

PANEL 4**COPYRIGHT AND THE PUBLIC SPHERE**

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Abstract: Copyright systems have undergone a major expansion at national, regional and international levels over the last two decades in particular. This expansion has been met by trenchant resistance from a broad-based social movement for the defence of the ‘public domain’, which in this context is taken to refer to information resources that are unencumbered by intellectual property rights. There is an emerging tendency to conceptualise the public domain as a kind of cultural ‘environment’, and there have been calls for strategies of ‘environmental preservation’ analogous to those around which the environmental movement took shape in the 1970s. Yet while it is easy to be sympathetic towards the general ambition underlying these arguments, the arguments themselves have not so far been premised on a particularly rich understanding of what ‘culture’ is, what its social dynamics are, and what exactly, therefore, is threatened by IP expansionism in general and copyright expansionism in particular. This paper forms part of an ongoing project to address these questions.

One promising starting point from which to begin to address them is the idea that an author is a kind of speaker (i.e. one who creates works with a view to communicating with a public), that ‘culture’ is the realm in which dialogue between speakers occurs, and that copyright law rightly forms part of the legal framework that facilitates this dialogue. Theories of copyright that adopt this starting point tend to assume that authorial rights (as well as limits on these rights) are legitimised by a more general individual right to freedom of expression. Frequently, however, such theories understand social relations (including relations mediated by speech) broadly on the model of the market: as essentially competitive interactions between atomised, purposively-rational agents; and from this perspective, culture can only be understood as that which develops through these agents’ communicative ‘exchanges’. What I aim to explore in this paper is whether a different, richer, understanding of culture – better equipped to serve as a reference point for the ongoing resistance to the expansion of the copyright system – might emerge from a direct engagement with the philosophy of Immanuel Kant.

Having outlined the context of the paper in the Introduction, I proceed in sections 1

and 2 to survey an emerging literature on the possible implications of Kant's (or Kantian) philosophy for how copyright law is to be understood. In general, this literature reads Kant's writings as bringing into view a fundamental reciprocity between authors' rights and the equivalent rights of users, thereby imbuing the public domain with a rich normative significance. In section 1, I focus on a recent attempt by Leslie Kim Treiger-Bar-Am to derive a right to freedom of expression from Kant's conception of moral autonomy, and a structure of authorial rights (and obligations towards other potential authors) from this right to freedom of expression. In section 2, I examine Abraham Drassinower's project of grounding copyright law in the principle of equal external freedom that animates Kant's legal theory.

While broadly sympathetic to Drassinower's view – that a justifiable copyright regime must be one that secures equal communicative freedom as between authors and 'users' of copyright material – I proceed in sections 3, 4 and 5 to argue that it can only be fully fleshed out by reading Kant's views on the rights of authors (and their publishers) in relation to his vindication of the public use of reason. Drawing in particular on Onora O'Neill's interpretation of the various writings in which Kant explains the basis and significance of the 'freedom to make public use of one's reason in all matters', I argue that what he envisages here is a *structured and principled* freedom – a freedom to engage in what O'Neill has called 'tolerant' communication. On one hand, 'toleration' names a particular attitude toward – indeed a practice in relation to – the communications of other persons: it is a *response* to communication which involves at the very least a recognition on the part of the addressee that she is addressed by another's communication. On the other hand, toleration also names the act of communicating itself in so far as it aspires towards what Kant called 'maturity' – that is, in so far as it aims to be critical and reflective in relation to what we would now call dominant worldviews, hegemonic ideologies, homogenised cultures, embedded traditions or established forms of expertise – while also being open to the mature perspectives of others. To communicate in this spirit of toleration is to participate in a communication community which is engaged in a collective project – that of advancing towards what Katerina Deligiorgi has called 'a culture of enlightenment'. I argue that it is this community, animated by this project, that constitutes the public sphere; and it is the defence of the public sphere – not the 'public domain' as such – that is truly at stake in contemporary resistances to copyright expansionism. It is when Kant's writings on publishing and publicity are read in relation to each other that they not only illuminate the emancipatory potential of

these resistances, but also contribute more positively to a re-thinking of copyright's role in relation to the public sphere.

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