Proceedings Symposium "A New Feudalism of Ideas?"
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PAPER 4:

Examining a paradigm shift in intellectual property: Music copyright around 1800

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On July 19th 1793, the French National Assembly replaced with a single stroke the old system of publishers' rights with a new system of authors' rights. The Assembly of the German Länder agreed in 1837 upon a common minimum protection for authors' rights. What had happened in Paris as an act of revolutionary enthusiasm, was in Germany carefully prepared with discussions in Frankfurt; but in both cases it was a change of paradigm. The basic assumptions of the old system were incompatible with those of the new:

- *Protection of publishers v. protection of authors*
- *Term limitation from the date of publication v. limitation from the author's death*
- *Protection of physical, printed works v. protection of abstract works.*

During the two centuries since, the Authors' Rights paradigm has expanded (and infiltrated the copyright approach of the Common Law countries). New forms of using works fell within the scope of protection, the term of protection has been extended up to 70 years *post mortem auctoris*, and nearly all countries in the world have now signed up to similar systems of protection.

However, since the late 1980s there are again signs that a fundamental shift in the principles underlying protection may be imminent. First was the issue of protecting computer software under copyright. From the mid-1990s, data exchange via the Internet set a new "digital agenda" that continues into the latest discussions about Napster and Gnutella.

Around 1800, as today, economic and technological trends stretched the basic legal assumptions. Copperplate and printed music became cheaper by new printing processes, today by digitalization. Distribution became cheaper by new custom unions on the continent, today

by the Internet. Yet, these technological and economic developments are not sufficient to explain the paradigm change around 1800. Independent of copyright practice and economic arguments a paradigm change will be prepared and facilitated through aesthetic changes and through discussion in the philosophy of law.

In this paper, I shall examine the philosophical and aesthetic developments underlying the paradigm change in the protection of products of the mind as intellectual property that occurred 200 years ago. I shall then point out some principles which might shape a paradigm shift in the digital environment.

Lawyers and economists may be dominating the current discussion: Lawyers proposing appropriate wordings; economists seeking rational answers on how to protect. But the fundamental questions: What is to be protected? And why? cannot be negotiated within those disciplines. In terms of the title of this symposium, it is likely that such a fundamental shift will resemble more a revolution than a retreat.

Work and Person

Authors' Rights were a major topic in the intellectual debate towards the end of the 18th century, in particular relating to philosophical concepts of person and personality. In Fichte's and Hegel's theory, intellectual property was a prototype in legitimizing property rules in general. And even aestheticists and theorists of music were discussing intellectual property in a broader sense.

The sudden protection of abstract works linked to an author's personality can be neatly traced in the case of music. Until the turn of the century, music could be an object of copyright only if it was printed. Printed music was protected together with maps, topographic drawings and other copperplates for a very limited period from competing reprints. Following the statutory interventions of the early 19th century, performance rights, protection of melodies and the ban of arrangements catapulted the music in the upper echelon of abstract 'works of intellect' (*Geisteswerke*).

This advancement of works of music within the copyright discussion coincides with the advancement of music within the aesthetic discussion. Music had been on the lowest level in the old 'paragone', the dispute about hierarchies between the arts. But soon music achieved the status of abstract authored works among romanticists such as Schopenhauer and Nietzsche.

What I call the Authors' Rights paradigm is an amalgam of mainly three assumptions: authors personality, intellectual property and a special concept of a 'work'.

18th-century discussions about bans on reprint were concerned with the interests of publishers as commercial traders. The emerging Authors' Right was based upon their personality. In countries of the civil law tradition, even today every 'work' needs the involvement of an author's personality to receive protection.

18th-century legitimations of Authors' Rights were based on fundamental rights. Philosophers of the enlightenment regarded bans on reprint as a means of protecting the freedom of speech. But since the French revolution and in Germany under Fichte's influence, the law of property was pushed to the forefront.

In Germany, it was in the 1820s and 1830s when both a peculiar *music* copyright was taking shape and the Authors' Rights paradigm in general was established. These were the decades, when Hegel's philosophy had its greatest impact. Hegel's *Philosophy of Right* (1820) said: "Property is the existence of a personality."[1]

What I call the concept of an abstract work in copyright discussions was considerably influenced by the aesthetics of music. In the 18th century, music was one of the genres of the arts without 'works'. Music and Speech is not about 'ergon' but about 'energeia', as Herder und Humboldt[2] puts it, and in 1739 Johann Mattheson called music a 'soundspeech' .

Music was taught and written about in terms of rhetoric, in figures of speech. Music was sound and gestural expression emerging and perishing in performances. Musicians on stage were expressing their *own* emotions in an attempt to evoke similar ones in the audience.

Only with the romantic period music takes the shape of 'works'. It is interesting to find among the most influential theorists of romantic music the Prussian lawyers Novalis, E.T.A Hoffmann and A.B. Marx. How could music become abstract, carrying ideas? Composers put ideas in *their* characteristic forms and encode them in notes. In a performance of the work these ideas are decoded while the performer reads music. Ideas are translated into sounds and thus conveyed to the listeners. Beethoven's for example said in his epigraph to the Missa Solemnis: "Von Herzen möge es wieder zu Herzen gehen". (Coming from heart it may go to heart again).

Schopenhauer's abstraction is even more explicit: "Music is never the phenomenon but the inner essence of all phenomenona. Music doesn't express this or that single, distinct joy or

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[1] Hegel, G. W. F., Grundlinien der Philosophie des Rechts, Hamburg 1995, § 51: "Eigentum" as "Dasein der Persönlichkeit"

[2] Humboldt, W. v., Ueber die Veschiedenheit des menschlichen Sprachbaus, in Works Vol. 6, p. 47: Sprache "ist kein Werk (Ergon), sondern einen Thätigkeit (Energia). Ihe wahre Definition kann daher nur eine genetische seyn. Sie ist nämlich die sich ewig wiederholende Arbeit des Geistes, den articulirten Laut zum Ausdruck des Gedankens fähig zu machen. Unmittelbar und streng genommen, ist dies die Definition des jedesmaligen Sprechens«

grief; but its expresses the JOY itself, or The Grief itself in abstracto whithout any additions even without the motives."[3]

Within the emerging Authors' Rights paradigm, protection had to be built on this aesthetic abstraction. Only if composers could express IDEAS – like literary authors did – was it possible to distinguish within their works between IDEAS in the public domain and FORMS in private property (the idea-expression dichotomy). And moreover: Only if a composer's personality is present in this privately owned form – even if he is personally absent while his work is performed – it will be possible to legitimate performance rights through the fundamental right of free speech.

Within the old paradigm of bans on reprint the author's right of free speech had expired with the sale of the manuscript. Authorship was still recognized but a book once released could not be withdrawn. Dramas and works of music were tied to their authors when the performance rights were legitimized as a kind of permanent right to publish.

As Eduard Gans - a friend of Hegel and a Berlin professor of law writes in the 1820s: "In performances the author exposes himself to the risk of disapproval and thus the dramatic author should be able to decide every time anew to which public he presents his work."[4]

Since that time using a work means not only *to accept* the authorship of a dramatist or a composer. For example like the praise of a baker's craftsmanship when the bread is tasty. Using a work means also recognising that everything ever done with the work is associated with the author's personality. This would be as if we conceded a right to the baker to withdraw his bread from our plates, whenever he judges it to be too little crunchy or too brown.

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[3] Schopenhauer, A., *Die Welt als Wille und Vorstellung I*., ed. Ludger Lütkehaus, Zürich 1988, Vol. I., p. 345f.: "Man darf (…) nie vergessen, daß die Musik (…) nie die Erscheinung, sondern allein das innere Wesen, das Ansich aller Erscheinung, den Willen selbst, ausspricht. Sie drückt daher nicht diese oder jene einzelne oder bestimmte Freude, diese oder jene Betrübniß, oder Schmerz, oder Entsetzen, oder Jubel, oder Lustigkeit, oder Gemütsruhe; sondern DIE Freude, DIE Betrübnis, DEN Schmerz, DAS Entsetzen, DEN Jubel, DIE Lustigkeit, DIE Gemütsruhe selbst, gewissermaßen *in abstracto*, das Wesentliche derselben, ohne alles Beiwerk, also auch ohne die Motive dazu."

[4] Gans, E., *Ueber das Recht zur Aufführung gedruckter Theaterstücke* (1830-1832), p. 381: "Durch die Aufführung tritt das Stück vor ein Publicum, ja es wird der Öffentlichkeit noch ganz anders und in verstärkterem Maaße, wie durch den Druck übergeben. Denn die Presse wirkt nicht auf eine Versammlung, sie wirkt nur auf Einzelne, sie ist also nur im Stande langsam den Eindruck hervorzubringen, den die Aufführung in *einem* Augenblick erzeugt. (…) Die Ansicht, daß jede Bühne ohne weiteres ein gedrucktes Stück, und zwar bloß weil es gedruckt ist, aufführen lassen könne, ist also aus zweien Gründen falsch, denn erstens erlaubt sie, daß man sich mit dem Eigenthum eines Anderen bereichere, zweitens gestattet sie, daß man einen Anderen einer Gefahr aussetze, der er sich vielleicht nicht aussetzen will."

The Right-to-Use: A new paradigm?

Around 1800, the Authors' Rights paradigm was based upon the author's personality, upon intellectual property and upon the abstract work concept. This was because of generally accepted assumptions about what a personality is, about what property means and about what a work of music is. These principles are fragile today. Lawyers will keep a firm hold on traditional categories for as long as possible, exactly the same as in those days when Prussia enacted a modern authors' rights act in 1837 – including performing rights and the protection of arrangements – but holding the 'Re-Print' in its title even at the expense of confusing the terms.

Today, the assumption of a personality tie between the author and his work is implausible. Just think of the fact that copyright in anonymous computer software is readily accepted. While starting Windows 2000 in the morning someone might have Bill Gates in mind but hardly anybody will think of the hundreds or thousand of software developers. The management of Apple has even decided no longer to disclose the names of software authors anticipating competitors could entice them.

A future legal protection might start not from the author's personality but from all users in a broad sense. The composer could be seen as a kind of first user of his/her work being followed by publishers, performers, listeners or dancers.

A future legal protection might not start any longer with the author's death but with the publishing date. Just as the ban of reprint in Europe did in the 18th century and as the US-American copyright did until a few decades ago.

To guard consumer interests, however, all future legal protections will probably stipulate that every performance and print version has to inform about all the parties having worked on this particular version.

A future legal protection might not be tied to a fundamental right in property. (Hegel had to explain even the immorality of slavery from a basic right of ownership). Today the wrong of slavery is generally accepted and can be separated from copyright discussions.

Apart from the rationality of exclusive rights as an economic incentive (for which a very limited term would suffice) it is hard to legitimize proprietary rights from an author's personality. In the UK, there are only a few hundred composers living from copyright royalties alone.

Perhaps a future legal protection might focus again on the right of a person to express him or herself and to speak freely. All instantiations of music could be accepted equally before the

law. For example: inventing melodies, harmonization, sound design, instrumentation, arrangement, performance, sound recording, production, publishing and distribution.

Music practice already anticipates such legal regulations. Today only very few composers claim to create eternally valid works. Even performers and fans of classical music do not believe in the old romanticists concept of authenticity (‘Werktreue’), binding the performers to a supposed author’s last will, deeming the ‘work’ as their obliging testament. Arrangements have found critical and aesthetic acceptance. This was not the case during the times of the Authors’ Rights paradigm.

Today, the old distinction between arrangement and performance is often blurred. Even between works and arrangements an aesthetically reasonable distinction can hardly be found. For example the late operas of Luigi Nono cannot be performed as original works: This is because the crucial effects arise from a sound design that has to be worked out anew for every performance. And is not every user of music software simultaneously a listener, an arranger and a composer?

The confusion will increase. Also the number of copyright regulations will increase. The old paradigm will cling on by its teeth. If and when a shift occurs, it will not happen as a result of rational argumentation but through the conversion of one party of a divided community or as a result of a generational change – like Thomas Kuhn has observed in the history of science.

	Reprinting bans Privilege >1800	**Authors Rights Since 1800**	**Utilization right ?**
Who is protected?	**Publishers** (to a certain extent also authors)	**Authors** (to a certain extent performers and arrangers)	**all 'users'** listeners, arrangers, performers, composers publishers, sound engineers
Legitimation through:	Economic policy Spent capital of the publisher In late 18th century a fundamental right of free speech	Fundamental Right of property protects a permanent connection between the author and his work. Author's Right is to protect "the author in his personal and intellectual relations to the work" (German UrhG § 11)	Economic policy to grant remuneration for a one-time labour Basic Right of communication and free expression
Object of protection is: concrete:	Printed music Name of the composer, title of the work, design of the copperplate	'Works' abstracted from printed music and performances Forms, melodies	Compositions, Arrangements. Performances, Cover-Versions Obligatory list of all 'Pre-Arrangers'

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