# KANT ON COPYRIGHT: RIGHTS OF TRANSFORMATIVE AUTHORSHIP

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## 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[1] and the United Kingdom Statute of Anne of 1709.[2] 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.[3] The authors' rights tradition ought to be recognized, embraced, and indeed strengthened to provide greater defense to authors.[4] 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.[5] Transformative authors are often labeled "copiers,"[6] "users,"[7] "creators," "recoders" or

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1 U.S. CONST. art I, § 8, cl. 8. ("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 in 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." Statute of Anne, 1709, Anne., c. 19 (Eng.).

The Statute of Anne is often dated 1710. Yet the statute was passed in February, and until 1752, when England went over to the Gregorian calendar, the legal year began in March. Stina Teilmann, *British and French Copyright: A Historical Study of Aesthetic Implications* 19 n.42 (Oct. 7, 2004) (Ph.D. dissertation, Univ. of S. Den.), *see* http://www.humaniora.sdu.dk/phd/dokumenter/filer/-0.doc.

3 For the history of the development of copyright alongside the protection of free speech, see Pamela Samuelson, *Copyright, Commodification, and Censorship: Past as Prologue – But to What Future?*, *in* THE COMMODIFICATION OF INFORMATION (Neil Weinstock Netanel & Niva Elkin-Koren eds., Kluwer Law International 2002).

For discussion of the overlap between the two supposed exclusive norms of copyright and author's rights (*droit d'auteur*), see Paul Edward Geller, *Must Copyright be Forever Caught between Marketplace and Authorship Norms?*, *in* OF AUTHORS AND ORIGINS (Brad Sherman & Alain Strowel eds., Oxford Univ. Press 1994) [hereinafter OF AUTHORS AND ORIGINS] and Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, *in* OF AUTHORS AND ORIGINS, *id.*

NOTE: Because of the range of sources cited, citations in this article include publication information for books.

4 Leslie Kim Treiger-Bar-Am, *Authors' Rights as a Limit to Copyright Control*, *in* 6 NEW DIRECTIONS IN COPYRIGHT (Fiona Macmillan ed., Edward Elgar 2007).

5 *See infra* Part IIA.

6 Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 842 (1993).

7 Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3 (2003).



"remixers,"[8] 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*.[9] 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.[10] 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.[11] 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

8 LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Random House 2001).

9 For discussion and analysis of the influence of Kantian theory on the development of German copyright, see Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993). *See also* Stig Stromholm, *Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 1 (1983); STIG STROMHOLM, LE DROIT MORAL DE L'AUTEUR EN DROIT ALLEMAND, FRANCAIS ET SCANDINAVE (Stockholm 1967); Stig Stromholm, *Right of Privacy and Rights of the Personality: A Comparative Survey* (Nordic Conference on Privacy, working paper, 1967).

10 *See* Edward Damich, *The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors*, 23 GA.L. Rev. 1, 26-27 (1988); Russell J. DaSilva, Droit Moral *and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 9-10 (1980); Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 19 (2001); Tom G. Palmer, *Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 848 (1990); Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 157 (1983); SIMON STOKES, ART AND COPYRIGHT 16 (Hart Pub. 2001); J.A.L. STERLING, WORLD COPYRIGHT LAW 43 (Sweet and Maxwell 1999); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370-71 (1998); Stina Teilmann, *Framing the Law: The Right of Integrity in Britain*, 27(1) EUR. INTELL. PROP. REV (2005).

In addition to the personality-right characterization, Netanel also sees Kant's discussion of the right to communicate one's thought as an aspect of Kantian theory of autonomy. Netanel, *supra* note 9, at 374-75; Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 17, 19 (1994). *See also infra* at notes 29 and 110.

11 *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*",[12] Kant writes of the need to protect the exclusive publication of books. The essay can be, and has been,[13] 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.[14] 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.

[12] IMMANUEL KANT, *On the wrongfulness of the unauthorized publication of books* (1785), *in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, PRACTICAL PHILOSOPHY (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) [hereinafter *Essay*].
NOTE: All citations to the works of Kant are from the Cambridge edition, except where indicated as to the Richardson or Hastie 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 Kneller and Axinn. The page numbering indicated refers not to the pages of the Cambridge or other editions, but to the Prussian akademie pagination of the standard German edition (marginal numbers in the Cambridge edition, bracketed in other editions).

[13] Caroline Nguyen, *Toward an Incentivized but Just Intellectual Property Practice: The Compensated IP Proposal*, 14 CORNELL J.L. & PUB. POL'Y 113, n.101 (2004).

[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):

> Notably, it is the publisher's right that Kant describes as personal. Stromholm argues: 'The remarks Kant devotes to the right and to the juridical 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.



In Part I of this article, Kantian theory on authors' rights is distinguished from personality rights in the Anglo-American legal regime. Kantian theory then will be shown to support authors' rights of autonomy of expression. Kant's moral philosophy generally is explored, and then in particular, Kant's essay on unauthorized publication. Authors' rights are seen to be at the center of Kant's analysis.

In Part II of the article, it will be shown that Kantian theory on the autonomy of expression, seen in Part I with regard to the so-called primary author, applies to the transformative author as well. In his essay on unauthorized publication, Kant upholds rights of transformative authorship. Kant writes of the author's right to prevent unauthorized publication by a publisher who does not serve as the author's agent; yet where changes are made to the author's work, Kant writes that publication of it is no longer within the author's control. The work becomes a work of the modifier, namely the transformative author.

The authors' rights rationale explains another distinction that Kant makes in his essay on unauthorized publication: Kant argues that copyright should prevent the unauthorized reproduction of only literary, and not visual, works. Upon reproduction of a visual work, Kant calls for the subsequent work to bear the name of the second artist. Perhaps this distinction reflects a hierarchy of the arts that goes back to ancient times, and the varying materiality and immateriality of works of different art forms. Yet most important for this discussion, the distinction that Kant makes shows the theoretical justification of the rights of the transformative author. The distinction reflects the difference in technological capabilities of reproducing works of different art forms at the time of Kant's writing of his essay. While reproductions of visual works required the expression of the so-called copier, exact reproductions (re-printings) of literary works did not.

Kantian moral philosophy thus supports the authorial rights tradition and its application to transformative authors' rights. The relationship between these two sets of rights is not accidental. The Kantian concept of autonomy centrally depends upon obligations.[15] Autonomy *is* a matter of obligations. Those obligations are duties to respect the autonomy of others. The rights deriving from the autonomy of the author necessarily entail obligations toward transformative authors, and toward the public. Likewise, the autonomy of the transformative author entails

[15] Kim Treiger-Bar-Am, *In Defence of Autonomy: An Ethic of Care*, 3 N.Y.U. J.L. & LIBERTY (forthcoming Winter 2008).

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 Ernest Weinrib, in reliance on Kantian moral philosophy.[16] Those principles can, too, elucidate rights under copyright.[17] The aim of this article is to use Kantian moral philosophy to understand the authorial rights of expression and their limits.

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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 a means for the social good of their production of literary works.[18] 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.[19] However, this is not so. It will be seen that the use of Kantian principles to understand authorial rights is a use of moral principles embedded in our legal culture.[20] The idea of autonomy of expression is central to our legal system and society, and its roots can be traced to Kant.[21]

16 ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (Harvard Univ. Press 1995).

17 *Cf.* Drassinower, *supra* note 7; *infra* Part IIIC.

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

19 On transplants, see Leslie Kim Treiger-Bar-Am, *A Right of Autonomy in Expression: Section 80 of the Copyright, Designs, and Patents Act (1988)* (D.Phil. thesis, University of Oxford) (on file with author) (arguing that the integrity right is not a foreign transplant into United Kingdom law); *see generally,* Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method,* 13 UCLA PAC. BASIN L.J. 199 (1994).

20 *See infra* Part IIIA.

21 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 90 and Part IIIA. *See also* Treiger-Bar-Am, *supra* note 15.



Using Kantian principles of morality is a coherent "fit," in the Dworkinian sense, with principles of the legal systems of the United States and the United Kingdom.[22] The coherence of Kantian principles of autonomy of expression with United States and United Kingdom copyright law and free speech doctrine also can be seen, as I have discussed elsewhere.[23]

Kantian principles were designed to be universal.[24] However, the universality of the principles is not investigated here. Nor is the accuracy of Kantian theory. While the analysis depends upon Kantian moral theory, I do not independently justify that moral law. The analysis will not aim to prove that Kant is right. A justification of autonomy is beyond the scope of this article; but more centrally, it is unnecessary. Whether or not Kant is correct is not the issue. As Richard Fallon writes, even if the Kantian conception of free will is not true, we ascribe to it and live by it, and so it is ascriptively so.[25]

It is the aim of this article to show that Kantian principles can be used to illuminate our understanding of authors' rights, not only on Continental *droit d'auteur* traditions, but also for the Anglo-American system of copyright.

## I. KANTIAN THEORY ON AUTHORIAL RIGHTS

Kantian moral theory can aid us in understanding the authorial rights embedded in Anglo-American copyright law. Before entering the analysis of Kantian theory of authorial autonomy, it is to be noted that currently, much of the scholarly commentary on Kant and copyright associates Kant with personality theories.[26] This section explores the problematic nature of that characterization on the Anglo-American copyright model.[27] The discussion will then turn to the Kantian position on

22 RONALD DWORKIN, LAW'S EMPIRE (Hart Pub. 1998) (on the "integrity" method of judicial interpretation).

23 *See supra* pages 1060-61, for a brief indication as to the United States and United Kingdom authorial rights' tradition. *See also* Treiger-Bar-Am, *supra* note 4 and cites therein; Leslie Kim Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression, in* 2 NEW DIRECTIONS IN COPYRIGHT (Fiona Macmillan ed., Edward Elgar 2006).

24 Geller, *supra* note 19, at 204. *See also infra* Part IA1, further exploring the universalism of Kantian principles with regard to the scope of copyright coverage.

25 Richard H. Fallon, Jr., *Two Senses of Autonomy,* 46 STAN. L. REV. 875 (1994).

26 *See supra* note 10, *infra* note 73.

27 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 19; 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.[28] 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."[29] 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.

*Justifying Copyright, in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE (Daniel McClean & Karsten Schubert eds., Ridinghouse 2002).

28 Regarding characterizations of Kant as supporting personality and natural law property theories under French and German law, which debate this article does not enter, *see infra* page 1073 (discussing monist and dualist approaches to authors' rights).

29 *See* Netanel, *supra* note 9; *see also* Waldron, *supra* note 6. Netanel recalls Kantian theory in this regard. *See* NEIL NETANEL, COPYRIGHT'S PARADOX (forthcoming Oxford Univ. Press 2008) (according to Kant, an author's words are a continuing expression of his inner self). These concepts may also recall the theory of property as embodiment of personality, *see infra* page 1072 and notes 73-74.



#### a. Kant

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.'"[30] 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."[31] It is a (universal) individuality for Kant that constitutes genius in art. Kant uses the terms "individuality" and "originality" together.[32] Individuality, and not the imprint of personality, animates genius.[33]

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. Drahos 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."[34] Yet Drahos 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.[35]

#### 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.[36] It was once widely presumed that artworks are expressions of an artist's emotions.[37]

30 Geller, *supra* note 3, at 168.

31 METAPHYSICS OF MORALS (1797) *in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, PRACTICAL PHILOSOPHY, *supra* note 12 [hereinafter *MM*] at 6:223.

32 IMMANUEL KANT, CRITIQUE OF THE POWER OF JUDGMENT 5:318 (Paul Guyer ed. & trans., Eric Matthews trans., Cambridge Univ. Press 2000) [hereinafter CRITIQUE OF JUDGMENT].

33 *Id.* at 5:313; *see also* discussion of the Kantian concept of genius *infra* pages 1079-1081.

34 PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 80 (Dartmouth Aldershot 1996).

35 *See infra* pages 1069-70, and Part IIIB.

36 MONROE C. BEARDSLEY, AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT A SHORT HISTORY 247-51 (U. Al. Press 1966).

37 MONROE C. BEARDSLEY, AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM *xl*

The Romantic conception has ceded, and further, been subjected to postmodern critique.[38]

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.[39] 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.[40] 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.[41] Whereas breakthrough creations may show authors' personal imprints, in most cases of incremental creativity authors' personalities "rarely permeate, or even identifiably mark, their works."[42] Geller writes, "[d]o authors personally express themselves? I would answer: sometimes and to varying degrees."[43]

The author's expression can be the subject of protection even where it is not defined as the expression of *something*, or of *anything in particular*. Monroe Beardsley writes that an artist's "act of expression will be regarded, roughly, as the act of creating something expressive."[44] The expression does not necessarily need a predicate; the verb does not need an object.[45]

### 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-

(2d ed. Hackett Pub. 1992) (there was a "general assumption" to this effect at the time of the writing of the first edition of Beardsley's book, in 1958). *See also id.* at 234 (on Schleiermacher), 247-48 (on Wordsworth & Hugo), 322-24 (on Croce & Collingwood).

38 *See, e.g.*, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., Duke Univ. Press 1994), discussed in Treiger-Bar-Am, *supra* note 23.

39 Geller, *supra* note 3, at 180.

40 *Id. See also* Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 112 (1998) (noting that artists such as Picasso, Stravinsky, Graham Greene, and Borges stated that they were not trying to make personal expressions in their works). Hughes also discusses the difficulties of inquiring into how personal an artwork is. *See generally* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 343 (1988).

41 Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1010 (1990).

42 Geller, *supra* note 3, at 178.

43 *Id.* at 181.

44 BEARDSLEY, *supra* note 36, at *xli*.

45 Beardsley and Dickie see the term "express" as a relational term, requiring an X that is expressed. *Id.* at 331; GEORGE DICKIE, INTRODUCTION TO AESTHETICS: AN ANALYTIC APPROACH 123 (Oxford Univ. Press 1997). Yet that requirement is with regard to the expressiveness of the *art object*, BEARDSLEY, *supra* note 36, at *xl*, 328, rather than necessarily the author. Further, art may be said to express, or arouse, emotions on the part of the viewer or audience. *See* DICKIE, *supra*, at 121.



American copyright protection. 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.[46]

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[47] the Supreme Court set the standard of originality "without requiring any manifestly personal input."[48] 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."[49]

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.[50] The standard evoked in *Bleistein* does not downplay the author, as Peter Jaszi sees it,[51] but rather universalizes it: all authors have their unique personality, namely, their individuality.

In the literary property debates in 18th 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.[52]

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 . . . ."[53] Copinger in the first edition of his book in 1870 writes,

46 Treiger-Bar-Am, *supra* note 23.

47 499 U.S. 340, 345 (1991).

48 Geller, *supra* note 3, at 172; *see also* Hughes (1998), supra note 40, at 120 & nn. 148-149; Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990) (from the theory of self-expressive creation grew extensions of protection into works of information displaying no personal imprint).

49 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) (Holmes, J.).

50 Hughes (1988), *supra* note 40, at 287, 352. Geller dismisses Holmes' formula as begging the question, but precisely because Geller inquires how to find evidence of personality in creation. Geller, *supra* note 3, at 178. Perhaps then, Geller would agree that personality was not part of Holmes' test.

51 Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, DUKE L.J. 455, 482 (1991).

52 Mark Rose, *The Author as Proprietor, in* OF AUTHORS AND ORIGINS, *supra* note 3, at 48-49. *See* Donaldson v. Becket (1774) 98 Eng. Rep. 257 (H.L.).

53 Francis Hargrave, *An Argument in Defence of Literary Property* (2d. edn. London, 1774), 35-6, *as reprinted in* BRAD SHERMAN AND LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760-1911, at 52 (Cambridge Univ. Press 1999); *also reprinted in* Rose, *supra* note 52, at 48.

"[t]he order of each man's words' is as singular as his countenance."[54] 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.[55] 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"[56], 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.[57]

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.[58] 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."[59] Similar

54 Cited in SHERMAN AND BENTLY, *supra* note 53, at 53.

55 Ginsburg, *supra* note 48; *id.* at 1870 (arguing for special protection of works showing authorial 'presence'); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1998 (2006) ("moral rights cover a limited category of copyrightable works whose authors satisfy a heightened standard of originality"). Regarding Teilmann's proposal for differentiating 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). Jaszi 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", Jaszi, *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 IB, 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 OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 8.98 (Kluwer 1987).



language has been used in the European Union.[60] Traditionally, French law may have entailed a requirement that works bear an imprint of personality, in order to receive protection.[61] Yet even in France today, in practice that traditional requirement appears to have given way to a focus on individuality and choice.[62] Bernard Edelman describes the stamp of personality as individualization.[63] Stromholm 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.[64]

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 Whitman has analyzed the democratic model of the United States as involving a leveling down, compared with the French model involving a leveling up.[65] 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.[66] Broad rights balancing will ensue.

60 E.U. Council of the European Communities Directive 93/98, art. 9, 1993 (EC) (moral rights are "a set of rights based on the fact that a work is the reflection of the author's personality."

61 GERALD DWORKIN & RICHARD D. TAYLOR, BLACKSTONE'S GUIDE TO THE COPYRIGHT, DESIGNS, AND PATENTS ACT 1988, at 95, 100 (Blackstone Press Ltd. 1989); GATLEY ON LIBEL AND SLANDER 4-03 (Clement Gatley, Patrick Milmo & W.V.H. Rogers eds., 10th ed. Sweet and Maxwell 2004).

62 Bernard Edelman, *The Law's Eye: Nature and Copyright, in* OF AUTHORS AND ORIGINS, *supra* note 3, at 83; Stromholm (1983), *supra* note 9, at 14-15; André Lucas, Pascal Kamina, and Robert Plaisant *in* INT'L COPYRIGHT LAW AND PRACTICE, FRA-2[1][b][iii] (Paul Edward Geller & Melville B. Nimmer eds., Lexis Nexis Matthew Bender 1999) (creative choice). Choice as determinative of transformative authorship is discussed *infra* Part IIC.

63 Edelman, *supra* note 62, at 83; *see also* Stromholm (1983), *supra* note 9, at 14-15.

64 Stromholm (1983), *supra* note 9, at 13. "Individuality" is used expressly in the language of the Swedish Copyright Act of 1960. *Id.* at 2, 28-9.

65 James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000).

66 Geller, *supra* note 3, at 170; Alain Strowel, *Droit d'auteur and Copyright: Between History and Nature, in* OF AUTHORS AND ORIGINS, *supra* note 3, at 249-50. *But see* David Vaver, *Intellectual Property: The State of the Art*, 116 L.Q. REV. 621, 635 (2000) (a broad grant, narrow exception rule applies to intellectual property in the United Kingdom); M. Spence

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.[67] I disagree. Courts are familiar with balancing fundamental rights.[68] Many commentators recognize that United States First Amendment case law involves balancing.[69] The First Amendment category approach involves "definitional balancing," i.e., balancing in order to define the categories.[70] Indeed, in copyright conflicts, it is submitted that autonomies of expression must be recognized on both sides of the conflict, where appropriate.[71]

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). Arguably the Anglo-American copyright system is already broad-broad, 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* Treiger-Bar-Am, *supra* note 4.

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

68 Aharon Barak, *Constitutional Human Rights and Private Law, in* DAVID FRIEDMANN & DAPHNE BARAK-EREZ, HUMAN RIGHTS IN PRIVATE LAW 33-4 (Hart Pub. 2001); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 199 (Harvard Univ. Press 1978).

69 John Fleming, *Libel and Constitutional Free Speech, in* ESSAYS FOR PATRICK ATIYAH 333, 337 (Peter Cane & Jane Stapleton eds., Clarendon Press 1991). This is in contrast with the view that some United States constitutional law scholars take, frowning upon the concept of balancing and preferring bright-line rules. Kathleen M. Sullivan, *J. Byron McCormick Lecture: Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 450 (1995); Kathleen M. Sullivan, *The Supreme Court: 1991 Term Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). *See also* Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 n.35 (2001).

70 Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 938-48 (1968), *cited in* Netanel, *supra* note 69, at 9. Where speech and non-speech elements are mixed, a balance – even while still not explicit – is more clearly undertaken. United States v. O'Brien, 391 U.S. 367, 376 (1968).

71 Sherman and Bently underscore that while rights of expression will not resolve all intellectual property conflicts, understanding rights as protecting expression has lent structure to intellectual property rules. SHERMAN & BENTLY, *supra* note 53, at 55.



rights in property.[72] 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.[73] The artwork thus embodies some part of the author's self.[74] A property relation ensues. Neil Netanel has applied Margaret Radin's[75] property theory to justify authorial moral rights of attribution and integrity of a work, and indeed recalls Kant in so doing.[76]

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.[77] 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 dominion over external things."[78] 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.[79]

72 Damich, *supra* note 10, at 83, n.135; Ginsburg, *supra* note 48, at 1882-5; Wendy J. Gordon, *Copyright Norms and the Problem of Private Censorship in* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 4.39 (Jonathan Griffiths & Uma Suthersanen eds., Oxford Univ. Press 2005); Hughes (1988), *supra* note 40, at 342-3; Hughes (1998), *supra* note 40; Palmer, *supra* note 10, at 840. See also *supra* page 1066, on commentators' use of the concepts "self-expression" and "self-presentation." *See* Spence, *supra* note 27, at 399, recognizing the limits of personality-embodiment theory.

73 DaSilva, *supra* note 10, at 11 ("infusions"); Geller, *supra* note 3, at 178 ("extensions" of authors' selves); Charles A. Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675, 678 (1971) ("emanations" of artistic personality); Ricketson, supra note 59, at 8.93 ("emanation or manifestation"), M.A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557, 572, 578 (1940) ("projections" into the world); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists under French Law*, 16 AM. J. COMP. L. 465, 466, 473 (1968); STOKES, *supra* note 10, at 16.

74 Ricketson, *supra* note 59, at 8.93.

75 MARGARET JANE RADIN, REINTERPRETING PROPERTY (Univ. Chicago Press 1993); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

76 Netanel, *supra* note 10, at 78; Netanel, *supra* note 9, at 363. On moral rights including the right of integrity, *see infra* pages 1076-77 and note 100. *See also* STOKES, *supra* note 10, at 16 (for Kant, works are an extension of the artists' personality).

77 Regarding the moral right of integrity in copyright, *see* W.R. CORNISH AND D. LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS 11-63 (5th ed. Sweet and Maxwell 2003) (proprietary right); 1 COPINGER AND SKONE JAMES ON COPYRIGHT 11-01 (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.

78 Netanel, *supra* note 10, at 11. Netanel writes of Kantian expressive autonomy supporting authors' rights, *infra* page 1077, even while seeing Kant as supporting an author's expression of inner self. Netanel, *supra* note 29.

79 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Post analyses the right of misappropriation of name and likeness and the right of publicity, as between property and personality. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991). *See also* Swack, *supra* note 10.

On United Kingdom law, see Tim Frazer, *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."[80] 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.[81]

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 . . . .[82]

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,[83] as well as Brad Sherman and Lionel Bently,[84] 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.[85]

L.Q. REV. 281 (1983).

80 DaSilva, *supra* note 10, at 11. Dietz calls moral rights in Germany a right to personality, ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY (Sithoff and Noordhoff 1978); Hughes describes them in civil law countries as inalienable aspects of property, Hughes (1988), *supra* note 40, at 351; and Strowel sees them as a broad conception of property encompassing personality, Strowel, *supra* note 66, at 238-40. *See also* Netanel, *supra* note 9, at 370-382; Sarraute, *supra* note 73.

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

82 *Essay*, *supra* n.12, at 8:86 and 8:86. *See also*, *What is a Book?*, in *MM*, *supra* note 31, 6:289-901.

83 Mark Rose, *The Author in Court: Pope v. Curll*, 10 CARDOZO ARTS AND ENT. L.J. 475 (1992).

84 SHERMAN & BENTLY, *supra* note 53, at 4, 47. Sherman and Bently even caution against too strict a divide between action and thing, *id.* at 50. *See also* Jaszi, *supra* note 51, at 475 (arguing that in the 19th century, "the 'work' displaced the 'author' as the central idea of copyright law"). I disagree, however, with Jaszi's interpretation of *Bleistein*, *see supra* note 51.

*Cf.* Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHIC-KENT L. REV. 701, 730-31 (1993) (critiquing this shift from action to object, but calling for a return to action as perceived in the audience).

85 *MM*, *supra* note 31, at 6:290. *See* Treiger-Bar-Am, *supra* note 23, at n.55.



Thus, calling authors' rights property-based personality rights and bringing Kantian theory to bear, is a problematic mix of the conceptions.[86] 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.[87] Yet while property concepts entail control, control does not necessarily entail property.[88]

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.[89] The link from Kant to the concept as it is understood today can be seen, as I have argued elsewhere.[90] Here it will be shown that Kant supported the autonomy of authorial expression.

For Kant, autonomy gives the capacity for choice. This

86 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).

87 J.W. HARRIS, PROPERTY AND JUSTICE 5 (Clarendon Press 1996).

88 Sunder makes this logical fallacy, arguing that permitting exclusive control allows a property right. Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996). Sunder's critique also fails to accord with the autonomy rationale for free speech, as I have discussed in Treiger-Bar-Am, *supra* note 23.

89 J. Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 ETHICS 109, 109, 115 (1988); L.M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 35 (Harvard Univ. Press 1990); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 368 (Cambridge Univ. Press 1989).

90 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 BIOETHICS 83 (Cambridge Univ. Press 2002). O'Neill critiques contemporary versions of autonomy for claiming a lineage to Kantian autonomy. Onora O'Neill, *Autonomy: The Emperor's New Clothes*, 1 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 2003. I believe it is possible to trace that lineage. Further, it is important to recall it: 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."[91] The self-development of one's capacities[92] 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."[93] As it is his end, so then is "communicating his thoughts" a man's innate right.[94]

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."[95] "In a book, as a writing, the author *speaks* to his reader."[96] 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."[97]

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."[98] Kant directly supports publishers' rights to economic copyright.[99] 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

91 IMMANUEL KANT, CRITIQUE OF PURE REASON A534/B562 (trans. Norman Kemp Smith, St Martin's Press 1929); Charles Taylor, *Kant's Theory of Freedom, in* CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY 108 (Z.A. Pelczynski & J. Gray eds., Athlone Press 1984).

92 IMMANUEL KANT, *Groundwork of The Metaphysics of Morals, in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, PRACTICAL PHILOSOPHY, *supra* note 12 [hereinafter *GMM*], at 4:423. *See also* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (Clarendon Press 1958), *reprinted in* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 153 (Oxford Univ. Press 1969).

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

94 *Id.* at 6:238.

95 *Id.* at 6:289.

96 *Essay, supra* note 12, at 8:80. *See also id.* at 8:83-4, 8:86 (writing is the *speech* of a person (*opera*)), 8:81 (literary works deliver "a *speech* to the public").

97 THE PHILOSOPHY OF LAW 131 (W. Hastie trans., 1887).

98 *Essay, supra* note 12, at 8:86. Kant writes there of an author's "inalienable right (*ius personalissimum*)". 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 IA1.

99 *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 168.



as he created it, is violative of the author's autonomy of expression.

Kantian principles thus support a right of attribution.[100] 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 speech. The innate personal right is a right not to be compelled to speak against one's will.[101] Unauthorized publication of a writing under the name of the author 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).[102] Kant condemns a publisher who may "give out the author's work, after his death, mutilated, falsified, or interpolated . . . ."[103]

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.[104]

These Kantian principles are consistent with rights of transformative use under the fair use doctrine,[105] 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 23. 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.

103 IMMANUEL KANT, 1 ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS 236 (William Richardson ed. & trans., Thoemmes Press 1993) (1798).

104 *MM, supra* note 31, at 6:429. Kant continues that telling a lie "is thus a renunciation by the speaker of his personality." Kant's use of "personality" here is not synonymous with its use in personality theories, as discussed *infra*, Part IA1.
*See also GMM, supra* note 92, at 4:429-430 (deception and false promising).

105 Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 (1994). For a comparison of transformative use protection under United Kingdom law, see Treiger-Bar-Am, *supra* note 4.

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.[106] 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. s 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.*[107] Both moral rights, of attribution and integrity, are recognized under the United Kingdom Copyright, Designs and Patents Act 1988 (again, in limited versions).[108] 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."[109] 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.[110] 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

106 *See supra* note 59.

107 *Compare* Gilliam v. American Broad. Co., 538 F.2d 14 (2d Cir. 1976), *with* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003). *See also* Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"?*, 23 CARDOZO ARTS & ENT. L.J. 379 (2005).

Justice Breyer points to protection under tort law. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

108 Copyright, Designs and Patents Act 1988, c. 48, §§ 77, 84 (attribution), 80 (integrity) (Eng.).

109 Geller, *supra* note 3, 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 Kantian 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 IIIC.



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.[111] Authors and artists are influenced by artistic traditions, and react to them. Prior works often serve as sources or inspiration for subsequent works. As Leval 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."[112] Original works are not created *tabula rasa*: "the beginning when there was nothing is long gone."[113] 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.[114] In music, an example of intertextuality is the Brentano String Quartet's Bach Perspectives: Ten Composers React to the Art of Fugue.

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.[115] 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*.[116] Rembrandt's drawings of

111 Rose, *supra* note 52, at 55 (current literary thought emphasizes that texts permeate and enable each other). Reading also requires earlier texts, *see* Rotstein, *supra* note 84, at 737.

112 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

113 NELSON GOODMAN AND CATHERINE Z. ELGIN, RECONCEPTIONS IN PHILOSOPHY AND OTHER ARTS AND SCIENCES *vii* (Routledge 1988).

114 *See* Treiger-Bar-Am, *Adaptations with Integrity*, *in* COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSON AND THE COMMODIFICATION OF COPYRIGHT (Helle Porsdam ed., Edward Elgar 2006).

115 GOODMAN & ELGIN, *supra* note 113 (termed there "variations").

116 LISA PON, RAPHAEL, DÜRER, AND MARCANTONIO RAIMONDI: COPYING AND THE ITALIAN RENAISSANCE PRINT 1-2 (Yale Univ. Press 2004).

Leonardo Da Vinci's *Last Supper* are interpretations, or variations of it. With digitalization and creative works on the internet, intertexuality is multiplied, as various art forms function together. Aesthetic theory recognizes the importance of the ability to adapt, interpret, and transform prior works.[117]

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.[118] Yet some postmodernists argue that every work is copied, with nothing original, and therefore that an "author" should not enjoy protection of expression.[119] I have argued elsewhere against the negation of authorial rights with that critique.[120] 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.[121]

### 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.[122] 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.[123] The genius adds his own creative spark: it is "individuality" and "originality"[124] that animate genius, as seen above.[125] For Kant, the genius then goes on to set his own rules, as with moral autonomy.[126]

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,

117 Nick Zangwill, *Aesthetic Functionalism, in* AESTHETIC CONCEPTS: ESSAYS AFTER SIBLEY 131 (Emily Brady & Jerrold Levinson eds., Clarendon Press 2001).

118 Treiger-Bar-Am, *supra* note 114.

119 *See* Litman, *supra* note 41; Rotstein, *supra* note 84, at 737, 756. *See also* Jaszi, *supra* note 51; WOODMANSEE & JASZI, *supra* note 38; 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 3, at 99-100 *citing* TERRY EAGLETON, LITERARY THEORY: 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").

120 Treiger-Bar-Am, *supra* note 23 (also rejecting the postmodern deconstruction of the self).

121 Treiger-Bar-Am, *supra* note 4.

122 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:318, 5:309. *See infra* page 1087.

123 *Id.* at 5:318.

124 Kant uses those terms together, *see id.* at 5:318.

125 *Id.* at 5:313.

126 Genius sets the rules for art. *Id.* at 5:307, 5:310, and 5:318. *See infra* pages 1081, 1084.



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 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.[127]

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."[128]

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,[129] and a translation may infringe copyright.[130] A distorted translation arguably should support an integrity right claim of distortion of authorial

127 *Essay, supra* note 12, at 8:86-87.

128 *Id.* at 8:87.

129 Compare *Essay, supra* note 12, at 8:87, with 17 U.S.C. § 101 (2007). On United Kingdom law, *see* THE MODERN LAW OF COPYRIGHT AND DESIGNS 5.74-6 (Sir Hugh Laddie et. al. eds., 3d ed. Butterworths 2000).

130 A translation may however be original and protected in copyright, *see* Laddie, *id.* at 3.65.

expression as well.[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.[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.[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."[134] Kant also ranks higher the artforms he believes enlarge the faculties engaged in the "power of judgment."[135] For Kant, artistic genius is akin to the moral freedom of the autonomous will: genius gives rules to art.[136] In favor of "genius," in the Renaissance the term "ingenius" was used, meaning reason, wit, skill and *judgment.*[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

131 CORNISH & LEWELYN, *supra* note 77, at 11-81; Laddie, *supra* note 129, at 13.18. *But see* U.K. Act § 80(2)(a)(i) (derogatory treatment cannot include translation of a literary or dramatic work).

132 *See supra* Part IB and *infra* Part IIIB2.

133 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:303; *id.* 5:322 § 51.

134 Donald W. Crawford, *Kant's Theory of Creative Imagination, in* ESSAYS IN KANT'S AESTHETICS 171-72 (Ted Cohen & Paul Guyer eds., Univ. of Chicago Press 1982) (for Kant, imagination is the free conformity to laws).

135 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:329 § 53.

136 *Id.* at 5:307, 5:310, 5:318. *See supra* pages 1066, 1079 and *infra* page 1084.

137 Christine Battersby, GENDER AND GENIUS: TOWARDS A FEMINIST AESTHETICS 38 (The Women's Press Ltd. 1989).



data is transformed into expression by *choice.*[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.[139]

Jane Ginsburg calls recasting the labor standard as subjective selection and arrangement "disingenuous" and "contrived."[140] Yet that conclusion derives from Ginsburg's analysis of copyright protection as based upon a work's being "personality-based."[141] By contrast, the argument herein is that works need not be conceived of as personal or personality-based, but rather, autonomy-based.[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.[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.[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 craft 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.[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

138 Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

139 Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

140 Ginsburg, *supra* note 48, at 1937, 1904, n.138.

141 *Id.* at 1868.

142 Ginsburg, *supra* note 48.

143 *Id.* at 1869.

144 Designers Guild Ltd. v. Russell Williams (Textiles) Ltd., [2001] F.S.R. 11 ¶ 24, at 121 (U.K.).

145 Krisarts S.A. v. Briarfine Ltd., [1977] F.S.R. 557, 562 (U.K.).

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. 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.

146 Macmillan & Co. Ltd. v. Cooper, [1923] 40 T.L.R. 186, 188 (U.K.). *See also* Laddie, *supra* note 129, at 3.137.

147 Geller & Nimmer eds., INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 62, at FRA-2[1][b][iii].

148 Edelman, *supra* note 62, at 87.

149 Kimron v. Shanks, CA 2811/93, 54(3) PD 817; *see* Neil J. Wilkof and Joshua Weisman, *in* Geller & Nimmer eds., INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 62, at ISR-7[3].

150 Beardsley, *supra* note 36, at 375 (Fallico's Existentialism).

151 1 Arturo Schwarz, THE COMPLETE WORKS OF MARCEL DUCHAMP 43 (2d ed. Thames and Hudson 1997) (citation omitted).



Yet the reproduction of a visual work, based on reproductive techniques available at the time of Kant's writing, demanded input and expression from the copier. The reproduction could be seen to represent a new expression of the subsequent artist. That transformative artist was, then, to be protected in his own right. This section will discuss the contours and bases of Kant's distinction. Further implications also will be drawn out.

#### 1. Hierarchies

During prior historical times, art forms were categorized differently than today.[152] Kant can be seen as standing in a long tradition of framing hierarchies of the arts, for example as was done by Plato,[153] Leonardo Da Vinci,[154] Hegel,[155] and Schopenhauer.[156] For Kant, the hierarchy of the arts is determined according to which best cultivates us to morality.[157] In the *Critique of Judgment*, Kant writes that poetry is closer to reason than the other arts.[158] While painting "can penetrate much further into the region of ideas and also expand the field of intuition" more than other pictorial arts,[159] it is not as high a form of expression as literary works. Like decorating rooms and the art of dressing, painting is "there merely to be viewed."[160] Today, this sense of hierarchy is a historical curiosity. The historical distinction made between art forms has waned.

Even while drawing this distinction, Kant writes that expression in all of the art forms is related to morality. Kant connects *artistic expression* to the autonomy of a reasoning will. In the *Critique of Judgment*, Kant writes that beauty is the symbol of morality. Beauty in nature shows a harmony and purposefulness, as does the reason of rational beings— the expression of which is the moral law.[161] With aesthetic cognition the imagination is free.

152 BEARDSLEY, *supra* note 36, at 105, 159-61.

153 PLATO, THE REPUBLIC (Desmond Lee trans., 2d edn revised, Penguin Books 1974). Plato divides visual art, connected with beauty and measure, from poetry, connected with madness and inspiration. BEARDSLEY, *supra* note 36, at 45.

154 Leonardo Da Vinci, *Paragone*, *in* THE LITERARY WORKS OF LEONARDO DA VINCI (Jean Paul Richter ed., 3d ed. Phaidon Publishers 1970) (1883).

155 G.W.F. HEGEL, 1 AESTHETICS: LECTURES ON FINE ART 82-90 (T.M. Knox trans., Clarendon Press 1975).

156 BRYAN MAGEE, THE PHILOSOPHY OF SCHOPENHAUER 176-184 (Clarendon Press 1983).

157 ESSAYS IN KANT'S AESTHETICS (Ted Cohen & Paul Guyer eds., Univ. of Chicago Press 1982).

158 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:314-5, 5:326. *See supra* page 1081.

159 *Id.* at 5:330.

160 *Id.* at 5:323-4 (except painting with the aim of teaching history or knowledge of nature).

161 *Id.* at 5:351-5:354 § 59. *See also* ARTHUR C. DANTO, PHILOSOPHIZING ART: SELECTED

The cognition is original, giving itself its own rules.[162] The exercise of genius is without externally-imposed rules; so too the exercise of autonomy is self-legislation.[163] 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.'"[164] 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 III 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*),[165] and a visual work as a thing in property (*opus*).[166] 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.[167] Even if this difference between literary and visual artworks does not indicate a metaphysical distinction,[168] nevertheless different protections of the art forms may be required, because of this divergence. Stina Teilmann uses Kant's distinction to underscore a necessary protection of visual artworks against destruction, due to their materiality.[169] There is a longstanding debate in intellectual property generally, as to whether the provisions regarding intellectual property categories,

ESSAYS 125 (Univ. of Calif. Press 1999) (for Kant the principles of moral life, as the principles of aesthetic judgment and of artistic creation, are uniform and universal). Danto challenges the claim of such universality with a communitarian response to art, *id.* at 126.

162 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:306-5:317 § 45-49.

163 *See* Crawford, *supra* note 134, at 172 (for Kant, imagination is the free conformity to laws). The Kantian concept of genius is also discussed briefly *supra* page 1066 and *infra* pages 1079-81.

164 IRIS MURDOCH, METAPHYSICS AS A GUIDE TO MORALS 9 (Chatto & Windus 1992).

165 In Richardson's translation, *supra* note 103, a "book" is called the "labour" of the author, rather than the "work" of the author. The emphasis is on action.

166 *Essay*, *supra* note 12, at 8:85-6.

167 Kant's "conception of the work of visual art seems to anticipate both the physicalism that haunts artistic Modernism, and the latter's rigid separation of textuality from visuality and concept from form." Anne Barron, *Copyright Law and the Claims of Art*, 4 I.P.Q. 368, 400 (2002).

168 *Infra* page 1088.

169 Teilmann, *supra* note 10. Yet I believe that Teilmann does not give sufficient weight to the immaterial aspects of visual art, nor to its necessary protection alongside copies of visual works.



each of which covers so many divergent types of works, should be separated out.[170] Digital works may further change those formulas, as they mix various media.[171]

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.[172]

Indeed, any instantiation of a literary work is called a copy. A book "is a particular kind of 'copy.'"[173] With musical works, every performance may be an instance of it.[174] The instantiation of a literary or musical work is multiple. The instantiation of a cast or lithograph is often less numerous but still multiple.[175] 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.[176] Moreover, originals can themselves be called copies in the sense that they constitute a copy of nature,[177] or of the work in the author's mind.[178] Justice Holmes in *Bleistein* took the view

170 SHERMAN & BENTLY, *supra* note 53; David Vaver, *Need Intellectual Property be Everywhere? Against Ubiquity & Uniformity*, *in* INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW (2006).

171 Netanel, *supra* note 10.

172 *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")."), and at n.90; Teilmann, *supra* note 10 (for Kant, "books are dual natured. The material copy, 'das Exemplar,' belongs to whomever has bought it, but the immaterial element of a book, 'die Rede,' which is what the book 'says' – that is, the author's address to the public – cannot be bought and sold.").

173 Notes of Committee on the Judiciary, H.R. REP NO. 94-1476, on 17 U.S.C. § 102 (2007). On United Kingdom law, see Copyright, Designs and Patents Act 1988 § 3(2) (Eng.).

174 GOODMAN & ELGIN, *supra* note 113, at 73-4.

175 "Limited editions, as opposed to reproductions, are comprised of multiple originals of the same work . . . ." H.R. REP NO. 514, 101st Congress, 2d Sess. 12 (1990), reprinted in 1990 U.S.C.C.A.N. 6915.

176 *See supra* Part IIA.

177 *See* BEARDSLEY, *supra* note 36, for a discussion on the complexities of the concept of nature in relation to art.

178 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 36, 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."[179] A photograph may be said to bear the same relation to nature.[180]

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 thing-ness. 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 artistic 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."[181] The artist gives expression to forms and speaks through them.[182] This is so even while the art of painting communicates form rather than concept.[183] "[T]he 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."[184] For Hegel too, poetry, as the expression of ideas, is present in all of the art forms.[185]

### 4. Reproductive Techniques

It appears that Kant's distinction between literary and visual works with regard to their unauthorized copying derives

The source of art as either nature or the workings of an author's mind may not be so divergent. Beardsley writes that for Hesiod and Homer art is accomplished with the aid of the Muses. When the poet speaks, a god was in some sense speaking through him. *Id.* at 26.

179 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).

180 Krisarts SA v. Briarfine Ltd., [1977] F.S.R. 557 (U.K.), discussed *supra* page 1082.

181 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:317, 5:320.

182 *Id.* at 5:317, 5:323-4.

183 *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 revisiting 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.

184 CRITIQUE OF JUDGMENT, *supra* note 32, at 5:324.

185 HEGEL, *supra* note 155, at 89.



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.[186]

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.[187] 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 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.[188] 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 was possible at the time, it is submitted that Kant would have wished 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

186 G.W.F. HEGEL, PHILOSOPHY OF RIGHT 68 (T.M. Knox trans., Oxford Univ. Press 1967).

187 Stina Teilmann, *On Real Nightingales and Mechanical Reproductions, in* COPYRIGHT AND OTHER FAIRY TALES, *supra* note 114; TEILMANN, *supra* note 2, at 102-3. *See supra* page 1079.

188 *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.[189] 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, engravers 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]

189 Walter Benjamin, *The Work of Art in the Age of Mechanical Reproductions*, *in* ILLUMINATIONS 217-51 (Hannah Arendt ed., H. Zohn trans. Harcourt Brace and World 1968).

190 Zangwill, *supra* note 117, at 127 (citation omitted).

191 BRAD SHERMAN & LIONEL BENTLY, INTELLECTUAL PROPERTY LAW 31, 68 (2d ed. Oxford Univ. Press 2004).

192 25 & 26 Vict, c.68, s.6; *see* SHERMAN & BENTLY, *supra* note 191, at 31, 68..

193 1 & 2 Geo. V, c. 46 (Eng.).

194 *See* 17 U.S.C.A. § 102, Historical and Statutory Notes; Kwall, *supra* note 55, at 1999.

195 Treiger-Bar-Am, *supra* note 114; Kwall, *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 . . . . [,] an 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

196 *See e.g.*, Müller v. Switzerland, Judgment of 24 May 1988, Series A, No. 133, 13 EHRR 212.

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 to 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.[200]

### 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 philosophical soul for rational self-rule,[201] and Aristotle's identification of choice and rational deliberation as elements of the virtues and the good life.[202] Influences on Kant's theory of autonomy can be found in many areas, including works of religious thinkers,[203] Renaissance humanists,[204] and political thinkers, especially Rousseau.[205] Kant's innovative idea was casting autonomy as a moral idea.[206]

200 *See supra* page 1071.

201 PLATO, THE REPUBLIC, *supra* note 153, at bks ii-iv; 215 d-e, 218-19; John Christman, *Introduction, in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL ANATOMY 4 (John Christman ed., Oxford Univ. Press 1989) (discussing related ideas held by Augustine and the Stoics, as well); *but see* David A.J. Richards, *Rights and Autonomy, in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL ANATOMY, at 206-07.

202 ARISTOTLE, NICHOMACHEAN ETHICS ii.6, iii.2 (Sir David Ross trans., Oxford Univ. Press 1925). Whether Aristotle's view of deliberative choice as a virtue amounts to freedom, however, is less clear. R.G. Mulgan, *The Ancient Greeks, in* CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY 23 (Z.A. Pelczynski & John Gray eds., Athlone Press 1984); CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 156 (Cambridge Univ. Press 1979).

203 GERALD DWORKIN, THEORY AND PRACTICE OF AUTONOMY 13 (Cambridge Univ. Press 1988). For Luther, freedom was from the body and its inclinations, as well as freedom to obey divine law. HOWARD CAYGILL, A KANT DICTIONARY 88-9 (Blackwell Publishers Ltd. 1995).

204 G. DWORKIN, *supra* note 203, at 13.

205 Caygill, *supra* note 203, at 88-89; Allen W, Wood, *General Introduction, in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, PRACTICAL PHILOSOPHY, *supra* note 12, at xvii. *See generally* J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY (Cambridge Univ. Press 1998); Taylor, *supra* note 91, at 102-3.

206 NATHAN ROTENSTREICH, MAN AND HIS DIGNITY 53 (The Magnes Press 1983).



Since Kant's time, the influence of the Kantian concept is felt in many diverse fields. In philosophy, autonomy is seen as having been given deep expression in the works of Kant.[207] The Kantian notion of the moral order "determines the foundations of political theory."[208] Generally, Kant's theory of autonomy marked a "crucial step" in the development of freedom as the "central value in our culture."[209]

In law, it is the Kantian concept of autonomy as choice that is often cited as the basis for many of the fundamental rights in the United States and England.[210] The protection of individual autonomy is often characterized as a necessary protection of individual decision-making processes. Feinberg writes: "The kernel of the idea of autonomy is the right to make choices and decisions. . . . [T]he most basic autonomy-right is the right to decide how one is to live one's life."[211]

Most relevant for the instant analysis is the autonomy rationale for the speech doctrine. In *West Virginia State Board of Education v. Barnette*, the United States Supreme Court held unconstitutional a state regulation requiring children in public schools to salute the American flag.[212] The individuals' right to autonomy[213] was safeguarded against the state's compulsion to declare a belief, or to utter what is not in one's mind.[214] In *Hurley and S. Boston Allied War Veterans Council v. Irish American Gay,*

207 Richards, *supra* note 201 (Rousseau and Kant); Fallon, *supra* note 25, at 878. Dillon calls Kant's notion the most influential for ethicists. DIGNITY, CHARACTER AND SELF-RESPECT 14 (Robin S. Dillon ed., Routledge 1995).

208 Taylor, *supra* note 91, at 109. *See also* BERLIN, *supra* note 92, at 138 (the heart of liberal humanism was deeply influenced by Kant and Rousseau).

209 Taylor, *supra* note 91, at 100.

210 See e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L. J. 383 (1999); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991); Douglas W. Vick, *Deontological Dicta*, 65(2) MODERN L. REV. 279, 284 (2000); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L.L. REV. 159, 166-7 (1997). On Kantian philosophy and equality, *see* R. Dworkin, *supra* note 68, and Drassinower, *supra* note 7.

The nature of the choice that autonomy affords is detailed below.

211 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO ONESELF 54 (Oxford Univ. Press 1986). The European Convention's Article 8 protection of respect for private life entails the right to make choices about one's body. *See* Pretty v. U.K. [2002] 2 F.C.R. 97. The United States constitutional protection of reproductive choice also relies on autonomy as freedom-of-choice. *See* Roe v. Wade, 410 U.S. 113 (1973).

212 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). One commentator cites *Barnette*, inter alia, to argue that the First Amendment is violated where VARA mandates an art owner's speech by forcing the owner to display an artwork, such as in Carter v. Helmsley-Spear, Inc., 517 U.S. 1208 (1996). Eric E. Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1140-1 (1996). Yet this view sees VARA as protecting artists' reputations, rather than expression rights, thus failing to frame the conflict as between parties' speech rights.

213 Barnette, 319 U.S. 624, 631 ("self-determination").

214 *Id.* at 633-34.

*Lesbian and Bisexual Group of Boston,*[215] the Supreme Court ruled that the First Amendment would not allow a state law to compel a private body to undertake an expressive activity. "[U]nder the First Amendment . . . a speaker has the autonomy to choose the content of his own message."[216] One who chooses to speak may also decide what not to say.[217] This case in particular upholds the principle of non-distortion of an author's expression that Kant upheld in his essay on unauthorized publication.[218] The autonomy rationale for free speech comes closest to the Kantian concept of autonomy when it is seen as a deontological right.[219] Such a view is offered by Fallon,[220] Ronald Dworkin,[221] Baker,[222] Richards,[223] and Schauer.[224] A consequentialist version of the autonomy rationale is also apparent. Schauer[225] and Feinberg[226] distinguish between the deontological right, and the consequentialist theory of self-development with free speech central to the good life. In *Whitney v. California,* Justice Brandeis sees free speech as both an end and a means, thus recalling both the deontological and consequentialist justifications.[227]

### B. *The Kantian Concept*

Autonomy on the Kantian concept is the capacity to self-legislate. What kind of law must the self make, and what does such law entail? This section will discuss first, the nature of the legislating, and second, the nature of the legislation. Autonomy, as the capacity to legislate, is universal and unconditional; so too the law that the autonomous individual makes must be universal

215 Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

216 *Id.* at 573. *See also id.* at 574 ("principle of autonomy to control one's own speech"); *id.* at 576 ( "the speaker's right to autonomy over the message").

217 *Id.* at 573.

218 *See supra* Part IB. For a discussion of the case and the moral right of integrity under copyright, see Treiger-Bar-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 200 (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").

224 Frederick Schauer, *Speaking of Dignity, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 189 (Michael J. Meyer & William A. Parent eds., Cornell Univ. Press 1992); SCHAUER, *supra* note 197, at 65.

225 SCHAUER, *supra* note 197, at 48-50.

226 J. FEINBERG, FREEDOM AND FULFILLMENT 91, 92-97, 316 (Princeton Univ. Press 1992). Feinberg identifies self-fulfillment as a concept of well-being and as having a crucial role in defining the good for man; he distinguishes self-determination as a right.

227 Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).



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."[228] 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.[229]

A main feature of Kantian autonomy is its universality. Kant writes that a free will "must . . . be attributed to every rational being."[230] 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."[231] 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.[232] Liberty and autonomy are often considered together.[233] Yet liberty, understood as freedom from political authority, must be preceded by a philosophical conception of free will to justify it.[234] Privacy, in the sense of isolation for the solitary rational decision-maker,[235] as well as

228 Oxford English Dictionary. *See* FEINBERG, *supra* note 211, at 27-28; *see also* G. DWORKIN, *supra* note 203, at 13.

229 *GMM, supra* note 92, at 4:412.

230 *Id.* at 4:448.

231 THOMAS E. HILL JR., AUTONOMY AND SELF-RESPECT 44 (Cambridge Univ. Press 1991); *id.* at 29.

232 For a full discussion and comparison of the conditional views of autonomy, see Treiger-Bar-Am, *supra* note 15.

233 *See, e.g.,* G. DWORKIN, *supra* note 203, at 6, 13; *see also* STEVEN LUKES, INDIVIDUALISM (Basil Blackwell Oxford 1973); Lois Shepherd, *Dignity and Autonomy after Washington v. Glucksberg: An Essay about Abortion, Death, and Crime,* 7 CORNELL J.L. & PUB. POL'Y 431 (1998); Michael Spence, *Passing Off and the Misappropriation of Valuable Intangibles,* 112 L.Q. REV. 427 (1996). Rousseau treats the two together. *See* THOMAS E. HILL JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 81 (Cornell Univ. Press 1992).

234 BERLIN, *supra* note 92, at 120, 139; J.S. MILL, ON LIBERTY 59, 122 (Penguin Classics 1985); Taylor, *supra* note 91, at 101, 108.

235 *See, e.g.,* Pretty v. U.K. [2002] 2 F.C.R. 97 (right to terminate one's life is denied). Privacy also can take on the meaning of autonomy as choice. *See* Kim Treiger-Bar-Am & Michael Spence, *Private Control/Public Speech, in* HUMAN RIGHTS AND PRIVATE LAW: PRIVACY

independence—political,[236] psychological,[237] or economic[238]—present conditions for the exercise of autonomous choice.

Rather than unconditional capacity, a conditional understanding of autonomy explores the *ability* to choose. One might ask, is a particular individual *able* to function autonomously? On this account, autonomy may be seen as dependent upon external conditions, including political-legal situations, and the extent to which socio-economic conditions allow the exercise of autonomy.[239] Autonomy also may be seen as conditioned on factors internal to the individual's make-up, including physical, mental, emotional and/or intellectual state and abilities,[240] and the emotional *sense* of one's competence and control.[241]

Alternatively, upon taking a conditional view one might explore the conditional *exercise* of choice. One might ask, do the actions of a particular individual show her autonomous functioning? The query moves from, "can she" to "does she" act autonomously? When autonomy is exercised we are said to act autonomously and at other times not.[242]

By contrast, autonomy understood as the unconditional capacity for choice is the central core of autonomy. Upon it the conditional views of autonomy as liberty, independence and privacy, and as ability or exercise, depend. It is prior, with the other meanings derivative. Kant also considers autonomy an ideal,[243] which may or may not be exercised effectively.[244] Yet such

(Katja S. Ziegler ed., Hart Pub. 2007).

236 FEINBERG, *supra* note 211, at 27-28.

237 O'NEILL, *supra* note 90, at 23-24, 28.

238 Real property has been said to confer autonomy. *See* Justice William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification, in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 29 (Jack N. Rakove ed., Boston Northeastern Univ. Press 1990); *see also* William A. Parent, *Constitutional Values and Human Dignity, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 224, at 50-51. Raz's discussion of the conditions necessary for the exercise of autonomous options may also be considered in this vein. RAZ, *supra* note 57.

239 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, 372-73; *see also* Joseph Raz, *Right-Based Moralities, 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 EMPOWERED SELF 255 (Oxford Univ. Press 1999); FRIEDMAN, *supra* note 89, at 37; O'NEILL, *supra* note 90, at 48-50.

240 HILL, *supra* note 233, at 77.

241 Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1989); 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).

242 HILL, *supra* note 233, at 82. *See* H.C. Frankfurt, *Freedom of the Will and the Concept of a Person, in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY, *supra* note 201; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972); Christman, *supra* note 88, at 113 and cites therein.

243 *GMM*, *supra* note 92, at 4:433. *See also* Fallon, *supra* note 25, at 892-93 (calling Kantian autonomy ascriptive, as we "ascribe" 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



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.[245]

### 2. Will and Choice

The universal, unconditional *Wille*, in the Kantian concept, is distinguished from the conditional *Willkür*.[246] It is the former which is the universal capacity to legislate. The rational *Wille* governs the exercise of the empirical, phenomenological *Willkür*.[247] While *Wille* is freedom of the will in the positive sense, by contrast, *Willkür* is freedom of the will in the negative sense.[248] *Wille* is freedom *to* self-legislate; *Willkür* is freedom *from* external, heteronomous constraints.[249] The *Wille* always acts rationally and morally – even where the *Willkür* does not follow the *Wille's* legislation.[250] 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."[251] The principle of autonomy is thus the categorical imperative.

kingdom of ends; but being free is recognizing that this is our ideal).

244 *GMM*, *supra* note 92, at 4:429-30, 4:440-41.

245 *See* Dillon, *supra* note 207, at 15.

246 LEWIS WHITE BECK, A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON 201 (Univ. Chicago Press 1960).

247 *Id.* at 196, 198.

248 *GMM*, *supra* note 92, at 4:412, 4:446.

249 CAYGILL, *supra* note 203, at 207-08. Compare Berlin's notion of positive and negative liberty. BERLIN, *supra* note 92.

250 BECK, *supra* note 246, at 203.

251 *GMM*, *supra* note 92, at 4:440.

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."[252] Kant explains that an "*end* is an object of free choice."[253] To use another as a mere means is "to act on a maxim that the other *cannot* also adopt."[254] 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.[255] 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."[256]

The autonomy that affords the capacity to self-legislate is the ground of a rational being's dignity.[257] Dignity is "absolute inner worth."[258] 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,[259] or created by respect.[260] 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.[261] Kant writes that there is a "certain sublimity and

252 *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 (Routledge and Regan Paul Ltd. 1978) (deeming the formulations "essentially equivalent"); *see also* Richard Wright, *Right, Justice, and Tort Law, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 163 (David Owen ed., Oxford Univ. Press 1997) (universalizing 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. Simmonds & 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).

253 *MM*, *supra* note 31 at 6:384; *see also id.* at 6:381.

254 ONORA O'NEILL, CONSTRUCTION OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 138 (Cambridge Univ. Press 1989) (emphasis in original).

255 Taylor, *supra* note 89, at 363.

256 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 150-85.

257 *GMM*, *supra* note 92 at 4:435-36; *see also id.* at 4:428 (on worth).

258 *MM*, *supra* note 31 at 6:435.

259 Dillon, *supra* note 207; D. Feldman, *Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty*, CURRENT LEGAL PROBLEMS 41, 55-56 (1994).

260 Robert E. Goodin, *The Political Theories of Choice and Dignity*, 18 AM. PHIL. Q. 91, 97 (1981).

261 IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON, *in* THE CAMBRIDGE EDITION OF



*dignity* in the person who fulfils all his duties."[262] 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,[263] attitude,[264] or behavior.[265] 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."[266]

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*.[267] 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.

262 *GMM*, *supra* note 92, at 4:440.

263 For Kant, respect is a moral feeling derived from reason. *GMM*, *supra* note 92, at 4:401; CRITIQUE OF PRACTICAL REASON, *supra* note 261, at 5:76-80; *MM*, *supra* note 31, at 6:399.

264 Stephen L. Darwell, *Two Kinds of Respect, in* Dillon, *supra* note 207, at 181-84; Feldman, *supra* note 259, at 55-56; Meyers, *in* Dillon, *supra* note 207, at 224.

265 DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE 64 (Butterworths 1999).

266 Dillon, *supra* note 207.

267 *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.[268]

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.[269] 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.[270] A response is provided in the strong notion of obligation that adjoins the Kantian concept of autonomy. Kant's concept of autonomy is often critiqued as too individualistic.[271] 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."[272] As I have argued elsewhere, the necessary universal, unconditional duties of respect both for and by the autonomous agent, respond to these critiques.[273] 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.

268 O'NEILL, *supra* note 90, at 83; *see generally id.* at 32-35, 73-95, 96, 99; O'NEILL, *supra* note 254, at 81-165.

269 *MM, supra* note 31, at 6:230; *see also id.* at 6:232 (a right is the reciprocal coercive consciousness of obligation in accordance with the law), 6:231, 6:237.

270 O'NEILL, *supra* note 90, at 82; MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 61-66 (Free Press 1991).

The rights and responsibilities of freedom of expression are set out together, in the European Convention on Human Rights and Fundamental Freedoms, Article 10.

271 GLENDON, *id.*, at 61-66; Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986). Ronald Dworkin correctly places Kant on the side of duty-based morality. R. DWORKIN, *supra* note 68, at 172.

272 Jane Kneller, *The Aesthetic Dimension of Kantian Autonomy*, *in* FEMINIST INTERPRETATIONS OF KANT 174-75 (Robin May Schott ed., Pa. St. Univ. Press 1997) (citing corrections to this picture); *see also* IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 80 (Routledge Press 1970).

273 For a response to the critiques of autonomy, see Treiger-Bar-Am, *supra* note 15.



### 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.[274] Abraham Drassinower recalls Weinrib's interpretation of Kant with regard to the obligations entailed under copyright.[275] 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

274 WEINRIB, *supra* note 16.

275 Drassinower, *supra* note 7; Abraham Drassinower, *Taking User Rights Seriously*, Chapter 16, in Michael Geist ed., IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW (Irwin Law 2005), *see* *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=839988.*

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

276 *Essay, supra* note 12, at 8:85.

277 Leslie Kim Treiger-Bar-Am, *Christo's Gates and the Meaning of Art: Lessons for the Law*, 27(11) EUR. INTELL. PROP. REV 389 (2005) (the public lends meaning to works); Treiger-Bar-Am, *supra* note 19. Rotstein argues for audience rights, Rotstein, *supra* note 84. Lior Zemer calls for the public to be seen as joint author of works. LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (Ashgate Pub. 2007).

278 Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 273, 285-86 (1991); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); Post, *supra* note 263, at 735-38. Post, however, recognizes that today, autonomy is incorrectly taken to mean atomistic, solely self-created identity. Post, *supra* note 263.



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.

279 Kant, CRITIQUE OF PURE REASON, *supra* note 91, at A 314/B 370, *cited in* AUTONOMY AND COMMUNITY: READINGS IN CONTEMPORARY KANTIAN SOCIAL PHILOSOPHY *viii* (J. Kneller & S. Axinn eds., State Univ. of N.Y. Press 1998).