KANT ON COPYRIGHT: RIGHTS OF TRANSFORMATIVE AUTHORSHIP

KIM TREIGER-BAR-AM*

INTRODUCTION ........................................................................................................ 1060
I. KANTIAN THEORY ON AUTHORIAL RIGHTS ........................................ 1065
   A. Current Understandings of Kantian Theory on Copyright .................. 1066
      1. Imprint of Personality? ................................................................. 1066
         a. Kant ...................................................................................... 1067
         b. Creativity ............................................................................ 1067
         c. Legal Standards .................................................................. 1068
      2. Property? .................................................................................. 1072
   B. Autonomy of Authorial Expression .................................................. 1075
II. TRANSFORMATIVE USE ............................................................................. 1078
   A. Creativity ..................................................................................... 1079
   B. Kantian Theory ............................................................................ 1080
   C. Defining Transformativity .......................................................... 1082
   D. Distinction Between Art Forms .................................................. 1084
      1. Hierarchies ............................................................................... 1085
      2. Thing-ness ............................................................................. 1086
      3. Expression and Communication .............................................. 1088
      4. Reproductive Techniques ......................................................... 1088
      5. The Law ................................................................................... 1090
      6. Art as Autonomy of Expression .............................................. 1091
III. MORAL AUTONOMY: OBLIGATIONS ....................................................... 1091
   A. Kantian Autonomy in Law and Culture .................................... 1092
   B. The Kantian Concept ................................................................. 1094
      1. Universality and Unconditionality ......................................... 1095
      2. Will and Choice ..................................................................... 1097
   C. An Ethic of Expression ............................................................... 1099
      1. Duties of Respect .................................................................. 1099
      2. Bilateral Duties Entailed in Authorial Rights ....................... 1101
      3. The Wider Society ................................................................. 1101
CONCLUSION ...................................................................................................... 1103
INTRODUCTION

Both the philosophical justifications and the limits of authors' rights deserve greater inquiry in Anglo-American copyright discourse. On the Anglo-American utilitarian view, the rationale of copyright is that it offers an economic incentive to increase production. Copyright is for the encouragement of learning and the promotion of science and useful arts, under the United States Constitution's Copyright Clause and the United Kingdom Statute of Anne of 1709. The utilitarian view understands copyright's purpose as exclusive of the authors' rights tradition. Yet on the Anglo-American model that tradition is present, and strong. The authors' rights tradition ought to be recognized, embraced, and indeed strengthened to provide greater defense to authors. Authors' rights can aid the author in a conflict with the copyright owner. Moreover, authors' rights can advance the rights of transformative authors. Authorship is itself transformative; creativity builds upon what came before. Transformatively authors are often labeled "copiers," "users," "creators," "recorders" or "remixers," by supporters of their rights. Recognizing them directly as "authors" will strengthen their rights. Authors' rights lend weight to the claims of these transformative authors in a conflict with the copyright owner, or with the so-called primary author (herself a transformative author). This article explores the analysis by one philosophical proponent of authors' rights and transformative authorship: Immanuel Kant.

Kantian theory is documented as having influenced and bolstered the Continental European theory of authors' rights, droit d'auteur. The Continental use of Kantian theory is not relied upon in this analysis. On the Continent, Kantian theories are understood through the lens of personality rights. Kant is placed in the camp of supporting authorial personality rights when he is recalled in discussions of copyright theory on the Anglo-American model, as well. I take issue with these analyses. Personality rights are interpreted differently in civil law systems than in the United States and United Kingdom. Continental views of Kant on authors' rights are not easily transplanted to the Anglo-American system.

The difficulties with the characterization in the United States and United Kingdom of authorial rights as personality rights on a Kantian scheme are discussed in the beginning of the

---

* The author (B.A. Yale 1985; J.D. Yale 1989; M.Jur. Oxford 2001; D.Phil. Oxford 2005) is a lecturer at Bar Ilan University in Israel. The author wishes to acknowledge gracefully the discussions with and engagement of Dr. Michael Spence, Professor Onora O'Neill, and Dr. Ralph Walzer during the development of this analysis. ©2008 Kim Tressler-Lin-As.

1 U.S. CONG. 1st Sess. 50, 51 (1790) ("The Congress shall have power . . . To Promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

2 The Statute of Anne of 1709 was titled, "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies." The Statute of Anne, 1709, Anne, c. 19 (Eng.).

3 The Statute of Anne is often dated 1710. Yet the statute was passed in February, and until 1723, when England went over to the Gregorian calendar, the legal year began in March. Stina Teitman, British and French Copyright: A Historical Study of Aesthetic Implications 19 n.42 (Oct. 7, 2004) (Ph.D. dissertation, Univ. of S. Devon), see http://www.humaniora.de/phd/dokumente/Bier/0.doc.


5 For discussion of the overlap between the two exclusive subnorms of copyright and author's rights (droit d'auteur), see Paul Edward Geller, Must Copyright be Free? Copyright, First Amendment, and Copyright Law Internationally (2002).

6 For discussion of the overlap between the two exclusive subnorms of copyright and author's rights (droit d'auteur), see Paul Edward Geller, Must Copyright be Free? Copyright, First Amendment, and Copyright Law Internationally (2002).

7 See infra Part II A.


10 2008 KANT ON COPYRIGHT

"remixers," by supporters of their rights. Recognizing them directly as "authors" will strengthen their rights. Authors' rights lend weight to the claims of these transformative authors in a conflict with the copyright owner, or with the so-called primary author (herself a transformative author). This article explores the analysis by one philosophical proponent of authors' rights and transformative authorship: Immanuel Kant.

Kantian theory is documented as having influenced and bolstered the Continental European theory of authors' rights, droit d'auteur. The Continental use of Kantian theory is not relied upon in this analysis. On the Continent, Kantian theories are understood through the lens of personality rights. Kant is placed in the camp of supporting authorial personality rights when he is recalled in discussions of copyright theory on the Anglo-American model, as well. I take issue with these analyses. Personality rights are interpreted differently in civil law systems than in the United States and United Kingdom. Continental views of Kant on authors' rights are not easily transplanted to the Anglo-American system. The difficulties with the characterization in the United States and United Kingdom of authorial rights as personality rights on a Kantian scheme are discussed in the beginning of the

---


---

* See infra page 1064, and Part IA.
article. Instead of turning to Continental analyses, the original Kantian sources are explored, and their relevance for Anglo-American doctrine developed.

As developed throughout the article, I believe that Kantian theories are useful for the Anglo-American understanding of copyright from a different perspective. It is not argued herein that in the development of Anglo-American copyright jurisprudence, Kantian theory played a role. Rather, it is submitted that Kantian theories can be used to illuminate the theoretical justifications for an authors' rights perspective on copyright in the United States and United Kingdom.

Kantian moral philosophy develops the concept of autonomy, and indeed the autonomy of the expressive and communicative being. It can be understood to support the autonomy of the author. In his essay, "On the wrongfulness of unauthorized publication of books," Kant writes of the need to protect the exclusive publication of books. The essay can be, and has been, viewed as supporting publishers' rights in furtherance of the economic incentive on the utilitarian model of copyright. Indeed, Kant in his essay talks primarily of publishers' rights, and secondarily about authors' rights. Yet a closer look at the essay reveals that it is much more. The essay follows from Kant's moral philosophy. The publisher's right is derived from the author's right: the publisher is the agent of the author. The essay is a staunch defense of authors' rights. It also staunchly defends the rights of the modifying and transformative author. Kantian thought can be used in theoretical debates on the Anglo-American copyright model to bolster authorial rights, including the rights of the transformative author.


13 Note: All citations to the works of Kant are from the Cambridge edition, except where indicated as to the Richardson or Hasle translations, and the CRITIQUE OF JUDGMENT and CRITIQUE OF PURE REASON. The Prussian collection is cited as such, where reference is made to its citation by Knoller and Asmann. The page number indicated refers not to the pages of the Cambridge or other editions, but to the Prussian academic pagination of the standard German edition (marginal numbers in the Cambridge edition, bracketed in other editions).

14 See Daniel Burkitt, Copyrighting Culture: The History and Cultural Specificity of the Western Model of Copyright, 2 INTELL. PROP. Q. 146, n.24 (2001).

15 Notably, it is the publisher's right that Kant describes as personal. Stromholm argues: "The remarks Kant devotes to the right and to the judicial construction of the author have a subsidiary and incidental character. It is the right of the publisher that he describes as a 'personal right': this term is nowhere used in relation to the rights of the author." (S. Stromholm (citation omitted)).

Burkitt, however, cites an alternative view.

obligations to respect the autonomy of the primary author. The centrality of obligations to autonomy is the subject of Part III.

The bilateral nature of rights and obligations in private law has been analyzed in detail by Ernst Weinrib, in reliance on Kantian moral philosophy. Those principles can, too, elucidate rights under copyright. The aim of this article is to use Kantian moral philosophy to understand the authorial rights of expression and their limits.

***

Before the discussion begins, the contours and delimitations of the analysis of morality and law will be noted.

At issue in this article is not Kant's theory of law, but Kantian moral theory of autonomy. Kant's understanding of authors' rights and obligations, deriving from that theory of autonomy, will be discussed. The article aims to understand legal rights under copyright in light of Kant's moral theory. The argument made herein is thus a legal rather than a moral one.

Hypothetical arguments regarding copyright on the basis of Kantian morality are distinguished. Copyright's marketplace norm could be called immoral, as it uses authors as means for the social good of their production of literary works. The argument also could be made that a transformative author's use of the primary author and the primary author's work, as a means rather than an end, is in violation of Kant's categorical imperative. Those arguments as to morality are not put forward here. As stated, the article pursues a legal argument.

At issue in this article is Anglo-American copyright doctrine, rather than Continental systems of droit d'auteur. It may be argued that Kantian principles are appropriate for Continental authors' rights regimes, but that they are an anomaly in the United States and the United Kingdom. Reliance upon Kant may be said to represent a transplant of foreign ideas. However, this is not so. It will be seen that the use of Kantian principles to understand authorial rights is a transplant of moral principles embedded in our legal culture.

The idea of autonomy of expression is central to our legal system and society, and its roots can be traced to Kant.

REFERENCES

---


Cf. Dressinower, supra note 7; infra Part IIIC.

See Waldron (1993), supra note 6, at 862 n.65.


The connection between Kantian autonomy and autonomy of expression is sometimes disputed. Regarding O'Neill's disagreement with that link being made, see infra note 50 and Part IIIA.


22 See supra pages 1050-61, for a brief indication as to the United States and United Kingdom authorial rights' tradition. See also Treiger-Bar-Am, The Moral Right of Integrity, A Freedom of Expression in 2 NEW DIRECTIONS IN COPYRIGHT (Pionia Macmillan ed., Edward Elgar 2006).

23 Geller, supra note 19, at 254. See also infra Part IA), further exploring the universality of Kantian principles with regard to the scope of copyright coverage.


See supra note 10, infra note 73.

For a fuller discussion of this characterization and its difficulty with respect to the integrity right under United Kingdom law, see Treiger-Bar-Am, supra note 10; Treiger-Bar-Am, supra note 23.

Michael Spence notes his disagreement with the way the theories of Kant and Hegel are portrayed in theoretical debates on intellectual property. See Michael Spence,
authors' rights and Kant's moral theory of autonomy, indeed as autonomy of expression.

A. Current Understandings of Kantian Theory on Copyright

Two main difficulties can be seen with describing Kant's support for authors' rights as personality rights in Anglo-American systems. First, authors' rights do not depend upon authors' personalities. Such a requirement would oppose Kantian theory, the nature of creativity, and elements of Anglo-American copyright and free speech doctrines. Moreover, where recognized under United States law, personality rights are considered rights in property. Kantian theory differs. Kant supports a personal right which is taken up in Germany on the monist tradition. It is contrasted with the property-based French dualist tradition associated with Hegel. These two difficulties will be discussed in turn. As stated earlier, I make no attempt to evaluate the association of Kantian thought with personality theories in Continental jurisprudence. I submit that the interpretation of Kantian theory as supporting rights of expression, rather than rights of personality, is more appropriate for the Anglo-American legal regime.

1. Imprint of Personality?

Personality theories envision authorial works as constituting an extension of the author's person. Personality theories may entail requiring the author to display an imprint of personality in her work. Commentators perhaps recall this requirement when they write of the author's "self-expression" or "self-presentation." Yet based on Kantian theory, I submit that such a requirement must be rejected. Nor does creative expression oblige; expression and communication may not necessarily be of the innermost selves and personalities of the author. The contradiction of such a requirement with Anglo-American law will also be seen.

Kantian theory does not presume a personal content of authorial expression. As Paul Edward Geller has noted, Kant "observed that authors expressed their own thoughts, not necessarily their personalities, in their 'discourse.'" For Kant, "psychological personality is merely the ability to be conscious of one's identity", whereas "[m]oral personality is . . . nothing other than the freedom of a rational being under moral laws." It is a (universal) individuality for Kant that constitutes genius in art. Kant uses the terms "individuality" and "originality" together. Individuality, and not the imprint of personality, animates genius.

The fact that Kant would not limit protection to only personal expression that bears the imprint of the author's personality, Geller paints as a limitation for the application of Kantian thought to authorial rights. I see it as a strength. Drahoš points to the potential inconsistency in the use of Kant's universal principles to understand authors' rights: Kant's "is a system which through its formal principle of universalization seeks to avoid the possibility of special pleading by moral agents." Yet Drahoš believes that authors' rights aim to protect the personality claims of authors, whereupon other agents do not find such protection. By contrast, I believe that Kant's support for authors' rights is a particular application of a universal principle. The universalism of Kantian doctrine will be returned to below.52

b. Creativity

In the Romantic view, creation was the expression of the innermost self of the individual; the biography of the author and artist was paramount in interpreting a work. It was once widely presumed that artworks are expressions of an artist's emotions.
The Romantic conception has ceded, and further, been subjected to postmodern critique. Artworks very well may be expressive, but not personally expressive. T.S. Eliot writes that a poem is not an expression of personality but an escape from it. Still other artists "take it as a challenge to produce works that betray no trace of their own personal involvement"; Marcel Duchamp's ready-mades are an example. An artist may not mean to express anything at all in her work. For example, the major technique of some contemporary artists is capturing random occurrences. Whereas breakthrough creations may show authors' personal imprints, in most cases of incremental creativity authors' personalities "rarely permeate, or even identifiably mark, their works." Geller writes, "[d]o authors personally express themselves? I would answer: sometimes and to varying degrees."

The author's expression can be the subject of protection even where it is not defined as the expression of something of or anything in particular. Monroe Beardsley writes that an artist's "act of expression will be regarded, roughly, as the act of creating something expressive." The expression does not necessarily need a predicate; the verb does not need an object.

c. Legal Standards

In addition to the requirement of an imprint of personality cohering neither with Kantian theory nor with the nature of creativity, it also conflicts with the legal standards of Anglo-American copyright law. The stamp of an author's personality need not be shown present in her artwork in the Anglo-American legal system. These copyright standards look for individuality rather than personality. Such a requirement would also be constitutionally suspect as content-specific, insofar as authors' rights are viewed as within the freedom of speech.

In Feist Publications, Inc. v. Rural Telephone Service Co., the Supreme Court set the standard of originality "without requiring any manifestly personal input." Justice Holmes' standard in Bleistein can be understood in the same light: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, something which is one man's alone."

While Holmes used the terms "personality" and the author's "personal reaction," those terms and the standard can be taken to refer to individuality rather than personal imprint. The standard evoked in Bleistein does not downplay the author, as Peter Jaszi sees it, but rather universalizes it: all authors have their unique personality, namely, their individuality.

In the literary property debates in 19th century England, on the question of whether common law rights allowed perpetual rights in copyright, a similar position may be seen taken by Francis Hargrave, counsel in Donaldson v. Becket. Similar to the position I see Holmes having taken in Bleistein, Mark Rose sees Hargrave's position in Becket as shifting the focus of copyright law from the composition to the writer.

That writer is an individual. In Donaldson, Hargrave writes: "[A] literary work really original, like the human face will always have some singularities, some lines, some features, to characterize it...." Copinger in the first edition of his book in 1870 writes,
"[t]he order of each man's words is as singular as his countenance." Thus, a right of expression protects the self insofar as the self is the source, i.e. origin of the work (and hence the work is original). Yet while the expression is by the self, it is not necessarily of the self. The self is to be respected as the one choosing the expression, and that respect is not contingent upon her choice of subject for presentation.

There are various calls in the Anglo-American copyright debate for copyright protection to be given based on the personal imprint and level of creativity that a work shows. I submit that the broad coverage of the rights in copyright in the United States and the United Kingdom, over a wide array of "authors" and a wide array of "works," coheres with the universalism of Kantian theory. The universalistic view of autonomy of expression also is seen in the free speech doctrine's wide coverage of a broad array of speakers. That universalism is perhaps reflected generally in the broadening of the term "author," which today has wider referential meaning not only to creative artists but to all of us as autonomous individuals: Josef Raz defines the concept of autonomy today as authorship of one's life.

European law may be different. While the subject of this article is not the use of Kantian theory in Continental theoretical and legal regimes, but rather its illumination of Anglo-American doctrine, the different approaches of the regimes is noteworthy. On the authorship norm in Europe, works that display some imprint of personality receive protection. At the Rome Conference on the Berne Convention for the Protection of Literary and Artistic Works, a work was said to have "a character representative of the personality of the author." Similar

54 Cited in SHERMAN AND BENTLY, supra note 53, at 53.
55 Ginsburg, supra note 48, at 870 (arguing for special protection of works showing "authorial "presence"); Robson Rosenthal, Knoll, Inspiration and Innovation: The Intimate Dimension of the Artistic Soul, 84 NOTRE DAME L. REV. 1945, 1998 (2000) ("moral rights cover a limited category of copyrightable works whose authors satisfy a heightened standard of originality"). Regarding Telman's proposal for determining works of various art forms, see infra page 1085 and note 169.

On this debate within copyright scholarship, see Geller, supra note 3, at 172 and citations therein.

56 See infra page 1088.
57 JOSEPH RAZ, MORALITY OF FREEDOM 370-71 (Clarendon Press 1986). Jastrow writes: "The concept of 'authorship' and the term 'author' had acquired special weight by 1710 through their association with the theme of 'possessive individualism' in general social thought," Jastrow, supra note 51, at 469-70 (citing Locke's notion of the individual's proprietorship over himself and Thomas Hobbes' definition of "person").

Regarding the Kantian concept of autonomy as autonomy of expression, see Part II, and Treiger-Bar-Am, supra note 15.

58 Geller, supra note 3, at 172.
59 Berne Convention for the Protection of Literary and Artistic Works, S. TREATY DOC. No. 27 (1986). See also SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION

language has been used in the European Union. Traditionally, French law may have entailed a requirement that works bear an imprint of personality, in order to receive protection. Yet even in France today, in practice that traditional requirement appears to have given way to a focus on individuality and choice. Bernard Edelman describes the stamp of personality as individualization. Strohmohr writes that the "expression of individuality" has become the central formula around which Continental European copyright law, Latin American, and African and Asian copyright law is organized.

The broader base of protection in the Anglo-American copyright doctrine than in the traditional French authors' rights model arguably better coheres with Kantian theory. It also perhaps reflects philosophical differences in the nature of the democracies in France and the United States. James Whitan has analyzed the democratic model of the United States as involving a leveling down, compared with the French model involving a leveling up. Indeed, protection of work in the United States without an imprint of personality follows.

It is a broad approach to authorial rights on a universal principle that is embraced here. A broad understanding of the rights of transformative authors is advocated as well, as discussed below. Where authorial rights are granted broadly, and exceptions also are viewed broadly, rights will be posed against one another. Arguably, this contrasts with the view of United States law to date as recognizing narrow rights and broad exceptions, versus Continental systems recognizing broad rights and narrow exceptions. Broad rights balancing will ensue.
Jeremy Waldron sees the approach to copyright conflicts which takes a view of authors' autonomies on both sides, as requiring an empty balance; where both parties claim rights of expression, Waldron sees an impasse. I disagree. Courts are familiar with balancing fundamental rights. Many commentators recognize that United States First Amendment case law involves balancing. The First Amendment category approach involves "definitional balancing," i.e., balancing in order to define the categories. Indeed, in copyright conflicts, it is submitted that autonomies of expression must be recognized on both sides of the conflict, where appropriate.

Before the concept of autonomy of expression is developed, another problem with the personality-characterization is explored: its complex relationship to property.

2. Property?

A second difficulty with understanding Kant to support a personality theory of authors' rights in the Anglo-American legal regime is that in that regime, personality rights sound in property. Kantian thought does not cohere. The mixture of authors, personality, property, and Kant, is problematic.

Many commentators discuss authors' personality rights as

and T. Endicott, "Vagueness in the Scope of Copyright," 121 L.Q. REV. 657, 660 n.11 (2005) (fair dealing is a vague standard controlled by the use of specific criteria for its application). Although the Anglo-American copyright system is already broad-based, with the expansion of copyright rights. United States copyright doctrine involves not only broad rights and broad exceptions, but poses broad rights against broad rights as well, see Tugend-Bar-Am, supra note 4.

66 Waldron, supra note 6, at 876-7. Waldron writes of "self-expression," see supra note 29, whereas I discuss expression.


70 Sherman and Bentely underscore that while rights of expression will not resolve all intellectual property conflicts, understanding rights as protecting expression has lent structure to intellectual property rights. SHERMAN & BENTLEY, supra note 55, at 55.

2008] KANT ON COPYRIGHT 1073

rights in property. Personality theory conceives of the author's personality being infused into the art object. The artwork, which indeed bears an imprint of the author's personality, is an emanation of the author's self in the world. The artwork thus embodies some part of the author's self. A property relation of authors' rights. Netanel has applied Margaret Radin's property theory to justify authorial moral rights of attribution and integrity of a work, and indeed recalls Kant in so doing.

Yet in the common law system, the degree to which authors' rights are conceived of in property or person or partaking of both, is a complex matter. Netanel writes critically of Anglo-American advocates of liberalism, "couch[ing] the relation between authors and their work as absolute possession and the exclusive right of use and disposal,... classical liberal terminology for people's domination over external things." Netanel develops a more nuanced view. Warren and Brandeis indeed write generally of the right to personality as both transcending property and being embraced within it, in its widest sense.


72 Rickerson, supra note 59, at 893.


74 Netanel, supra note 10, at 78; Nettane, supra note 9, at 305. On moral rights including the right of integrity, see supra pages 1076-7 and note 100. See also STOKES, supra note 10, at 16 (for Kant, works are an extension of the artist's personality).

75 Regarding the moral right of integrity in copyright, see W.R. CORNISH AND D. LEWIS' INTTEL. PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS 1143 (5th ed. Sweet and Maxwell 2003) (proprietary right); J. CONNING AND KENT, JAMES ON COPYRIGHT 1141 (15th ed. Sweet and Maxwell 2005) (personal right); DWORKIN AND TAYLOR, supra note 61, at 95, 100; Netanel, supra note 10, at 2; Roeder, supra note 73, at 564.

76 Netanel, supra note 10, at 11. Netanel writes of Kantian expressive autonomy supporting authors' rights, supra note 1077, even while seeing Kant as supporting an author's expansion of inner self: Nettane, supra note 29.


On United Kingdom law, see Tim Frasier, Appropriation of Personality - A New Tort, 99
The distinction on the Continent is also complex. Droit d’auteur “is part of a larger debate over the meaning of ‘property’ and ‘personality’ rights in the civil law system.” On the German school, following Kant’s monist view of authors’ rights as personal rights, economic rights are dependent upon personal rights. Rights in copyright are inalienable – i.e., cannot be assigned or waived — but can be licensed. Yet in France, following the dualist, Hegelian notion of authors’ rights within property, economic and non-economic personal moral rights are set out distinctly. For Kant, the author’s right of copyright is a personal right (jus personalissimum). This is in contrast with a property right in the object (in re):

The author and someone who owns a copy can both, with equal rights, 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 to the public, ie, as a copy. This right of the author is, however, not a right to the thing, namely to the copy (for the owner can burn it before the author’s eyes), but an innate right in his own person . . .

Intellectual property law is said to have moved from a conception of the protection of action to protection of a thing, with the commodification of intangibles in the modern period. Rose, as well as Brad Sherman and Lionel Bently, have noted this trend. Kant may be said to partake of the earlier view, looking not at the right to a book as a corporeal artefact, but to the rights involved in the discourse.\(^\text{15}\)

---


15 DaSilva, supra note 10, at 11. Dietz calls moral rights in Germany a right to personality. A.D. Dietz, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY (Shubof and Norrold 1978); Hughes describes them in civil law countries as inalienable aspects of property. Hughes (1988), supra note 45, at 551; and Strowel sees them as a broad conception of property encompassing personality, Strowel, supra note 60, at 288-90. See also Netanel, supra note 9, at 370-382; Sarrute, supra note 73.

16 Netanel, supra note 9, at 378; DaSilva, supra note 10, at 54-5. Personal and economic dimensions create two related but separate rights (“dualisism”) or two aspects of the same unitary right (“monism”). See the work of Strowelm for full development of the distinction, supra note 9.

17 Eves, supra n.12, at 8-85 and 6:86. See also, What is a Book? in MM, supra note 31, 6:289-90).


19 Sherman & Bently, supra note 53, at 4, 47. Sherman and Bently caution against too sharp a divide between action and thing, id. at 50. See also Jasti, supra note 51, at 476. The 19th century is described by Jasti as the “epoch displaced the ‘author’ at the central idea of copyright law.” I disagree, however, with Jasti’s interpretation of Blattstein, see supra note 51.

Cf. Robert H. Rotstein, Beyond Metaphor: Copyright Infringement and the Fiction of the Work, 68 CHIC.-KENT L. REV. 791, 790-91 (1993) (questioning this shift from action to object, but calling for a return to action as perceived in the audience).

2008 KANT ON COPYRIGHT 1075

Thus, calling authors’ rights property-based personality rights and bringing Kantian theory to bear, is a problematic mix of the conceptions. I am not denying here that authors’ rights support proprietary interests; expression rights often come hand-in-hand with economic rights (such as with advertising and campaign financing). Arguably authors’ rights are a form of property insofar as they entail control, and as such they lie on the ownership spectrum. Yet while property concepts entail control, control does not necessarily entail property.

Authors’ rights afford authors autonomy, namely choice and control over their expression; as discussed below. It is the expression element of authorial rights rather than the property elements — or consequences — that are at issue in this article. Instead of a personality theory, I submit that Kant’s support for authors may be better seen on the Anglo-American model as a Kantian theory on rights of expression.

B. Autonomy of Authorial Expression

Kantian autonomy is self-governance. A fuller exploration of the contours of the Kantian concept of autonomy will be set forth below. Autonomy has largely developed into a contemporary concept of autonomy of expression.\(^\text{21}\) The link from Kant to the concept as it is understood today can be seen, as I have argued elsewhere.\(^\text{22}\) Here it will be shown that Kant supported the autonomy of authorial expression.

For Kant, autonomy gives the capacity for choice. This

---

\(^{21}\) In addition to personality theory, Kantian analysis is also sometimes recalled in Anglo-American discussions of property theory, for justifications of copyright. Waldron, supra note 6 (discussing Kantian theories on coercion and harm, in the context of hardships imposed by property holdings).

\(^{22}\) J.W. Harris, PROPERTY AND JUSTICE 5 (Clarendon Press 1996).

\(^{23}\) Sandler makes this logical fallacy, arguing that permitting exclusive control allows a property right. Madhavi Sandler, Authorship and Autonomy as Rights of Exclusion: The Intellectual Property of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 49 STAN. L. REV. 145 (1996). Sandler’s critique also fails to accord with the autonomy rationale for free speech, as I have discussed in Treiger-Bar-Am, supra note 23.


\(^{25}\) I show the theoretical and historical basis for making that link, which is sometimes disputed. See Treiger-Bar-Am, supra note 15. Onora O’Neill rejects this connection. Onora O'Neill, Autonomy and Trust in Biotechnics 85 (Cambridge Univ. Press 2002). O’Neill critiques contemporaryversions of autonomy for claiming a linkage to Kantian autonomy. Onora O’Neill, Autonomy: The Emperor’s New Clothes, 1 PROCEEDINGS OF THE AMBROSEANUM SOCIETY 2003. I believe it is possible to trace that lineage. Further, it is important to recall that as with the Kantian concept, so too the contemporary concept of autonomy of expression must be understood to entail obligations. See Treiger-Bar-Am, supra note 15.

I deeply appreciate the discussion of the Kantian concept with Onora O’Neill.
capacity allows for self-determination: "[I]n the human being there is a faculty of determining oneself from oneself." The self-development of one's capacities can be seen for Kant specifically with respect to expression. Kant writes that expression and communication are a person's natural end. The human being has a "natural purposiveness," an "inner end," to fulfill the speaker's capacity to "communicate his thoughts." As it is his end, so then is "communicating his thoughts" a man's innate right.

The protection afforded a book follows. In his essay "On the wrongfulness of unauthorized publication of books", Kant writes that a book "represents a discourse that someone delivers to the public." "In a book, as a writing, the author speaks to his reader." In the Hastie translation of the Metaphysics of Morals this is even stronger: a book is "the means of carrying on the interchange of Thought."

Kant develops this idea to the defense of authors, and publishers. As an author's book is his speech to the public, the author retains in that speech a personal right. The author has an "innate right in his own person." Kant directly supports publishers' rights to economic copyright. Yet publishers deserve to receive protection insofar as they are the agents of the authors. The central argument is one of authors' rights of expression.

Two principles that arise from this essay further show the support that Kant gives to an author's rights in his speech to the public: attribution and transformation. Kant upholds the right of the author to have his work associated with his name. For Kant, the association of the name of an author with a work he has not chosen to publish, or a work that has been changed from the work as he created it, is violative of the author's autonomy of expression.

Kantian principles thus support a right of attribution. Further, when the work is modified or transformed, the work becomes the speech of another. That other author has a right to have her name associated with the transformed work. Kantian theory of transformative authorship is developed further in Part II. Related to both rights of attribution and transformation, Kant's essay supports the principle of non-distortion of an author's work. The author must be protected against compulsion of his unauthorized publication is a violation of the author's will (unless the work is revised and printed under another's name, i.e., transformed, as seen below). Kant condemns a publisher who may "give out the author's work, after his death, mutilated, falsified, or interpolated ..." Also in the Metaphysics of Morals, an extension of the principle of non-distortion of speech can be seen. Telling a lie may be understood as a distortion of one's own speech. Kant writes of the importance of not telling lies as a duty to oneself. An "intentional untruth in the expression of one's thoughts" is a violation of one's ethical duty to oneself, on the doctrine of virtue.

These Kantian principles are consistent with rights of transformative use under the fair use doctrine, and moral rights under copyright. The moral right of attribution requires that an

---

100 I submit that an offence to authorial autonomy also can arise from a copy or non-transformative modification, even without attribution to the author. Misattribution ought not be required as an element of stating a claim of integrity right violation. Nor ought a statutory defense be afforded where a modifier removes attribution of the modification to the primary author or affords the primary author an opportunity for disclaimer. See Treiger-Bar-Am, supra note 25. The autonomy and dignity of the anonymous author will suffer from distortion of her expression regardless of the public knowledge of authorship of a modification. Indeed, anonymity is rightfully protected under copyright law. See U.S. Copyright Act, 17 U.S.C. § 302(c) (2007); U.K. Copyright, Designs and Patents Act 1988, c. 48, §§ 57, 66A, 81(5) (Eng.) (regarding the integrity right). Anonymity is also protected under the free speech doctrine. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

101 Essay, supra note 12, at 8:81-2.

102 Id. at 8:80 (will); id. at 8:87 (revisions). See infra pages 1079-80.


104 MM, supra note 31, at 6:429-430.

105 Id. at 6:258.

106 Essay, supra note 12, at 8:80. See also id. at 8:83-4. 8:86 (writing is the speech of a person (opera), 8:87 (literary works deliver "a speech to the public").

107 THE PHILOSOPHY OF LAW 131 (W. Hastie transl., 1887).

108 Essay, supra note 12, at 8:86. Kant writes there of an author's "imitable right in one's publication." The editor's note explains it is "the most personal right." Id. This is not equivalent to a personality right under Anglo-American doctrine, as discussed supra Part I.A.

109 Id. at 8:82. Kant's interest in protecting publishers was a means of protecting the marketplace as the communication network for discourse, on Geller's view. Geller, supra note 3, at 188.
author's name be associated with her work. The moral right of integrity allows an author to object to the distortion of her work. The rights derive from French law, and appear in the Berne Convention for the Protection of Literary and Artistic Works. The former right is recognized in United States copyright law only with respect to visual works in certain circumstances, under the Visual Artist's Rights Act of 1990, 17 U.S.C. § 106A ("VARA"). The principle of the attribution right was also recognized under the Lanham Act in Gilliam v. American Broadcasting Co., but that position has come into doubt given Dastar Corp. v. Twentieth Century Fox Film Corp. Both moral rights, of attribution and integrity, are recognized under the United Kingdom Copyright, Designs and Patents Act 1988 (again, in limited versions). The copyright control over derivative works may offer some similar protection, but to the copyright owner rather than necessarily to the author.

I agree with Geller that Kant, in his essay on unauthorized publication, "did not give the fullest logical extension to his theory that copyright was to assure the autonomy of personal self-expression." I think that Netanel's interpretation of Kant's essay on unauthorized publication, as supporting the principle that "the author alone may determine whether and how his words are to be disseminated," may be too broad. Yet that extension can be found elsewhere in Kant's moral theory, as will be discussed in Part III. Before entering that analysis, Kant's view of the rights of transformative authorship is discussed.

II. TRANSFORMATIVE USE

Kant justifies protection of the autonomy of all authors, including transformative authors. This Part will begin with a discussion of creativity. It will be seen that authorship is, itself, transformative. Kant's support for transformative authorship will then be developed.

A. Creativity

The creative process is intertextual, with creativity building upon prior creativity. Expression is often group expression. Also, authors often rely on earlier authors and texts, and artists on prior artists and artworks. Authors and artists are influenced by artistic traditions, and react to them. Prior works often serve as sources or inspiration for subsequent works. As Levial writes, "all intellectual creative activity is in part derivative . . . there is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned on prior thinkers." Original works are not created tabula rasa "the beginning when there was nothing is long gone." The creative spark added by the subsequent author and artist is a transformation of the past. Those transformations represent the expression of the subsequent author.

That creativity relies upon borrowing from the past can be seen in all of the art forms. Adaptations are a central means of creativity with literary, visual, and musical artworks alike. Shakespeare's works are based upon tales previously told. Shakespeare's works have then been used and adapted in a variety of ways. In music, an example of intertextuality is the Brentano String Quartet's Bach Perspectives: Ten Composers React to the Art of Figuring. In visual art, Marcel Duchamp's LHOOQ, adding a moustache to a copy of the Mona Lisa, can be called an adaptation of Da Vinci's work. Picasso's studies of Velazquez's Las Meninas are another example. Going further back in time, Raphael and Marcantonio's Judgment of Paris took the assembly of figures from a Hellenistic sarcophagus; and Manet took the assembly as the centerpiece of his Le Dejeuner sur l'Herbe. Rembrandt's drawings of

---

106. See supra note 59.
108. Copyright, Designs and Patents Act 1988, c. 48, §§ 77, 84 (attribution), 80 (integrity) (Eng.).
109. Geller, supra note 5, at 169. I disagree however with Geller's reference to the integrity right as a protection of personal self-expression, see infra page 1066. For a fuller treatment of a Ramist interpretation of the integrity right under United Kingdom law, see Treiger-Bar-Am, supra note 19.
110. Netanel, supra note 10, at 17. The rights of others, including other transformative authors and the public, limit the authorial right, as indeed Netanel underscores. See infra Part III.
Leonardo Da Vinci’s *Last Supper* are interpretations, or variations of it. With digitalization and creative works on the internet, intertextuality is multiplied, as various art forms function together. Aesthetic theory recognizes the importance of the ability to adapt, interpret, and transform prior works.\(^{17}\)

The intertextuality of creativity is a point often made in postmodern critiques of authors’ rights. The postmodern analysis can be useful in illuminating that creativity is transformative.\(^{18}\) Yet some postmodernists argue that every work is copied, with nothing original, and therefore that an “author” should not enjoy protection of expression.\(^{19}\) I have argued elsewhere against the negation of authorial rights with that critique.\(^{20}\) Here it is noted that the postmodern focus on intertextuality in fact effectively recalls the need to protect authors’ rights broadly—including rights of transformative authorship.\(^{21}\)

### B. Kantian Theory

Also for Kant, the use of prior art is a central part of creativity. In the *Critique of Judgment*, Kant writes that imitation is part of the learning process of talented artists. It is rather “aping” that is to be avoided.\(^{22}\) Even genius breakthroughs react to tradition. The second genius does not imitate but is aroused by the first genius to a feeling of his own originality.\(^{23}\) The genius adds his own creative spark: it is “individuality” and “originality”\(^{24}\) that animate genius, as seen above.\(^{25}\) For Kant, the genius then goes on to set his own rules, as with moral autonomy.

Further, in his essay “On the wrongfulness of unauthorized publication of books”, Kant’s views on attribution, discussed above, show his support for the autonomy of expression of the modifier, namely, the transformative author. Kant would not allow the publication of a modified work under the name of the primary author. Kant would support, and indeed require, the publication of a modified work under the name of the modifier.

Moreover, in that essay Kant expressly supports rights of modification and transformative use. For Kant publication of a significant modification of an author’s work is justified. The modifier is himself an author. Kant writes:

> If someone *so alters* another’s book (abridges it, adds to it, or revises it) that it would even be a wrong to pass it off at any longer in the name of the author of the original, then the revision in the editor’s own name is not unauthorized publication and therefore not impermissible. For here another author, through his publisher, carries on with the public a different affair from the first, and therefore does not interfere with him in his affair with the public; he does not represent the first author as speaking through him, but another one.\(^{17}\)

A transformed work is not the speech of the primary author, but rather the speech of the transformative author. Therefore, the primary author cannot control its publication. Its publication is rather under the control of the transformative author.

Kant’s reasoning reflects the idea/expression dichotomy in copyright doctrine. A primary author cannot prevent the publication of a subsequent work where that subsequent work has altered the primary work: the modified work “is not the same speech of the author, even though the thoughts might be precisely the same.”\(^{18}\)

For Kant, the degree of modification necessary to constitute a transformation is different than it is today. Only a small change was necessary to constitute a transformation, rather than a copy. It was literal, exact reproduction that Kant sought to prevent, where unauthorized by the author. Kant did not call unauthorized publication of a translation of a work unjust, finding that with a translation, no expression is copied. Today translations are within the exclusive publication right of the primary author. Translations are defined as derivative works,\(^{20}\) and a translation may infringe copyright.\(^{20}\) A distorted translation arguably should support an integrity right claim of distortion of authorial


\(^{18}\) *Trüger-Bar-Art*, supra note 41; *Röstein*, supra note 84, at 737, 756. See also Jazi, *supra* note 84; *Woodmansee & Jazi*, supra note 88; *David Saunders, Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright, in Of Authors and Origins, supra note 18, at 99-100* citing TERRY EAGLETON, LITERARY THEOLOGY: AN INTRODUCTION 138 (Univ. of Minn. Press 1983) (“[t]here is no such thing as literary ‘originality’, no such thing as the ‘first’ literary work; all literature is intertextual.”).

\(^{19}\) *Trüger-Bar-Art*, supra note 23 (also rejecting the postmodern deconstruction of the field).


\(^{21}\) Id. at 5:518.

\(^{22}\) Id. at 5:518.

\(^{23}\) Kant uses those terms together, see id. at 5:518.

\(^{24}\) Id. at 5:513.

\(^{25}\) Id. at 5:513.

\(^{26}\) *Geiss* sets the rules for art. Id. at 5:507, 5:510, and 5:518. See infra pages 1081, 1084.
expression as well.\textsuperscript{131}

Thus, Kant's threshold finding of modification-as-transformation was lower than it is today. Nevertheless, Kantian theory can help guide the determination of when a work is transformative.

C. Defining Transformativity

What makes a work transformative? The Kantian concept of autonomy can aid in this analysis as well. According to Kant, as we have seen above and as is further developed below, autonomy is freedom of the will to choose.\textsuperscript{132} The United States legal standard for originality in copyright looks to choice, as well. Transformative use can also look to this element in defining transformative works.

Kant writes that only production through freedom, i.e., through a capacity for choice that grounds its actions in reason, should be called art.\textsuperscript{133} Kant saw a close similarity between the artist and the dreamer—except with the great difference that the forms imagined by the dreamer are produced involuntarily, “whereas the invention of forms by the artist is governed by choice.”\textsuperscript{134} Kant also ranks higher the artforms he believes enlarge the faculties engaged in the “power of judgment.”\textsuperscript{135} For Kant, artistic genius is akin to the moral freedom of the autonomous will: genius gives rules to art.\textsuperscript{136} In favor of “genius,” in the Renaissance the term “ingenius” was used, meaning reason, wit, skill and judgment.\textsuperscript{137}

The United States standard of originality for defining a work under copyright examines whether the author has exercised judgment and choice in constituting the work. This can be seen as an element of autonomy. The Supreme Court in Feist Publications, Inc. v. Rural Telephone Service Co. looks for “some minimum degree of creativity,” and “choice”; a compilation can become sufficiently original to be protected in copyright, where the mere selection of data is transformed into expression by choice.\textsuperscript{138} Other United States decisions also look to choice, judgment, and selection. In Rogers v. Koons, the circuit court points to the originality of plaintiff's work, given plaintiff's “creative judgments” in creating it.\textsuperscript{139}

Jane Ginsburg calls recasting the labor standard as subjective selection and arrangement “disingenuous” and “contrived.”\textsuperscript{140} Yet that conclusion derives from Ginsburg’s analysis of copyright protection as based upon a work’s being “personality-based.”\textsuperscript{141} By contrast, the argument herein is that works need not be conceived of as personal or personality-based, but rather, autonomy-based.\textsuperscript{142}

Ginsburg rejects the interpretation of copyright’s protection as based on authorial choice, also because that criterion is irrelevant to the protection of data bases for their commercial value, and irrelevant to their importance as sources of information.\textsuperscript{143} I argue here for the justification of authors’ rights under copyright based not on consequentialist criteria of value, but on the author’s deontological right to autonomy of expression.

Cases from other jurisdictions show autonomy as choice as well, in determinations of originality and transformation under copyright. In the United Kingdom, the House of Lords used “choice” in describing originality in Designers Guild Ltd. v. Russell Williams (Textiles) Ltd: the expression of an artistic work represents the artist’s choice.\textsuperscript{144} What makes a picture of nature original? In Krisarts S.A. v. Briarfine Ltd. the question arose as to copyright over a well-known view of London. The court looked to the choice of viewpoint, the exact balance of . . . features . . . the figures which are introduced . . . the draft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution.\textsuperscript{145}

Choice also can be seen in selective judgment, or discretion. Lord Atkinson in Macmillan & Co. Ltd. v. Cooper writes that a copyright work must entail the expenditure of labor, skill and judgment "sufficiently to import to the product some quality of character which the property did not possess and which
differentiates the product from the raw material."146

As seen above, the traditional French requirement that a protected work must bear the author's imprint of personality also has given way to protection of works that result from the author's "creative choice."147 In France, Edelman writes that copyright protects the artist's individualization of her work by choice.148 Also in Israel the deciphering of ancient texts from the Dead Sea Scrolls was deemed original and capable of supporting copyright, given the plaintiff's exercise of discretion in having chosen between possible textual alternatives.149

This element can be seen in the art world as well. Choice can be transformative. Even a piece of driftwood on a mantelpiece may be exhibited, insofar as it was chosen by an artist.150 Marcel Duchamp writes that his ready-mades became the artworks they did because of his choice of the objects. The choice of object was constitutive of the ready-made being designated an art object. An example is the changing of a urinal into Duchamp's artwork, the Fountain. As Duchamp wrote:

Whether Mr Mutt [Duchamp's exhibition pseudonym in this instance] with his own hands made the fountain or not has no importance. He CHOSE it. He took an ordinary article of life, placed it so that its useful significance disappeared under the new title and point of view...151

In sum, autonomy can be seen as both the justification for protection and the method for determination of transformative authorship.

D. Distinction Between Art Forms

In his essay on unauthorized publication, Kant makes a distinction between art forms. Only literary works, and not visual works, deserve protection against unauthorized reproduction.152 I submit that this distinction shows Kant's support for transformative authorship. Indeed, the re-printing of a literary work demands no originality or extra creativity from the copier.

147 Geller & Nimmer eds., INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 62, at §§11[b][ii].
149 Kimron v. Shanks, CA 2811/93, 54(9) PD 817; see Neil J. Wilk and Joshua Weinstein, in Geller & Nimmer eds., INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 62, at JSR-7(5).
150 Beardsley, supra note 56, at 375 (Faulkner's Excerptarism).
151 1 Aron Schoen, THE COMPLETE WORKS OF MARCEL DUCHAMP 45 (2d ed. Thames and Hudson 1997) (citation omitted).
152 BEARDSLEY, supra note 36, at 105, 159-61.
159 Id. at 5:320.
160 Id. at 5:323-4 (except painting with the aim of teaching history or knowledge of nature).
161 Id. at 5:351-534 § 59. See also ARTHUR C. DANTO, PHILOSOPHERING ART: SELECTED
The cognition is original, giving itself its own rules. The exercise of genius is without externally-imposed rules; so too the exercise of autonomy is self-legislation. As Murdoch writes, for Kant the "work of art, not subject to an empirical concept, is produced by the free spontaneous activity of the imagination acting in accord with the notion of 'an object in general.'" Similarly, the free activity of the moral will is not constrained by empirical condition. A fuller discussion of Kantian moral theory, and in particular autonomy, is given in Part II of this article.

2. Thing-ness

Kant distinguishes between artworks in different media based on what may be termed their thing-ness. Due to the difference in their materiality, Kant distinguishes literary work as speech and action (opera), and a visual work as a thing in property (opas). Indeed visual works have a closer relationship to their materiality. Yet it will be seen that both literary and visual works have an immaterial aspect. Visual works are material. Visual artworks are dependent upon and attached to their material form in a way that a literary or musical work cannot be. Even if this difference between literary and visual artworks does not indicate a metaphysical distinction, nevertheless different protections of the art forms may be required, because of this divergence. Sina Teilmann uses Kant’s distinction to underscore a necessary protection of visual artworks against destruction, due to their materiality. There is a longstanding debate in intellectual property generally, as to whether the provisions regarding intellectual property categories, each of which covers so many divergent types of works, should be separated out. Digital works may further change those formulas, as they mix various media.

Following the distinction in their materiality, a visual and a literary work have different relationships to a copy and an original. It is also because of this unique relationship between an original and a copy, that Kant makes the argument that literary works must be protected from unauthorized copying whereas visual works need not be. Kant recognizes the uniqueness of a "copy" of a book. Kant’s distinction between a book as a thing—as a mere instrument—or as speech, was discussed above.

Indeed, any instantiation of a literary work is called a copy. A book "is a particular kind of 'copy.'" With musical works, every performance may be an instance of it. The instantiation of a literary or musical work is multiple. The instantiation of a cast or lithograph is often less numerous but still multiple. With a painting or sculpture it is singular. Thus, an original and a copy of a visual work are different in nature from an original and a copy of a literary work.

Yet due to the intertextuality of creativity, all "originals," of both literary and visual works, can in essence be termed copies. Visual ideas and images travel from one work of artistry to another. There is no such thing as an "original" artwork, in the sense of tabula rasa, for works in either media. So-called original works are copies in the sense that they react to and build upon each other. Moreover, originals can themselves be called copies in the sense that they constitute a copy of nature, or of the work in the author’s mind. Justice Holmes in *Bleistain* took the view

173 Netanel, supra note 10.
174 See *What is a Book?*, supra page 1073. See also Palmer, supra note 10, at n.32 ("Thus, a "book" is both the corporeal thing I hold when I read "my book"), and also the address by one person to another (the "author's book").
177 Limited editions, as opposed to reproductions, are comprised of multiple original of the same work... *H.R. REP. NO. 514, 101st Congress, 2d Sess. 12 (1990), reprinted in 1990 U.S.C.C.A.N. 6919.
178 See supra Part III.
179 See BEARDSLEY, supra note 56, for a discussion on the complexities of the concept of nature in relation to art.
180 Regarding the subject/object distinction, see Netanel on liberalism, supra note 10. In the Romantic period, the biography of the author and artist was thus paramount to an understanding of the work. BEARDSLEY, supra note 56, at 249.
that a drawing from life is, while an original drawing, also a copy of nature. According to Holmes: "Others are free to copy the original. They are not free to copy the copy." A photograph may be said to bear the same relation to nature.

Thus, we can acknowledge that there is some distinction between literary and visual works, and at the same time that much of the essence of the distinction between art media has faded. Both literary and visual works are seen to embody their author's expression. Both have an immaterial creativity about them, beyond their thingness. With the advent of digital artworks and the mix of media in art, the distinction further dissolves.

3. Expression and Communication

Indeed, in other writings, Kant recognizes this. Kant writes that artworks both literary and visual are a means of expression and communication. In the *Critique of Judgment*, Kant writes that artist's spirit is talent to express ideas and to make them universally communicable, "whether the expression consist[s] in language, or painting, or in plastic art". The artist gives expression to forms and speaks through them. This is so even while the art of painting communicates form rather than concept. "The spirit of the artist gives a corporeal expression to what and how he has thought, and makes the thing itself speak as if it were in mime." For Hegel too, poetry, as the expression of ideas, is present in all of the art forms.

4. Reproductive Techniques

It appears that Kant's distinction between literary and visual works with regard to their unauthorized copying derives fundamentally from the state of reproductive technologies at the time of his writing. Kant's support of protection against unauthorized publication of copies of literary, but not visual artworks, may well have been because of the ease of copying books and the difficulty of copying visual arts in his time. Hegel makes this reasoning explicit in his distinction between the two art forms.

Any writing (without modification) of a literary work is a copy. It was the exact copying of a book by a printing press that Kant was opposing. Indeed, in early copyright law, it was "printing" that was prohibited, rather than "copying" in the sense of imitation. By contrast, a reproduction of visual art would itself have been considered an original, given the reproductive techniques in Kant's time. When a visual work was copied, changes were necessarily apparent. The reproduction was a new work, reflecting the second artist's expression.

When Kant's essay was translated into English in 1798, the term "imitation" was also used to represent what in Kant's view was allowed with visual works. Instead, the later Cambridge edition uses the term "copy". During Kant's time, imitation was a main method of teaching the arts. In the 1798 edition, the term "copied" was used with respect to Kant's proposed prohibition on the reproduction of a visual artwork. The Cambridge translation centuries later uses the term "molded or cast." Indeed making a mold or cast would result in an exact reproduction. If making copies of visual works possible at the time, it is submitted that Kant would have wanted to prevent their copying as well.

Kant's distinction recalls the rationale behind copyright to prevent duplicate, exact or near-exact versions, of a literary work. Yet in today's world, where exact or near-exact reproductions of artworks of different media are possible, the distinction fades. Over the course of time, the distinction in reproductive techniques has changed. Walter Benjamin compares the changes to literature wrought by the mechanical reproduction of writing, i.e., printing, to the changes to art wrought by the acceleration in reproductions, first by engraving, etching, and lithography, and

---

200 Id. at 5:317, 5:320.
201 Id. at 5:323-4. Also, the art of tone communicates form, id. at 5:329. In his essay on unauthorized publication, Kant further theorizes visual works as "a symbolic representation of some idea event." Essay, supra note 12, at 8:81. In revising the issue 12 years later, in the *METAPHYSICS OF MORALS*, Kant names it a distinction between a writing as a "discourse" and visual art as a "sign of a concept." MM, supra note 31, at 6:289.
202 CRITIQUE OF JUDGMENT, supra note 32, at 5:324.
203 Hegel, supra note 155, at 89.
205 See the Richardson translation, supra note 103, at 8:85-6. Richardson also uses the term "copy" to signify an object of visual art a copy of a visual work of art may be imitated.
later by photography. Today, with modern artistic reproductive techniques, a copy of a visual artwork can be an exact copy, rather than a new original work. Digital capabilities weaken the distinction between literary and visual works and between originals and copies further, or perhaps even erase it altogether. Nick Zangwill notes that there is no difference of kind between "multi-instantiable works of art such as novels, symphonies, and prints, and particularistic arts such as painting and sculpture . . . , only a matter of current technological limitations." 190

5. The Law

It has been seen that the bases of the distinction Kant draws between artistic media have ceded. The distinction between works under the legal standard in copyright also has waned. Today, authorial rights extend to expression broadly.

In earlier times, the legal protection extended to various art forms was distinct. Copyright treated different art forms differently. While literary works were protected by the United Kingdom's Statute of Anne from 1709, engravors received protection later in 1735, and certain sculptures received protection only in 1798. 191 Categories for such sculptures were later widened in 1814. Copyright protection was extended to paintings and drawings only with the 1862 Fine Arts Act. 192 Not until the United Kingdom Copyright Act of 1911 were visual and literary artworks protected alongside each other. 193 In the United States, the protection of "writings" under the Copyright Clause of the Constitution was widened over time, with fine art categories included in 1802. 194

Today, these distinctions are waning. While not universal, copyright's broad categorization of protected works is extensive, as discussed above. Yet distinctions have not been completely erased. The current United States law of moral rights protects only visual artworks, pursuant to VARA. This distinction between art forms is inapposite: it is submitted that the albeit limited protection afforded by VARA should be extended to other art forms as well. 195

191 Zangwill, supra note 117, at 127 (citation omitted).
193 25 & 26 Vict. c 60, s 5; see SHERMAN & BENTLY, supra note 191, at 31, 68.
194 1 & 2 Geo. V, c. 46 (Eng.).
196 Treiger-Bar-Am, supra note 114; Kwali, supra note 55.

Protection is extended to many art forms for example under the Copyright, Designs and Patents Act 1988 in the United Kingdom, again albeit in limited form. Neighboring rights continue to treat performances separately from other artworks. Various art forms are treated together as expression and communication in the free speech doctrine as well. 196 As seen in the phrase "a picture paints a thousand words," literary and visual works are different denominations of the same currency. 197

6. Art as Autonomy of Expression

Kant's view is in a sense postmodern in seeing art not as a thing but as speech, and expressly, communication with the public. It is this conception of art and authors' rights that gives rise to authorial rights, as an element of rights of autonomy of expression. As Anne Barron writes:

The connection he made in 1785 between cultural production and communicative action, and his thesis that law can and should be involved in sustaining processes of communicative action, are highly suggestive as pointers towards a possible future . . . [a]n alternative vision of what "copyright" law could be: a regime of cultural/communication rights, unequivocally detached from the institution of property. 198

Copyright has moved from a basis in the author's conduct to a commodification of the author's work. 199 I suggest a return to the focus on authors' rights as protection of conduct rather than things, with regard to all the art forms. Art is action, an exercise of will. It is exercise of the author's autonomy of expression.

III. MORAL AUTONOMY: OBLIGATIONS

It has been seen that for Kant, authors' rights, including those of the transformative author, can be justified as rights of autonomy of expression. Here, the analysis returns to autonomy for a closer examination of the Kantian concept. After exploring the tradition and contours of the Kantian concept, it will be seen that autonomy is centrally a matter of obligations. The obligations

197 FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 97 (Cambridge Univ. Press 1982) (noting the relevance of the proverb for the free speech doctrine).
198 Barron, supra note 167, at 393. Barron, however, sees that move as about the work rather than authorship, whereas I believe we can see the nature of authorship as an act of expression.
199 See Rose, supra note 83.
are mutual and bilateral: autonomy entails rights for respect for one's autonomy, and also entails obligations of respect to the other. Thus the very concept of authorial autonomy grounds obligations to respect other authors. The legal protection arising from the necessary respect for authors must likewise require mutual and bilateral obligations of respect. A balance of the rights, construed broadly, of the so-called primary and transformative authors ensues.290

A. Kantian Autonomy in Law and Culture

The Kantian concept of autonomy is central to the culture and legal traditions of the United States and United Kingdom. Its roots can be traced back to distant times. Current legal doctrines, including those embodying the principle of freedom of expression, evidence Kantian influence. The use of the Kantian concept of autonomy to understand the Anglo-American copyright doctrine is, then, a pursuit arising from a long-standing tradition.

Roots of the concept developed by Kant have been seen in the philosophies of ancient Greece: the Platonic idea of the capacity of the philosophic soul for rational self-rule,291 and Aristotle's identification of choice and rational deliberation as elements of the virtues and the good life.292 Influences on Kant's theory of autonomy can be found in many areas, including works of religious thinkers,293 Renaissance humanists,294 and political thinkers, especially Rousseau.295 Kant's innovative idea was casting autonomy as a moral idea.296

290 See supra page 1071.
293 GERALD DWORKIN, THEORY AND PRACTICE OF AUTONOMY 15 (Cambridge Univ. Press 1988). For Luther, freedom was from the body and its inclinations, as well as freedom to obey divine law. HOWARD COVILLE, A KANT DICTIONARY 869 (Blackwell Publishers Ltd. 1995).
294 G. Dworkin, supra note 203, at 13.
and unconditional. By its very nature, the universal law entails obligations.

Autonomy is "self-rule." The word "autonomy" is derived from the Greek stems for "self" (autos) and "law" or "rule" (nomos), and means literally "the having or making of one's own laws." It is self-governance and self-determination. For Kant, autonomy is the freedom of the will to choose. Kantian autonomy is the capacity to act on rational principles and to exercise the reasoning will through the freedom of choice.

A main feature of Kantian autonomy is its universality. Kant writes that a free will "must . . . be attributed to every rational being."

Autonomy is "a property of the wills of all adult human beings insofar as they are viewed as ideal moral legislators, prescribing general principles to themselves rationally, free from moral determinism, and not motivated by sensuous desires." Another related feature central to the Kantian concept of autonomy is its unconditionality. The obligations of autonomy follow.

1. Universality and Unconditionality

Kantian autonomy is absolute, not empirically present or absent in varying degrees. It is not a conditional description of a certain life situation. Contrasting it are particular, conditional conceptions. Numerous conditional conceptions of autonomy may be distinguished. Liberty and autonomy are often considered together. Yet liberty, understood as freedom from political authority, must be preceded by a philosophical conception of free will to justify it. Privacy, in the sense of isolation for the solitary rational decision-maker, as well as

---

2008] KANT ON COPYRIGHT 1095

---

216 Id. at 578. See also id. at 574 ("principle of autonomy to control one's own speech"); id. at 575 ("the speaker's right to autonomy over the message").
217 Id. at 578.
218 See supra Part IB. For a discussion of the case and the moral right of integrity under copyright, see Treiger-Bass-Am, supra note 23.
219 For a contrary view as to the connection between autonomy of expression and the Kantian concept, see discussion of O'Neill's position, supra note 90.
220 Fallon, supra note 25, at 884.
221 RONALD DWORKIN, FREEDOM'S LAW 209 (Harvard Univ. Press 1996).
222 C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 52 (Oxford Univ. Press 1989). Baker also writes of the use of speech to develop oneself, which resonates with consequentialist arguments. Id. at 59.
223 Richards, supra note 201, at 252-253 (using the term "independence").
225 Schauer, supra note 197, at 48-50.
exercise derives from the unconditional and universal concept of autonomy: i.e., from the primary unconditionality of the capacity that is held universally by all.250

2. Will and Choice

The universal, unconditional Wille, in the Kantian concept, is distinguished from the conditional Willkür.251 It is the former which is the universal capacity to legislate. The rational Wille governs the exercise of the empirical, phenomenological Willkür.252 While Wille is freedom of the will in the positive sense, by contrast, Willkür is freedom of the will in the negative sense.253 Wille is freedom to self-legislate; Willkür is freedom from external, heteronomous constraints.254 The Wille always acts rationally and morally – even where the Willkür does not follow the Wille's legislation.255 The essence of Kant's concept of autonomy is the universal, unconditional capacity to legislate morally with the Wille directing the Willkür.

The discussion will now turn to look at the nature of the legislation that the Wille directs. It will be seen that it is composed primarily of obligations.

3. What Is the Nature of Wille's Law?

The law that is legislated by the autonomous being is universal and unconditional. Kant explains that Wille is what causes us to act. Wille's causality must have a law. The free will gives it that law. Law must be universal. The law must direct action on no other maxims than those which can be universal laws. Positive freedom dictates that individuals follow the categorical imperative of choice, namely "to choose only in such a way that the maxims of your choice are also included as universal law in the same volition."256 The principle of autonomy is thus the categorical imperative.

250 FEINBERG, supra note 211, at 27-28.
251 O'NEILL, supra note 90, at 23-24, 28.
252 Real property has been said to confer autonomy. See Justice William J. Brennan, Jr., The Constitution of the United States: Contemporary Rhetoric, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 29 (Jack N. Rakove ed., Boston Northeastern Univ. Press 1990); see also Williams A. Parent, Constitutional Values and Human Dignity, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, supra note 229, at 50-51. Rawls' discussion of the conditions necessary for the exercise of autonomous options may also be considered in this vein. RAZ, supra note 57, at 154.
253 RAZ, supra note 57, at 154. For Raz, autonomy is both the conditions which provide the ability to achieve an autonomous life and its achievement as exercised. Id. at 204, 378-79; see also Joseph Raz, Rights-based Morality, in THEORIES OF RIGHTS 191-92 (Jeremy Waldron ed., Oxford Univ. Press 1984). As to the availability of options in order to exercise autonomy, see also Thomas M. Franck, THE EMPOWELLED SELF 265 (Oxford Univ. Press 1993); FRIEDMAN, supra note 89, at 37; O'NEILL, supra note 56, at 48-50.
254 Hill, supra note 233, at 77.
255 Jennifer Nedelsky, Recognizing Autonomy: Sources, Thoughts and Paradoxes, 1 Yale J.L. & FEMINISM 7, 10 (1999); Kent Greenawalt, Speech, Crime and the Uses of Language 27-28 (Oxford Univ. Press 1989) (advancing the notion that the exercise of free speech enhances one's sense of dignity and also is an emotional outlet).
257 GMN, supra note 92, at 4:438. See also Fallon, supra note 25, at 892-93 (calling Kantian autonomy aspirative, as we "acquire" to ourselves free will); Hill, supra note 233, at 84 (a normative ideal); Taylor, supra note 91, at 108-09 (the ideal for Kant lies in the
Another of Kant's formulations of the categorical imperative deriving from autonomy is: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means." Kant explains that an "end is an object of free choice." To use another as a mere means is "to act on a maxim that the other cannot also adopt." The categorical imperative requires you to do unto others as you would have others do unto you. Indeed, you would have others treat you as an end, as being able to make choices for action. Rawls uses a similar notion in theorizing about the original position. The principles that would be adopted by autonomous, namely free and equal rational beings, "are the principles that we would want everyone (including ourselves) to follow.

The autonomy that affords the capacity to self-legislate is the ground of a rational being's dignity. Dignity is "absolute inner worth." Dignity is unconditional: as rational beings' autonomy is unconditional, so too is the dignity it grounds. As seen with regard to autonomy, some views also perceive dignity as conditional, such as where dignity is understood as self-respect, a feeling, a sentiment, or created by respect. For Kant too, there is a conditional dignity arising from the realization of the ideal of autonomy, and fulfillment of the capacity of moral self-legislation. Kant writes that there is a "certain sublimity and

---

281 Id. at 4:429. A third formulation of the categorical imperative is that morality consists in actions relating to the making of laws whereby a kingdom of ends is possible. Id. at 4:436. As to the equivalence of the formulations, see Ralph C.S. Walker, Kant: The Arguments of the Philosophers 159 (Rowbottom & Regan Paul Ltd. 1978) (deeming the formulations "essentially equivalent"); see also Richard Wright, Rights, Justice, and Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 163 (David Owen ed., Oxford Univ. Press 1997) (emphasizing maxims is the supreme principle of Right, and not to treat others as means but only as ends is the supreme principle of Virtue). But see Hillel Steiner, Working Rights, in A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 281-82 (Matthew H. Kramer, N.E. Simmons & Hillel Steiner eds., Oxford Univ. Press 1998) (asserting that two formulations of the categorical imperative are not equivalent: an action can conform to one and not the other).
283 Taylor, supra note 89, at 363.
284 JOHN RAWLS, A THEORY OF JUSTICE 226, 453 (Harvard Univ. Press 1971). The original position may be viewed as a procedural interpretation of Kant's conception of autonomy and the categorical imperative within the framework of an empirical theory. In Rawls' theory, autonomy also gives rise to obligations of respect. See id. at 454-56; see also R. Dworkin, supra note 68, at 159-65.
285 GMM, supra note 92, at 4:435-36; see also id. at 4:428 (on worth).
286 MM, supra note 31 at 6:355.
287 Dillon, supra note 207; D. Feldman, Secrecy, Dignity, or Autonomy? Value of Privacy as a Civil Liberty, CURRENT LEGAL PROBLEMS 41, 55-56 (1994).
289 IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON, in THE CAMBRIDGE EDITION OF

---

2008] KANT ON COPYRIGHT

2009
dignity in the person who fulfills all his duties." Yet as with autonomy, the exercise derives from the capacity. At its essence, dignity is unconditional.

Because autonomy and the dignity it grounds are universal and unconditional, they are the bases for an individual's necessary receipt of respect. Again, as with autonomy and dignity, respect has a conditional facet: respect as experienced describes a conditional sentiment, attitude, or behavior. Moreover, in practice respect may be awarded conditionally by degrees to those deemed more or less worthy. Yet at its core, respect is an unconditional and universal right. The obligation of respect is likewise unconditional and universal. The Kantian concept of respect "is one of the cornerstones of his most influential ethics."

Autonomy thus has a bilateral relationship to dignity. Because we are autonomous, we deserve respect for our dignity. Moreover, the self-legislation of the autonomous rational being gives us positive freedom, which entails obligations to respect other autonomous beings. Autonomy therefore grounds both the dignity of autonomous beings and also their obligation to respect the dignity of others.

C. An Ethic of Expression

1. Duties of Respect

In this section, we move from the discussion of obligations to duties. For Kant, the objective necessity of an action from obligation is called duty. Respect is a two-sided coin: it is a right and also a duty. Autonomy entails not only the requirement of respect for the autonomous agent, but that autonomous agent's respect for the other. The categorical imperative both entails that

---

THE WORKS OF IMMANUEL KANT, PRACTICAL PHILOSOPHY, supra note 12, at 5:78; Dillon, supra note 207, at 15.
282 GMM, supra note 92, at 4:440.
283 For Kant, respect is a moral feeling derived from reason. GMM, supra note 92, at 4:401; CRITIQUE OF PRACTICAL REASON, supra note 201, at 5:76-80; MM, supra note 31, at 6:399.
284 Stephen L. Darwall, Two Kinds of Respect, in Dillon, supra note 207, at 181-84; Feldman, supra note 250, at 55-56; Meyers, in Dillon, supra note 207, at 204.
285 DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE 64 (Butterworths 1999).
286 Dillon, supra note 207.
287 GMM, supra note 92, at 4:439; see also MM, supra note 31, at 6:222. The distinction between these concepts will not be discussed further. Nor is the distinction between responsibility and duty explored in the instant analysis.
a person is due respect and also, or even primarily, imposes upon a person the duty to respect others. The duty to show respect is not only a social implication of Kantian ethics; it is at the very heart of Kantian autonomy. Duty is the key to Kant’s moral theory of autonomy.

The relationship between autonomy and obligation should also be seen in the relationship between rights and duties. As autonomy consists in obligation, so too rights should be seen as consisting in duties. For Kant, right is the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom. Kant’s discussion of legal right is not analyzed here; rather, his moral philosophy is under review. The implication of the instant analysis for rights theory, however, may be noted. Rights are widely seen as correlative to duties on the part of the other: X’s right entails Y’s duty to respect that right. Yet here we see that rights are correlative to duties upon the rights-holder as well. X’s right entails X’s duty to respect Y.

The responsibilities that arise with rights are often debated. The missing social dimension of rights is lamented. A response is provided in the strong notion of obligation that adjoins the Kantian concept of autonomy. Kant’s concept of autonomy is often criticized as too individualistic. Critics paint the Kantian man as the individualist super-hero, believing he can make all moral decisions on his own: “a moral superstar alone on a rock of rational will power . . . isolated, non-social, and ahistorical.” As I have argued elsewhere, the necessary universal, unconditional duties of respect both for and by the autonomous agent, respond to these critiques. Kantian autonomy takes positive freedom to impose necessarily social relationships and duties. Those duties can be seen with regard to authorial rights, as discussed in the next section.

2. Bilateral Duties Entailed in Authorial Rights

Central to Kantian autonomy are obligations to the other. The Kantian concept of expression is communication, and the safeguarding of discourse. The obligations to the other, and the rights of the self and the other, present a bilateral set of relations in the Kantian system. Ernest Weinrib writes of private law as based on a Kantian notion of mutuality and equality of obligations. Abraham Drassinower recalls Weinrib’s interpretation of Kant with regard to the obligations entailed under copyright. In focus here is the duty (deriving from obligation) which arises from autonomy. The bilateral, mutual duties of author and modifier ensue. The author and modifier owe each other respect for the rights and duties of the other.

Both the primary author and transformative author have rights, and duties to the other are correlative to the need to respect those rights. Each has a duty to respect the other, where that duty arises from the other’s right. In addition, each author has a duty to respect the other, arising from that author’s autonomy and right.

Thus, the bilateral relations of respect demanded by copyright are four-fold. (1) Primary author’s autonomy and dignity translate into a right of respect for that autonomy and dignity. It places a duty on a would-be copier and transformative author to respect primary author’s expression. (2) Transformative author too has a right of autonomy of expression. Primary author has a duty to respect transformative author, correlative to transformative author’s right. (3) But even prior to primary author’s duty correlative to transformative author’s right, primary author’s duty to transformative author arises from primary author’s own autonomy. (4) As an autonomous being, transformative author also has a duty to respect primary author’s autonomy and dignity. The rights and obligations have a broader impact, as well.

3. The Wider Society

This analysis of authorial rights of autonomy of expression shows consequences for the relationship between the authors in a

---

269 O’Neill, supra note 90, at 85; see generally id. at 52-54, 73-75, 90, 96; O’Neill, supra note 254, at 81-105.
270 Ibid, supra note 51, at 6:232; see also id. at 6:232 (a right is the reciprocal correlative consciousness of obligation in accordance with the law); 6:231, 6:237.
274 Weinrib, supra note 16.
copyright claim involving conflicting expression rights: the primary author and transformative author. The analysis also involves the wider society.

The authorial discourse that is of concern to Kant is not only between two authors, or between the author and the reader. Kant calls for safeguarding the author's discourse with the public, and the public's discourse with the author. Both the author and the public have a right to the published work, which is a discourse between the author and the public. In his essay "On the wrongfulness of unauthorized publication of books", Kant writes that upon an author's death, the public may require the publisher to continue printing the author's work. The public may demand the continued printing, in unadulterated form, in order to continue the discourse. The author's communication with the reading public continues.276

On the utilitarian norm for copyright, the well-being of the public is at the center of the copyright scheme. The encouragement of learning and progress of science and the arts is for the social good. Also on the authorship norm, the public is centrally present. First, the public is present as a source of creative inspiration for the author. Second, it is present in readership. As readers, listeners, and viewers, the public is the general audience for works of authorship. Third, the public is present as a set of future transformative authors. The public is both a beneficiary and holder of rights deriving from authorial rights. Authorship relies upon the public.277

Thus, the Kantian system bears implications for the wider society. Autonomy is sometimes contrasted with norms of civility. Robert Post sees the former as individualistic and the latter as communal.278 By contrast, here we see autonomy as social. Autonomy of expression establishes a norm of civility.

Authors' rights can be seen as a protection of autonomy. I suggest recalling the Kantian origins of the concept of autonomy, which have obligations at their central core. Autonomy entails rights of the individual but also duties. Her rights require that others show her respect; she is, moreover, required to show respect to others. Authorial rights are, then, a norm of civility. Authorial rights set forth an ethic of expression and communication for the society as a whole.

CONCLUSION

A tradition of authors' rights exists in the Anglo-American copyright regime. I call for recognizing it, embracing it, and using it to the benefit of authors. Who are those authors? Authorship is itself transformative. All authors are at some level transformative authors. Creativity builds upon earlier creativity; authors rely on other authors and other works. Authors' rights must be used to protect transformative authorship. The call here is not for an expansion of copyright, but for protecting authorship.

The analysis herein of Kantian theory draws out Kantian principles for an illumination of the authorship concept under the Anglo-American copyright doctrine. I argue that Kant's essay and moral theory can— and should— be understood to support authors' rights and rights of transformative use. I do not attempt to speculate how Kant would have responded to modern copyright doctrines. Kant indeed recognizes that an author's words may be understood and developed in new directions by others. Kant writes: "it is by no means unusual to find that we understand [an author] better than he has understood himself since he may not have determined his concept sufficiently . . . ."279 This passage in itself shows the importance of the transformation of works by subsequent authors. It also shows the importance of the reading public.

Authors' autonomy of expression is upheld by the authorship norm. It must be protected. It also must be recognized to include, and indeed center upon, obligations. As Kant taught, autonomy entails obligations. That is the normative claim of this article.

---

276 Essay, supra note 12, at 8:26.