it, very accurately, as *On the Unlawfulness of Reprinting*. Besides, the commentary on it, written by Friedemann Kawohl (*Commentary on Kant's essay On the Injustice of Reprinting Books* (1785)', in *Primary Sources on Copyright* (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org)) offers a remarkably faithful interpretation of Kant's ideas on copyright: "Kant denies the concept of "intellectual property" and the idea that any intellectual content is materialised in the book as such. In Kant's view the book is a medium, a mere tool for conveying the author's thoughts, and thus an unlicensed reprint does not encroach on any property as such of the author or publisher. Rather, it is unlawful because it

same topics in *Die Metaphysik der Sitten, Rechtslehre* § 31, III1 (1797). Fichte believed that his ideas on copyright followed Kant's footprints. There is, however, a remarkable difference between them. While Fichte bases the illegality of reprinting on a concept of intellectual property, Kant endorses the Roman Law tradition and does not apply the concept of property to written texts, as it is clearly stated in the 1785 essay conclusion.

If the idea of book publishing as such which was taken as the basis for the above arguments were to be understood properly and (as I flatter myself to think it feasible) if it were to be elaborated with the requisite elegance of Roman juridical scholarship, then actions against reprinters could very well be brought before the courts without it being necessary to apply beforehand for a new law to be promulgated in this respect.<sup>26</sup>

According to Kant, a book can be seen:

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

1. The book as a material object may be reprinted. It becomes a property of whoever buys it. For the very principle of private property, it is not fair to restrain the ways in which its legitimate purchaser may use it (VUB, AA.08 [79:10-13](#)).

2. The *Nachdruck* does not prevent anyone to keep on conceiving his thoughts. They remain a "property" of their author, regardless of their reproduction, because they are not material: properly speaking, ideas cannot be stolen (AA.08 [79:08-10](#)).

3. A speech is an action (*Handlung*) (AA.08 [85-86](#)). A person who is speaking to a public is not selling anything to them: he is engaging a relationship with them. Therefore, such a relation is not a matter of rights on things (*iura realia*), but of personal rights (*iura personalia*).

In the *Metaphysik der Sitten*, the *ius reale* or *ius in re* is a right on things;<sup>27</sup> the *ius personale* is the "possession of another's choice [*Willkür*], in the sense of my capacity to determine it by my own choice to a certain deed".<sup>28</sup> In other words, it is a right entitling someone to obtain acts from other persons. As moral subjectivity involves freedom, personal rights cannot be established without the concerned persons' consent.

According to Kant, the *ius reale* cannot be applied to ideas, or, better, to thoughts, because they can be conceived by everyone at the same time, without depriving their authors. Surprising as it may seem, the *ius reale* protects the freedom to copy, if it is taken seriously. If a thing has been purchased in a legal transaction and the purchasers copy it by their own means, they are working on their legitimate property. For the very principle of private property, it is not fair to restrain the ways in which its legitimate purchaser may use it.

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amounts to an "agency without authority".

26 I Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, AA.8, [87:09-14](#). The translation is by Luis Sundkvist, adapted from John Richardson's anonymous translation of 1799, now in the Cambridge University site *Primary Sources on copyright (1450-1900)* quoted above.

27 §11, MS, AA.06 [260](#). The English translations from the *Metaphysik der Sitten* are by M. Gregor: I. Kant, *The Metaphysics of Morals*, Cambridge, Cambridge U.P., 1996.

28 §18, MS, AA.06 [271:04-10](#). According to R. Pozzo ("Immanuel Kant on intellectual property". *Trans/Form/Ação* 29 (2), 2006) Kant's copyright belongs to the family of personal rights, in the current meaning of rights <http://www.thefreedictionary.com/Personal+rights> pertaining to the person, like the rights of a personal security, personal liberty, and private property. Such an interpretation contrasts with the definition of *ius personale* contained in the *Metaphysik der Sitten* and gives the readers the misleading impression that Kant intended copyright as a basic human right.

For this reason, no *ius reale* can be opposed to the reprinter. If we see the book as a material thing, whoever buys it has the right to reproduce it: after all, it is his book. Furthermore, in Kant's opinion, no affirmative personal obligation can derive from a *ius reale* (VUB, AA.08 [83.](#)), because a *ius personale* on someone cannot be claimed by purchasing some related things without obtaining his expressed consent.

Therefore, Kant cannot be included among the intellectual property forerunners. In his perspective, on the one hand, no *ius reale* can be opposed to the reprinter's claim, and, on the other hand, thoughts cannot be properly "stolen". Knowledge is not a material object exposed to a competitive use.

Kant, by conceiving the book as an action, adopts a strategy based on the *ius personale* only., and concludes that the unauthorized printer is comparable to an unauthorized spokesperson rather than to a thief. Therefore, to protect authors from reprinters, it is not necessary to invent a *ius reale* on immaterial things. Kant's argument sticks to Roman Law tradition: a person, by speaking to a public, engages a relationship with them. The book may be viewed as a *medium* through which he transmits his speech to a wider public. In the age of printing, such a *medium* used to be provided by publishers. Thus publishers can be considered as spokespersons who speak in the name of the authors. And, as such, they need the authors' authorization (VUB, AA.08 [79-82](#)) to speak in the name of another without his authorization is like engaging him in a relationship without his consent. As personal rights concern relations among free beings, they can arise only from expressed agreements. Hence, the unauthorized printer is like an unauthorized spokesperson, who produces a relation of the author with the public without being entitled to do it.

The scope of Kant's justification of copyright applies only to the publishing of texts, does not touch the so-called derivative works and it is justified only as far as it helps the public to get the texts.

Kant does not recognize works of art as speeches. He calls works of art *Werke* or *opera*, i.e. *things* that are produced, while indicating books as *Handlungen* or *operae*, i.e. actions. As the works of art are simply physical objects, we can derive from Kant's assumption that every legitimate purchaser may reproduce them and may donate or sell the copies to others (AA.08 [85-86](#)). Every time an object can be treated only as a product, its legitimate owner may do what he wants with it, because of his *ius reale*, which has to be taken seriously on both sides. Moreover, as the injustice of reprinting books depends on their communication to the public, we can deduce that their reproduction for personal use is not to be forbidden.

As regards as the derivative works, Kant states that, if one shortens, augments, retouches or translates the book of another, he produces a new speech, although the thoughts can be the same. Therefore, derivative works cannot be seen as *Nachdruck* and are perfectly lawful (AA.08 [86-87](#)). In a Kantian environment, everyone may become a "wreader" - a reader and writer at the same time - without being hindered by copyright restrictions

The goal of the transaction between the author and the publisher is conveying his text to the public. The public has a right to interact with the author, if the latter has chosen to do it. According to Kant, the publisher may neither refuse to publish - or to hand over to another publisher, if he does not want to do it himself - a text of a dead author, nor release mutilated or spurious works, nor print only a limited impression that does not meet the demand. If the publisher



does not comply, the public has the right to force him to publish (AA.08 [85](#)). In a Kantian environment the publisher's rights are justified only when they help authors to reach the public. Copyright should be neither censorship nor monopoly.

In the 1785 essay Kant stated that the mandate of an author to a publisher should be exclusive (AA.08 [81](#)) because the publisher becomes willing to publish a book only if he is certain to earn something from it; therefore, he is interested in avoiding competition. But later, in the *Metaphysik der Sitten*, Kant does not mention the exclusivity requirement at all, perhaps because he has realized that it was based on an empirical contamination, depending on the current state of technology.

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

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

Kant's thesis is based on the technical assumption that publishing requires an intermediation - just as it used to be in the age of print -, which is lawful only if it has the author's consent. Where the intermediation is not necessary any longer, where no one is speaking in the name of another, copyright makes no sense.<sup>29</sup>

There are at least three outstanding differences between Kant and Fichte:

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

While Fichte is an intellectual property endorser, Kant is an "enlightened" conservative who supports the Roman law tradition, against the propertization trend.<sup>30</sup> He accepts the copyright principle, according to which authors are entitled to decide how to publish their works. The rights of the publishers, however, are justified only as long as they help authors to reach the public, while the personal use of the texts and the so-called "wreading" should be free. And, above all, all that can be viewed as a product is, in his opinion, outside the

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<sup>29</sup>In a Kantian environment, sites like [The Pirate Bay](#), as they are only facilitating people to copy materials for their personal use, should not be seen as a "pirate" *Nachdrucker*.

<sup>30</sup>In *Freedom, Ownership and Copyright: Why Does Kant Reject the Concept of Intellectual Property?*, Società italiana di filosofia politica, 2010, <http://www.sifp.it/pdf/kantpisa.pdf>, §4, I widen the scope of the argument by showing that Kant's ideas on copyright can be connected to his general theory of the scope of property.

scope of copyright and may be copied without restrictions. In a nutshell: Kant suggests an argument for authors' moral rights without sacrificing Enlightenment.

#### **4. G.E. Lessing: authors and publishers in a copy-friendly environment**

If we eliminate, with Kant, the concept of property from the realm of creative works, we can see copyright only from the perspective of a relationship among persons. Therefore, we become able to take seriously not only authors and their publishers, but also the public at large. Kant's copyright has the only function to protect authors' freedom to share their texts as they prefer, and to make it easier to communicate them to the public. But, if copyright is only a means to foster the publication and the diffusion of texts, its rules should also be connected with the prevailing media technology. We should become aware that copying a text to read it in the Internet age is not the same as reprinting a book to sell its copies in the age of printing.<sup>31</sup>

How can authors get an income in a copy friendly environment? About ten years before Kant, Lessing had proposed an answer to such a question, in his unpublished fragment *Leben und leben lassen*.

In the 18<sup>th</sup> century, the political fragmentation of Germany made the *Nachdruck* of privileged books very easy. In this game, authors were the weaker players: after having sold their manuscripts at low prices, they did not share any further profit with publishers and reprinters. Lessing, who was trying to live on his work, without depending on patronage, advocated, on their behalf, a peculiar, far-sighted solution.

First of all, Lessing tried to give his work an economic meaning, by applying to it Locke's justification of property. Everyone is entitled to be the legitimate owner of all that has come into being by means of one's work. Such a thesis had been proposed also by Diderot,<sup>32</sup> to argue in favor of a perpetual copyright. However Lessing, unlike Diderot, realized that such a claim is partly rhetorical: when a book has been published, it can be copied. It is impossible to enclose an immaterial thing. Moreover, why should authors defend copyright in a situation in which most of the profit from their creative work is earned by publishers? From the authors' perspective, the core question has to be reformulated as follows: how can authors get an income in a copy-friendly environment and in a publishing system in which publishers hardly share their earnings with them? The *rights of the authors* as workers are not the same as authors right as intended by the publishers.

Lessing suggested a system of print on demand in which earnings were equally shared among printers, authors and publishers, supported by a free circulation of previews. In such a system, only books really required by the public would deserve to be printed and the *Nachdruck* would not undermine the earnings of the first publishers, because it could happen only later. To quote Kevin Kelly: "When copies are free, you need to sell things which cannot be copied"<sup>33</sup>.

31 On this difference, it is still worth reading Richard Stallman's dystopian tale "The Right to Read", *Communications of the ACM*, 40, 2, 1997, <http://www.gnu.org/philosophy/right-to-read.html>.

32 D. Diderot, *Lettre sur le commerce de la librairie* (1764), [http://www.freescape.eu.org/biblio/article.php3?id\\_article=145](http://www.freescape.eu.org/biblio/article.php3?id_article=145)

33 K. Kelly, *Better than free*, 2008

To be accomplished, Lessing's project would have need a wide and cheap circulation of information, which was not possible in the age of printing. Nowadays, however, we can both emancipate authors from publishers and cooperate with them, in a free information environment, by selling things that cannot be copied. The subscription printing is only an opportunity among others.<sup>34</sup>

## **5. Apostles and scholars: the “noble Luther”**

In his attempt to justify authors' right to be paid for their work, Lessing criticized Martin Luther for his evangelical “it was freely that I received and freely that I gave it”<sup>35</sup>, paraphrased in his *Warning to the Printers*<sup>36</sup> that introduced his Bible translation published in 1541. The “freely ye have received, freely give” of the Gospel of Matthew belongs to a set of instructions given by Jesus to his apostles before sending them in the world. Luther does not conceive his translation as a business operation, but as an apostolic mission. The translator is the means of a word that transcends him, within a community of knowledge ideally founded by and in Christ himself.

The Reformation saw the first large scale media campaign, in which the evangelic party was able to use in a way both consistent and efficacious all the communication opportunities provided by the recent Gutenberg invention.<sup>37</sup> Luther encouraged laymen to access the Holy Scriptures and the faith in an autonomous way, without depending any longer on the mediation of the Roman-Catholic authority. He encouraged them, in other words, to break themselves free from a hierarchical community of knowledge, built upon the scarcity of texts and the monopoly of their interpretation, to be Christian in an immediate way. Without the printing press, Luther German translation of the Bible and the booklets advocating his ideas would have never reached the wider public of laymen whose religious dignity was theorized by him. In a way, the medium was the message as well.

The very success of Luther resulted in several unauthorized reprints of his Bible translations, sometimes heavily modified by his Roman-Catholic opponents. The *Warning to the Printers* contains Luther's self-defense. Its arguments are very different from an – anachronistic – advocacy of intellectual privilege:

Therefore, if someone wishes to acquire our newly revised version of the Bible for himself or for a library, I hereby honestly warn him that he should pay attention to what and where he is buying and that he should try to buy this version only which was published here this year (1541). For I'm not counting on living so long / that I would be able to go through the Bible a second time. And even if I were to live as long as this would take I am fast becoming too weak for such work.<sup>38</sup>

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[http://www.kk.org/thetechnium/archives/2008/01/better\\_than\\_fre.php](http://www.kk.org/thetechnium/archives/2008/01/better_than_fre.php)

34 D. Baker ("The reform of intellectual property", *Post-Autistic Economic Review*, 5 (32), 2005 <http://www.paecon.net/PAERreview/development/Baker32.htm>) suggests to replace copyright – a government granted monopoly that does not belong to market economy – with a distributed patronage, for instance by deducting contributions to arts and sciences from taxable income, or by establishing a system of individual vouchers.

35 Mt. 10.8: “freely ye have received, freely give”.

36 Luther's "Warning to the Printers", Wittenberg (1541) is now included in *Primary sources on copyright*, [http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showthumb/%22d\\_1541\\_im\\_001\\_0002.jpg%22#](http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showthumb/%22d_1541_im_001_0002.jpg%22#).

37 M.U. Edwards, *Printing, Propaganda, and Martin Luther*. Berkeley and Los Angeles: University of California Press, 1994

38 Luther's "Warning to the Printers" (see above).

If, against the Roman-Catholic hierarchy, the right and the duty to evaluate the Scriptures belong to the readers, they are as well in the condition to appreciate the difference between the Bible edition elaborated by Luther himself and the careless, hasty reprints published for the sake of money only. Luther does not claim himself trustworthy because of his creativity and ingenuity. He presents himself as an “unworthy, wretched, poor instrument”: his merit depends only on his participation in Christ, or, in more secular words, in a community of knowledge from which he has received freely before freely giving it his contribute.

Why could Luther afford to be “nobler” than Lessing and neglect the economic facets of books writing and publishing? Luther, while using the printing press to spread the word of his Reformation, could still rely on the heritage of a community of knowledge – the ideal church to which all Christians ideally belong because they are one with Christ – in which both writers and readers were not alone before their books. Luther still belonged, at least partly, to the premodern world, which conceived knowledge as a collective enterprise, beyond individuality and ownership.<sup>39</sup>

Only two centuries later, the power of the publishing system had become so strong that Lessing's appeal to the public to emancipate authors from the publishers grip remained of theoretical concern only. The very system that made it possible Luther's appeal to his readers created, both because its costs and because its technical proclivity to intellectual privilege and censorship, a new kind of mediation – and new kinds of oligopolies.

## **6. Back to the future: Plato's academy and the web**

According to Plato, the technical possibility of a mediation overpowering the communities of knowledge was introduced by the very invention of writing.

In a well-known *Phaedrus* myth, the Egyptian god Theuth, inventor of the letters (*grammata*) presents his invention to the pharaoh Thamus with the following words:

This invention, o king, will make the Egyptians more sapient and will improve their memories; for it is drug (*pharmakon*) of memory and sapience that I have discovered.” But Thamus replied, “Most ingenious Theuth, one man has the ability to beget arts, but the ability to judge of their usefulness or harmfulness to their users belongs to another; and now you, who are the father of letters, have been led by your affection to ascribe to them a power the opposite of that which they really possess. For this invention will produce forgetfulness in the minds of those who learn, because they will not practice their memory. Their trust in writing, produced by external characters which are no part of themselves, will discourage the use of their own memory within them. You have invented a drug not of memory (*mneme*), but of reminding (*hypomnesis*); and you offer your pupils the appearance of sapience, not true sapience, for they will read many things without instruction and will therefore seem to know many things, when they are for the most part ignorant and hard to get along with (*syneinai*), since they are not sapient, but only appear sapient (*doxosophoi*). (*Phaedrus*, 274e-275a)

Writing is a *pharmakon*, an equivocal Greek word meaning both “drug” and “poison”, because it can produce both good and bad effects:

- it facilitates the reminding (*hypomnesis*), that is the preservation and

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39 C. Hesse, “[The rise of intellectual property, 700 b.c.-a.d. 2000: an idea in the balance](http://www.amacad.org/publications/spring2002/hesse.pdf)”, *Daedalus*, 2002 (Spring), p. 34, <http://www.amacad.org/publications/spring2002/hesse.pdf>).

transmission of information;

- the abundance of information does not enhance, by itself, the users' memory and sapience, or their personal ability to recall the proper notion when it is needed and to evaluate and connect mnemonic data;
- as information provided by writing depends on external devices, not on personal and interpersonal conditions, the staying together that supported oral cultures and ancient philosophical schools (*synousia*) becomes difficult: cooperation is replaced by competition.

According to Plato, we have knowledge only if the knowing subject can handle notions in a critical way and interlink them,<sup>40</sup> and is able to discuss them with others. If an idea is only for someone, it cannot be an idea for everyone; but if an idea is not for everyone, it is not knowledge. Writing produces the delusion the life of knowledge can be transferred to objects that can be owned, bought and sold. But the actual knowledge is something different: the information abundance caused by writing does not imply, in itself, the ability to control our notions in a critical way. We have to learn to use *grammata* being aware both of their potentialities and of their limitations. According to Socrates, *grammata* do not produce anything clear and certain. The only use of written words is "reminding (*hypomnesai*) him who knows the matter about which they are written" (*Phaedrus*, 275d).

To understand the meaning of *hypomnesis*, as the writing proper purpose, we should use as term of comparison the *anamnesis* of *Phaedrus* 249b-d. *Anamnesis* - literally, a remembering "from above" (*anà*) - is understanding "according to what is called *eidos*, by going forward from manifold sensations to the unit collected together by means of reasoning". On the other hand, *hypomnesis* - literally, a remembering "from below" is the bare ability of preserving information. In other words, knowledge is composed by two elements:

- a bunch of information data that can be preserved and conveyed in various ways, object of *hypomnesis*;
- their systematic interconnection, in a unitary and consistent meaning.

In both levels, memory (*mneme*) plays a role. From Plato's point of view, knowledge can exist only in relation to a collective endowment, which is not created by single individuals, but only reconstructed by them. To get knowledge, we need information; but we should also be able to understand it, that is to explain, select and evaluate it. Written texts can give us *hypomnesis* and information data; but to obtain knowledge we need people to discuss with. An idea becomes an idea only if it is not private, but can be thought and shared by everyone. Information becomes knowledge only if it passes the examination of sharing.

Writing, *Phaedrus*, has this terrible quality, and is very like painting; for the creatures of painting stand like living beings, but if one asks them a question, they preserve a solemn silence. And so it is with speeches; you might think they

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40 In Plato's *Meno* (98a) Socrates states that science consists in bonding. In Plato, these bonds are not associations, but causal reasonings: in his dialogs, however, myths are used as nodes of a web of associations (see for instance the affinity between the *Meno*'s account of Daedalian statues and the similar account of *Euthyphro*: M.L. McPherran, *The Aporetic Interlude and Fifth Elenchus of Plato's Euthyphro*, p. 14, in D. Sedley ed. *Oxford Studies in Ancient Philosophy*, Volume XXV: Oxford U.P., Winter 2003.



spoke as if they had intelligence, but if you question them, wishing to know about their sayings, they always say only one and the same thing. And every word, when once it is written, is bandied about, alike among those who understand and those who have no interest in it, and it knows not to whom to speak or not to speak; when ill-treated or unjustly reviled it always needs its father to help it; for it has no power to protect or help itself. (275d-e)

A written text – just every kind of monologue<sup>41</sup> – cannot go beyond the communication of bare data because it lacks interactivity. However, there is a further kind of speech, its “legitimate” brother. (*Phaedrus*, 276a) To understand the meaning of such a metaphor, we should recall *Phaedrus*, 275d-e: the written text is a son of the writer, but cannot resort to its kinship. When it is ill-treated, its fathers' authority does not grow from the text, if he does not defend it in person. For this reason, it is like an illegitimate, unrecognized child. A legitimate child, on the contrary, enjoys some rights from its father's legitimation, on the basis of its position in a chain of authority:

Socrates: [The speech] which is written with science in the soul of the learner, which is able to defend itself and knows to whom it should speak, and before whom to be silent.

Phaedrus: You mean the living and breathing speech of him who knows, of which the written one may justly be called the image (*eidolon*). (*Phaedrus*, 276a)

According to Socrates, a written text is ephemeral like the gardens of Adonis (*Phaedrus*, 276b).<sup>2</sup> On the contrary, he who has knowledge of the just and the good

...will plant the gardens of letters for amusement, and will write, when he writes, to treasure up reminders (*hypomnèmata*) for himself, when he comes to the forgetfulness (*lethe*) of old age, and for others who follow the same path, (*Phaedrus*, 276d)

...but, in my opinion, seriousness is far nobler, when one employs the dialectic method (*dialektiké techne*) and, with science (*episteme*), plants and sows in a fitting soul speeches which are able to help themselves and him who planted them, which are not fruitless, but yield seed from which there spring up in other minds other words capable of continuing the process for ever, and which make their possessor happy, to the farthest possible limit of human happiness. (*Phaedrus*, 276e-277a)

Socrates believes in the potential immortality of the speeches that are “written in the soul” and considers texts as passing, even if they can admittedly preserve information. According to Plato notions (object of *hypòmnesis*) can become knowledge only by means of an interactive and critical processing among persons, which transcends individuality.<sup>42</sup> Plato is silent about himself – the author – because he wants to emphasize that reason and research, as such, go across us all and beyond everyone of us.

Socrates' words and metaphors seem to suggest that the speeches “written in the soul” are more permanent in time as well. Stressing either the importance of texts or the role of speeches “written in the soul” leads, indeed, to two different communication strategies.

Plato's criticism of writing has reached us by means of a written text, freely copied through the centuries. He has obviously chosen to write, but within the

41 In *Protagoras* 329a-b, Socrates refuses to listen to the Sophist's long speeches, by asserting that some speaker can certainly deliver long and beautiful speeches, but they – just like books – would not be able to answer to someone interrupting and questioning them.

42 See L. Edelstein, “Platonic anonymity”, *The American Journal of Philology*, 83 (1), 1962, pp. 1-22 <http://www.jstor.org/stable/291776>

frame of a communication strategy in which writing is clearly subordinate.

If Plato had adopted the text as a major or unique means to preserve and communicate knowledge, not bare information, he would have had to consider that «it is bandied about, alike among those who understand and those who have no interest in it [...] and has no power to protect itself» (*Phaedrus*, 275d-e). To propagate a text in time and space, we need to copy it. However, if the writer leaves it to itself, it is easy mangling or altering it. The only way to preserve its integrity is the control of its copy, even before that the invention of print and the interest of the state to censorship together with the stationers' pursuit of monopoly pave the way to copyright. Copy, however, is not only the vector of counterfeiting, but also a crucial medium to disseminate a text in time and space. Therefore, the control of copy will abridge the propagation of texts; there will be fewer copies and it will be easier a text gets lost for the wear of time. Besides, if texts have a smaller circulation, the cultural community that knows them will be smaller as well. Thus, even if some texts succeeded in surviving, they risk to become unintelligible, because no one is able to understand them any longer.

Plato did choose to take seriously the task of writing in the soul: he worked for the creation of a cultural community and treated text just like a mnemonic help, which can produce knowledge only if someone capable to follow its paths will read it attentively. In such a perspective, there is no reason to control the copy: our texts circulate freely, even if they risk to get altered or forged. A community of persons lasts both by means of direct teaching and thanks to easily accessible texts, while yielding, in this way, a continuity in cultural tradition. People are less long-lasting than many data storage supports; but the knowledge communities, composed by people, let information remain knowledge. From a more earthbound perspective, people copy and rewrite the texts, and the redundancy they produce secures them against the wear of the time and the calamities of history.

Plato, thus, founded the Academy as seed of a knowledge community, and set free his writings in the quicksand of the ancient *samizdat*. The very fact we are still discussing on his thought after two millennia and a half shows that he was historically right. The success of GNU-Linux, which is likewise founded on a users and developers community and on the freedom of the code, is not a computer science oddity. All the meaningful cultural experiences that cross centuries and generations spread in a similar way. We have now the tools to address and open communities of knowledge relying not only on face to face communication, but on an evolving, open and hyperlinked web of documents and data.<sup>43</sup>

In 1969, Foucault's question "What is an author?", which suggested that we could as well do away with such a concept, could seem brilliant, sophisticated and provocative. However, from the revolutionary point of view of both Plato and Tim Berners-Lee, the overcoming of authors in a public web of science<sup>44</sup> is

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43 S. Harnad, *Back to the Oral Tradition Through Skywriting at the Speed of Thought*, 2003, <http://www.interdisciplines.org/defispublicationweb/papers/6>.

44 James Boyle (*Mertonianism Unbound? Imagining Free, Decentralized Access to Most Cultural and Scientific Material*, in E. Ostrom, C. Hess, eds., *Understanding knowledge as a commons*, Cambridge Mass.-London, The MIT Press, 2007, pp. 123-143) asks himself whether we are underestimating the power of a lay audience, given free Internet access to cultural materials and factual data as well as scholarly work, to add richness and depth to the world of scholarship in the same way that they have in the world of the provision of

both a heritage from the past and a possibility for the future.

We have always loved one another. We're human. It's something we're good at. But up until recently, the radius and half-life of that affection has been quite limited. With love alone, you can plan a birthday party. Add coordinating tools and you can write an operating system. In the past, we would do little things for love, but big things required money. Now we can do big things for love.<sup>45</sup>

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factual information.

45 C. Shirky, *Supernova Talk: The Internet runs on love*, 2008 <http://www.shirky.com/herecomeseverybody/2008/02/supernova-talk-the-internet-runs-on-love.html>.