Commentary on Fichte's "The Illegality of the Unauthorised Reprinting of Books": An Essay on Intellectual Property During the Age of the Enlightenment

Graham Mayeda*

THIS ARTICLE IS A COMMENTARY ON THE AUTHOR'S English translation of JG Fichte's *Proof of the Illegality of the Unauthorised Reprinting of Books: An Argument and a Parable*, written in 1793. The text is an interesting statement of Fichte's natural law interpretation of copyright law. In his commentary, Mayeda compares and contrasts competing theories of intellectual property of Fichte's contemporaries, including Immanuel Kant, GWF Hegel and John Locke. Mayeda also describes those elements unique to Fichte's argument that will be taken up again in his later philosophical works, which articulate an intersubjective approach to law.

CET ARTICLE EST UN COMMENTAIRE DE LA TRADUCTION ANGLAISE du texte intitulé « Proof of the Illegality of the Unauthorised Reprinting of Books: An Argument and a Parable » de l'auteur JG Fichte, rédigé en 1793. Ce texte comporte un exposé intéressant sur l'interprétation que Fichte a faite de la législation sur le droit d'auteur sous l'angle du droit naturel. Dans son commentaire, Mayeda compare des théories concurrentes de la propriété intellectuelle élaborées par les contemporains de Fichte, notamment Immanuel Kant, GWF Hegel et John Locke. Mayeda décrit également les éléments uniques à l'argumentation de Fichte qui seront repris dans ses travaux philosophiques ultérieurs, dont se dégage une approche intersubjective du droit.

* Associate Professor, Faculty of Law, University of Ottawa. I would like to thank Ernest Weinrib and Abraham Drassinower who originally hired me to translate Fichte's text when I was a J.D. student at the University of Toronto

Commentary on Fichte's "The Illegality of the Unauthorised Reprinting of Books": An Essay on Intellectual Property During the Age of the Enlightenment

Graham Mayeda

1. INTRODUCTION

THE UNIQUE ASPECTS OF JOHANN GOTTLIEB FICHTE'S (1762–1814) legal theory only crystallised into a coherent theoretical whole with his publication, in 1796, of the *Foundations of Natural Right*.[1] Nevertheless, it is instructive to look at his earlier works, such as the present essay on the reprinting of books, since these foreshadow some of the ideas that would later emerge. Picking up on this development in Fichte's thought, my explication of Fichte's article will serve two functions. First, it indicates those elements unique to Fichte's argument that will be taken up again in later works. Second, it articulates Fichte's rights-based natural law approach to copyright law, which is both novel and distinctly modern.

Fichte's work remains relevant to contemporary debates about intellectual property because, in addition to articulating a rights-based theory of copyright, it provides a critique of competing theories. As we will see, Fichte rejects Locke's labour theory of property because it fails to capture the idea that creative works are unique expressions of the creator's thought and expression. Fichte also spends considerable time combating the theory of utilitarianism, which has established itself today as the principal justification for protecting intellectual property. In "Proof of the Illegality of the Unauthorised Reprinting of Books" he does this in two ways. First, he states that there is absolutely no need to consider arguments about the utility of the reprinting of books if it can be shown that the practice of reprinting is a violation of the idea of right itself. Fichte thus addresses the shortcomings of utilitarianism as the foundation of a legal and moral theory. Second, he demonstrates the shortcomings of the utilitarian position by exposing the contradictions that arise within the arguments of its advocates.

Fichte also discusses many other important issues in modern copyright law in his article. Although he does not do so explicitly, in his rejection of his

1. Johann Gottlieb Fichte, *Foundations of Natural Right* (Cambridge University Press, 2000) [page references are to the German edition as cited in the English translation: Immanuel Hermann Fichte (ed.), *Fichtes Werke*, vol. 3 (Berlin: Walter de Gruyter & Co., 1971).].

opponent's arguments, Fichte articulates what has come to be known as the moral rights of the author. Moreover, in articulating these rights, he goes further than his contemporaries in providing a theoretical justification for these rights based on the nature of the author's creative process. Fichte also argues that the recognition of property rights has implications for fair competition—it would be unfair for the creator of a unique work to remain uncompensated for the time invested in the creation.[2] Fichte's theory of property is distinguished from that of his contemporaries because it gives a prominent role to the relationships between people, rather than focusing solely on the individual. In my view, the intersubjective approach that Fichte develops is quite different from the view of Immanuel Kant and other contemporary rights-based legal theories. These theorists only take into account intersubjectivity in two regards: first, they consider that an individual's rights are limited by the equal rights of another; second, they consider that corrective justice requires that the defendant is only liable for the damage suffered by the plaintiff— i.e., damages serve the primary function of correcting the wrong suffered by the plaintiff.[3] Law deals with the fact that two isolated individuals have come into contact, and its purpose is to regulate the results of this contact. In contrast, Fichte sees intersubjectivity as playing a more substantive role in constituting rights. For him, we can only conceive of the individual in the context of a relation with others,[4] which leads Fichte to the conclusion that we are bound to others "by our very existence."[5] Law does not simply arise from the necessary encounter of isolated individuals, but from the fact that human existence is necessarily intersubjective existence.[6]

Finally, Fichte's essay on copyright tries to answer some of the questions that have constantly plagued rights-based views of intellectual property: What is the unique intellectual aspect of a creative work? How does this unique aspect relate to the individuality of its creator? and How does this originality give rise to a property interest? The answers to these questions raise difficult issues about the functioning of our intellect. Fichte's unique epistemology provides an original answer about the nature of this functioning and, as a result, it provides an original answer to these questions. Unlike his contemporary, Kant, Fichte considers the creation of knowledge to involve both the external object and the imprint of the free individual who perceives it. While Kant denied the possibility of true objectivity because of our inability to know things as they are independent of our perceptions of them, Fichte considered objects as real limits on the power of our

2. Johann Gottlieb Fichte, "Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Räsonnement und eine Parabel (1793), (2008) 5:1&2 *University of Ottawa Law & Technology Journal* 141 at pp. 171-197; Johann Gottlieb Fichte, "Proof of the Illegality of the Unauthorised Reprinting of Books: An Argument and a Parable," trans. Graham Mayeda, (2008) 5:1&2 *University of Ottawa Law & Technology Journal* 141 at pp. 171-197 at para. 22.
3. See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); and Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge University Press, 1999), for examples of contemporary rights-based legal theories.
4. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 45:

> [T]he concept of individuality is a *reciprocal concept*, i.e. a concept that can be thought only in relation to another thought, and one that (with respect to its form) is conditioned by another—indeed by an *identical*—thought. This concept can exist in a rational being only if it is posited as *completed* by another rational being. Thus this concept is never *mine*; rather, it is—in accordance with my own admission and the admission of the other—*mine and his*, *his and mine*; it is a shared concept within which two consciousnesses are unified into one.

5. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 45.
6. Fichte, *Foundations of Natural Right*, *supra* note 1 at pp. 37–38.

intellect, thereby escaping the charge of scepticism launched against Kant.

Having given a brief overview of the unique arguments that Fichte presents in "The Proof of the Illegality of the Unauthorised Reprinting of Books," some historical context will now be provided to help situate Fichte's views.

*

2. HISTORICAL CONTEXT OF FICHTE'S ARTICLE

FICHTE'S ARTICLE APPEARED IN THE *BERLINISCHE MONATSSCHRIFT* in 1793, although it had originally been written in 1791.[7] It was a response to an article by Johann Albert Heinrich Reimarus, titled "The Publishing House Considered Once More in Relation to Writers, Publishers, and the Public."[8] Fichte's article, which follows his teacher Kant's article by eight years,[9] appears to have been widely read by his contemporaries, as can be seen from its inclusion in a book by Ernst Martin Gräff, which reviewed and discussed the influential contributions to the German debate on the nature of copyright.[10] It was published at a time when the new idea of copyright was replacing the older doctrine of privilege. In 1774, in the case of *Donaldson v Becket*,[11] the House of Lords recognized the author's ownership of his work, but permitted Parliament to set limits on this right, for instance by limiting the duration of copyright.[12] The period leading up to and following this decision sparked intense debate in regard to the nature of intellectual property rights, both within England and continental Europe.[13] Fichte's article, which mentions recent court decisions recognizing the right of authors in their work, is just one of many German contributions to this debate. Other intellectuals who waded into the German debate included Immanuel Kant,[14] Gotthold Ephraim Lessing,[15] Johann Stephan Pütter,[16] Rudolph Zacharias

7. Jocelyn Benoit, "En guise d'introduction au texte de Fichte," in Emmanuel Kant, *Qu'est-ce qu'un livre? Textes de Kant et de Fichte* (Presses Universitaires de France, 1995) 98–117 at pp. 98–99.
8. JAH Reimarus, "Der Bücherverlag in Betrachtung der Schriftsteller, der Buchhandler und des Publikums, abermals erwogen," 1791:1 *Deutsches Magazin* 383–414, <http://www.ub.uni-bielefeld.de/diglib/aufkl/deutschmaga/deutschmaga.htm>.
9. Kant, "Von der Unrechtmäßigkeit des Büchernachdrucks," 1785:1 *Berlinische Monatsschrift* 403–417, <http://www.ub.uni-bielefeld.de/diglib/aufkl/berlmon/berlmon.htm>, reprinted in Königlich Preußischen Akademie der Wissenschaften, ed., *Kant's gesammelte Schriften*, vol. 8 (Berlin: Walter de Gruyter, 1923) 77–87. For an English version, see "On the Wrongfulness of the Unauthorised Publication of Books," in Immanuel Kant, *Practical Philosophy*, Mary J Gregor, ed. (Cambridge University Press, 1996) 23–35. It appears that Fichte had not read Kant's article when he wrote his own in 1791. See Benoit, "En guise d'introduction au texte de Fichte," *supra* note 7 at p. 99.
10. Ernst Martin Gräff, *Versuch einer einleuchtenden Darstellung des Eigenthums und de Eigenthumsrechte des Schriftstellersund Verlegers und ihrer gegenseitigen Rechte und Verbindlichkeiten* (Leipzig: Gräff, 1794).
11. *Donaldson v Becket* (HL, 1774), 98 *English Reports* 257.
12. Alain Strowel, "Droit d'auteur and Copyright: Between History and Nature," in Brad Sherman and Alain Strowel, eds., *Of Authors and Origins: Essays on Copyright Law* (Clarendon Press, 1994) 235–253 at p. 242. See also Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993) at p. 5.
13. Mark Rose, "The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship," in Sherman and Strowel, *Of Authors and Origins, supra* note 12, 23–55. On the "debate over the book" in Germany, see Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author," (1984) 17:4 *Eighteenth-Century Studies* 425–448, <http://www.case.edu/affil/sce/authorship/Woodmansee.pdf> at pp. 440–448; and Rose, *Authors and Owners*, *supra* note 12 at p. 131.
14. Kant, "Von der Unrechtmäßigkeit des Büchernachdrucks," *supra* note 9 at pp. 403–417.
15. Gotthold Ephraim Lessing, "Live and Let Live," in Herbert G Göpfert, *Werke* (Carl Hanser, 1973), vol. 5, as cited in Woodmansee, "The Genius and the Copyright," *supra* note 13. Originally written in 1772, published posthumously. See also Carla Hesse, "The Rise of Intellectual Property, 700 B.C. –A.D. 2000: An Idea in the Balance," (2002) 131:2 *Daedalus* 26–45. <http://www.forumonpublicdomain.ca/?q=system/files&file=The%20Rise%20of%20IP%20-%20Carla%20Hesse.pdf>, pp. 34–35.
16. *Der Büchernachdruck nach ächten Grundsätzen des Rechts* (Göttingen; Wittwe Vandenhoeck, 1774).

Becker[17] and Johann Gottfried Herder[18] among others.

The era in which Fichte published his article in the *Berlinische Monatsschrift* was characterised by the emergence of the author in the modern sense of the word, i.e., as the creator of an original text. Prior to and during the Renaissance, the author was considered more of an artisan than an artist, a person whose inspiration came from without, either from God or some muse, rather than from within.[19] However, with the Enlightenment emerged the idea of the author as generator of creative ideas.[20] This transformation of the concept of author made it possible to consider the existence of a property right in an original work. Previously, because a work was considered to be the response to some external muse or a result of the inspiration of God, the author's proprietary entitlement to the work was much weaker. Indeed, initially, the right of the author was not thought to extend beyond the physical material of the manuscript.[21] But once the muse was internalized, it became easier to acknowledge the existence of a closer relationship between the author and her work.[22]

The concept of privilege that copyright came to replace was rooted in the older view of authorship. According to this view, a book was a means for transmitting ideas received by the author from external sources. As a result, the compensation that an author received from a publisher for his work was considered to be an *honorarium*, rather than payment for the work itself. As Woodmansee points out, "[t]he honorarium an author might expect to receive for his work bore no relationship to the exchange value of that work but was rather an acknowledgment of the writer's achievements."[23] As the publication of books became more widespread during the eighteenth-century, the reproduction of books without the permission of the author or the original publisher became more prevalent. To protect the emerging class of publishers and printers, *privilege* was extended to them, which gave them an exclusive license to produce a particular work until they had realised a profit.[24] The privilege was extended to a printer by

17. *Das Eigenthumsrecht an Geisteswerken* (Frankfurt/Leipzig: no publisher, 1789).
18. Roger Chartier, "Figures of the Author," in Sherman and Strowell, *Of Authors and Origins*, *supra* note 12, 7–22 at p. 15.
19. Woodmansee, "The Genius and the Copyright," *supra* note 13 at pp. 426–427. See also Buyora Binder, "The Law-as-Literature Trope," in Michael Freeman and Andrew DE Lewis (eds.), *Law and Literature* (Oxford: Oxford University Press, 1999) 63 at 65-66.
20. Rose, *Authors and Owners, supra* note 12 at p. 6. See also Paul Edward Geller, "Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?" in Sherman and Strowel, *Of Authors and Origins*, *supra* note 12, 167–201 at p. 168; and Martha Woodmansee, "On the Author Effect: Recovering Collectivity," in Martha Woodmansee and Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press, 1994) 15–28 at pp. 16, 27.
21. Rose, *Authors and Owners*, *supra* note 12 at p. 9 ("the bookowner's property was not a right in the text as such but in the manuscript as a physical object made of ink and parchment.") and p. 17 ("Authors may not have owned their texts, but they did of course own their manuscripts, the physical objects they had made with their own hands or caused to be made").
22. See Rose, "The Author as Proprietor," *supra* note 13 at p. 52, where Rose discusses how the late eighteenth-century debates about the nature of property rights went hand-in-hand with the Romantics' novel view that works of art were the "expression of the unique personality of the artist."
23. Woodmansee, "The Genius and the Copyright," *supra* note 13 at pp. 434–435. See also Rose, *Authors and Owners*, *supra* note 12 at p. 17 ("the actions of the republic and the king [in granting privilege] are perhaps best understood in terms of 'honor' and 'reward' rather than 'property'").
24. Rose points out that copyright was traditionally a right of the publisher, not the author. See Rose, "The Author as Proprietor," *supra* note 13 at p. 27. See also David Saunders, "Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright," in Sherman and Strowel, *Of Authors and Origins*, *supra* note 12, 93–110 at p. 94; and L Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968) at p. 146.

the local ruler, though it was also occasionally granted to authors.[25] While it might appear that the idea of *privilege* was an early form of copyright protection, in fact, it was aimed at ensuring the viability of a printer's business rather than being a recognition of the author's property right in the book.[26] As well, the privilege did not really afford legal protection, since it was a conditional grant to a printer rather than a law derived from the right of the author.

This background is important to keep in mind because Fichte often refers to the system of *privilege* in his article. For Fichte, the granting of privilege is the creation of a positive law which is an exception to a natural law. If the positive law forbids the reprinting of books for a limited period, then the natural law to which it is an exception must be a permissive law allowing anyone to reprint a book. However, Fichte disagrees that this is the natural law view of ownership in a creative work. He goes on to demonstrate that books differ from other goods for which privileges are granted. As a result, the system of privilege is unsuited to them. Books should not be protected against reprinting as an exception to a permissive natural right. Instead, he argues that there is a natural property right in books derived from the nature of the book and the nature of the human creative process. The prohibition on the reprinting of books follows from an innate right, and any utilitarian arguments aimed at undermining the granting of privilege to a publisher or printer thus misses the mark, since they do not consider the relationship between the author and her work as determinative of the relationship between the author and the public.

*

3. FICHTE'S PLACE IN GERMAN PHILOSOPHY

BEFORE TURNING TO AN INTERPRETATION OF FICHTE'S views on intellectual property, a few words about Fichte's place in German philosophy of the eighteenth- and nineteenth-centuries might be helpful. Fichte initially perceived himself as an interpreter of Immanuel Kant.[27] He was inspired by Kantian philosophy, but, in his view, some difficulties with Kant's views remained to be solved. One of the primary difficulties that Fichte saw with Kantian philosophy was that it did not appear to deal adequately with scepticism. The primary culprit, according to Fichte and many of Kant's critics, was Kant's dualism—his view that sensibility and the understanding, or appearance and concepts—were separate.[28] This separation led to scepticism because it suggested that all knowledge of the external world is subjective, as we can only know it by means of our senses. A related problem was Kant's claim that the nature of human knowledge meant that "things in themselves" could never be known in any way other than through our subjective sensible capacity.[29]

25. Rose, *Authors and Owners*, *supra* note 12 at pp. 10–11; John Feather, "From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries," in Woodmansee and Jaszi, eds., *The Construction of Authorship*, *supra* note 20, 191–209 at pp. 192–193.
26. Woodmansee, "The Genius and the Copyright," *supra* note 13 at p. 437.
27. Peter Baumanns, *JG Fichte: Kritische Gesamtdarstellung seiner Philosophie* (Karl Alber, 1990) at p. 20.
28. Frederick Beiser, "The Enlightenment and Idealism," in Karl Ameriks, ed., *The Cambridge Companion to German Idealism* (Cambridge University Press, 2000) 18–36 at p. 29; Peter Rohs, *Johann Gottlieb Fichte* (Beck, 1991) at pp. 32–33.
29. Rohs, *Johann Gottlieb Fichte*, *supra* note 28 at pp. 33–34.

Shortly after Fichte took up his first university teaching post in Jena in 1794,[30] his attempts to address the criticisms of Kantian critical philosophy[31] led him to become a rising star in the German intellectual world, although this fame was short-lived.[32] In his attempts to extricate Kantian philosophy from its difficulties, Fichte argued that the subject is not passive, but rather actively engaged in affecting the objective world. It is through this "striving toward the world" that the resistance of external objects is experienced, and this resistance constitutes the objectivity of external things.[33] Through this active mastery of objects external to the self, they begin to conform to humans' rational ideas of them. And yet, a purely rational idea is impossible. As a result, Kant's view that humans are merely passively acted upon by objects is false—humans also act on the world—and yet, as Kant maintained, humans cannot entirely make the world conform to their ideas of it.[34]

Fichte's attempt to overcome the difficulties with Kant's philosophy was both an inspiration[35] and a target for later German idealists such as Hegel.[36] Indeed, after the Atheism Controversy,[37] criticism of Fichte mounted on all sides. For example, Hegel's publication of *The Difference Between Fichte's and Schelling's System of Philosophy* in 1801 provided a trenchant critique of Fichte's philosophy and demonstrated the superiority of Schelling's views over those of Fichte. Among other criticisms, Hegel argued that Fichte's attempt to ground objectivity in the striving ego failed to overcome the dualism that plagued Kant's philosophy. According to Hegel, the ego that strives and the object that limits the ego are never satisfactorily united.[38] Fichte, unable to adequately meet the objections of Hegel and his contemporaries, never quite regained the philosophical stature that he enjoyed in the mid- to late-1790s. Nevertheless, Fichte's early works, of which the present essay on the "The Proof of the Illegality of the Unauthorised Reprinting of Books" is an example, are an important contribution to, and elaboration of, German idealism generally, and more specifically, an elaboration of a rights-based approach to law. Indeed, when compared to Kant's early comments on the subject of reprinting, Fichte's essay is a much more systematic explanation of the origin and nature of copyright than that provided by Kant.[39] However, before exploring Fichte's theory of intellectual property in greater depth, it is helpful to turn now to a brief overview of theories of intellectual property of Fichte's contemporaries.

---

30. Rohs, *Johann Gottlieb Fichte*, *supra* note 28 at p. 13.
31. Rohs discusses how Fichte's philosophy was in part inspired by the desire to overcome Kantian dualism. *Johann Gottlieb Fichte*, *supra* note 28 at p. 146.
32. Following the "Atheism Controversy" of 1798–1799, Fichte was soon supplanted by FW Schelling as the pre-eminent German philosopher (Rohs, *Johann Gottlieb Fichte*, *supra* note 28 at p.145). On the Atheism Controversy, see George di Govanni, "From Jacobi's Philosophical Novel to Fichte's Idealism: Some Comments on the 1798-99 'Atheism Dispute,'" (1989) 27:1 *Journal of the History of Philosophy* 75–100; and Rohs, *Johann Gottlieb Fichte, supra* note 28 at p. 111–120.
33. Rohs, *Johann Gottlieb Fichte*, *supra* note 28 at p. 60.
34. Beiser, "The Enlightenment and Idealism," *supra* note 28 at p. 30.
35. Baumanns, *JG Fichte*, *supra* note 27 at p. 20.
36. Baumanns, *JG Fichte*, *supra* note 27 at p. 60–61.
37. For a good account of the controversy, see Rohs, *Johann Gottlieb Fichte, supra* note 28 at p. 111–120.
38. HS Harris, "Introduction to the *Difference* Essay," in G.W.F. Hegel, *The Difference Between Fichte's and Schelling's System of Philosophy* (State University of New York Press, 1977) 1-78 at p. 36. See also Hegel's exposition of this problem. Hegel, *The Difference Between Fichte's and Schelling's System, ibid* at 119–126.
39. Geller, "Copyright between Marketplace and Authorship Norms," *supra* note 20 at p. 169.

*

4. THEORIES OF INTELLECTUAL PROPERTY AT THE TIME OF FICHTE

IN FICHTE'S TIME, THERE WERE THREE MAIN THEORIES of intellectual property: first, the "labour theory" propounded by John Locke; second, the utilitarian view; and third, the rights-based natural law view articulated by Immanuel Kant, which GWF Hegel developed in a slightly new direction well after Fichte had written "Proof of the Illegality of the Unauthorised Reprinting of Books."

The utilitarian view of intellectual property rights holds that the protection of these rights aims at improving social utility. This is expressed by William Fisher, who states that for utilitarians, the "lawmakers' beacon when shaping property rights should be the maximization of net social welfare."[40] The utilitarian view had initially been developed by Jeremy Bentham[41] and John Stuart Mill,[42] and it has received more recent treatment by scholars such as William Landes and Richard Posner, who explain that the purpose of copyright law is to promote economic efficiency. To achieve this goal, the law must "maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection."[43]

David Vaver states that modern intellectual property law, in addition to being based on the need to prevent unfair competition between those who incur research and development costs and those who do not, adheres to two moral imperatives: "everyone should own the product of their own mind; nobody should reap what they have not sown."[44] These two imperatives recall John Locke's view of property. Locke argued that a person should be entitled to the natural results of her labour and that the state therefore has an obligation to protect this entitlement.[45] Vaver assigns normative force to Locke's argument, although there has been debate about whether Locke should be interpreted as arguing that there are normative reasons for rewarding labour or whether he simply meant that in order to motivate people to labour we must provide a reward for this labour.[46] As well, some have questioned whether Locke's view provides a theory of property that can apply to intellectual property, given the difficulty of determining what constitutes "mental labour."[47]

The third justification for property rights is a rights-based justification derived from Kant and developed by Hegel. On this view, the exercise of human

---

40. William Fisher, "Theories of Intellectual Property," in Stephen R Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168–199, <http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf> at p. 169.
41. See Jeremy Bentham, *A Manual of Political Economy* (Putnam, 1839).
42. See John Stuart Mill, *Principles of Political Economy*, 5th ed. (Appleton, 1862).
43. William Landes and Richard A Posner, "An Economic Analysis of Copyright Law," (1989) 18 *Journal of Legal Studies* 325–363 at p. 326.
44. David Vaver, "The Future of Intellectual Property Law: Japanese and European Perspectives Compared," WP 09/99, *OIPRC Electronic Journal of Intellectual Property Rights* (1999), <http://www.oiprc.ox.ac.uk/EJWP0999.pdf > at p. 2.
45. Fisher, "Theories of Intellectual Property," *supra* note 40 at p. 171. See also John Locke, *The Second Treatise of Government* (Bobbs-Merrill Company, Inc., 1952), <http://www.gutenberg.org/etext/7370> at s. 27. See also Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) at pp. 174–182 for a discussion of Locke's view and his famous "proviso" that there must be "enough and as good left in common for others" after a person has acquired property through mixing her labour with it.
46. Justin Hughes, "The Philosophy of Intellectual Property," (1988) 77:2 *Georgetown Law Review* 287–366, <http://www.justinhughes.net/docs/a-ip01.doc> at p. 296.
47. Fisher, "Theories of Intellectual Property," *supra* note 40 at p. 185.

labour on physical things is a manifestation of our freedom.[48] The state ought to protect property rights either because property manifests the exercise of a free will or because "private property rights are crucial to the satisfaction of some fundamental human needs."[49] Fichte's view can be made to fit with such a rights-based theory of intellectual property. His view is that intellectual works manifest a form that expresses the unique personality of the individual, and recognition of this unique form is the basis for the author's right in the work. However, Fichte's view is not an exact fit with the traditional articulation of the rights-based approach. Fichte does acknowledge that an intellectual work is the expression of an individual's unique personality. However, in his *a priori* arguments for the proof of the existence of copyright, he provides a phenomenological justification for this. In his view, the individuality of each person's ideas is evident in the inability of any person to use the images or form of the ideas of another to express his own ideas. The inaccessibility of the minds of others, which is part of our everyday experience, thus leads us to the conclusion that the form of each person's expression is unique. This view differs from Kant's, which is based on the idea that a state that does not protect property fails to recognize the freedom of the individual. For Kant, freedom entails freedom over objects and hence possession. If the state does not protect property, human freedom is limited by the need to constantly protect one's possessions.[50] Unlike Fichte, Kant's view of property does not depend on a recognition of the unique imprint of a person's individuality on his creative works.

Fichte's view also differs from Hegel's more elaborate justification of property. For Hegel, the recognition of property in things that we possess is the recognition of the individual's power over the external world, and hence, a manifestation of his freedom. Or in Justin Hughes' words, "[t]hrough society's acceptance of the individual's claims upon external objects, *possession* becomes *property*, and the expression of the individual becomes more objective."[51] The recognition of a right to property is an increase in freedom because, for Hegel, "social recognition of a person's claims to private property demonstrates that the individual's claims comport with that social will."[52] Fichte does not provide a justification for the recognition of a property right on the basis of a recognition of a fundamental aspect of human nature such as freedom that is the foundation of a normative system. Instead, his view is based on our experience of generating ideas. Only later, as we will see when we examine the relationship between Fichte's views in "Proof of the Illegality of the Unauthorised Reprinting of Books" and his subsequent works, will we understand how this essay foreshadows Fichte's view that right is related to self-consciousness. It is only in these later works that we come to see how a legal right can be derived from the phenomenological observation that the form of a work is the expression of the unique personality of an individual.

48. For modern interpretation of this view, see Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993); and Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988).
49. Fisher, "Theories of Intellectual Property," *supra* note 40 at p. 171.
50. See Ernest Weinrib, "Poverty and Property in Kant's System of Rights" (2003) 78:3 *Notre Dame Law Review* 795–828.
51. Hughes, "The Philosophy of Intellectual Property," *supra* note 46 at pp. 333–334.
52. Hughes, "The Philosophy of Intellectual Property," *supra* note 46 at p. 334.

Having located Fichte's work among the theories of property common at the time he was writing, it is now worthwhile to turn to an elaboration of his view of the nature of copyright. Fichte's article is divided into two sections. The first furnishes an argument that supports Fichte's view. The second parodies the position of the utilitarian defenders of the reproduction of books by means of a parable. The first section is divided into three sub-sections. The first deals with an *a priori* deduction of the property right of the author in her book. The second deals with an *a posteriori* argument, in which it is advanced that the principles proposed by Fichte are corroborated by the actual practice of authors. This section uses an intuitive appeal to current practice and norms to demonstrate that they are consistent with the natural rights position. Finally, he demonstrates the incoherence of the utilitarian position.

*

5. PROOF OF THE EXISTENCE OF A RIGHT IN BOOKS

5.1. The a priori *Proof of the Existence of Copyright*

FICHTE GROUNDS HIS INVESTIGATION OF COPYRIGHT in the newly emergent conception of authorship outlined above. He begins with the proposition that it is possible to own something which is not itself physical. As we have seen, this is a departure from the earlier view that all ideas exist in the public domain and that the author is merely someone inspired by external sources to articulate these ideas. Fichte argues that if he can demonstrate that a book contains non-physical elements that are not part of the public domain, then there must be a property right in those elements.

According to Fichte, the physical aspects of the book—the paper, ink, board and thread of which it is composed—are undoubtedly the property of the publisher until they are transferred to the buyer. The buyer of a book acquires a right to the physical book itself. This is because if the right to the physical material were not transferred, any use of the book by the purchaser without the permission of the author or publisher would be a violation of the latter's right to physical integrity. However, it is not self-evident that the intellectual aspects are transferred to the buyer. There are two different intellectual aspects to the book according to Fichte. These are the *ideas* (what Fichte calls the "material" or "content" of the book) and the *expression* of the ideas (which Fichte calls their "form"). Further to the right to the physical object, the buyer also acquires a right to the ideas contained in the book. Once expressed by the author, these ideas become part of the public domain and can be acquired by anyone who takes the time to study the book and who has sufficient intelligence to understand the ideas contained in it.

There are two reasons that Fichte gives for why ideas become part of the public domain. The first is that the acquisition of the ideas entails no interference with the thoughts or physical person of the author. Rather, the ideas are acquired through independent study by the reader. The second is that, in producing the book for public consumption, the author must have wished to communicate the ideas and share them with others. The desire to communicate is rooted in

the author's need to harmonise her thoughts with those of others. This will to communicate, which ensures that the acquisition of the author's ideas is not a violation of the author's right, is expressed in Fichte's assertion that no-one could wish to "teach facing empty walls" or "write books which no-one reads."[53]

In contrast to the right of the public to use the ideas contained in the work, the right to appropriate and use the form in which the ideas are expressed is not transferred to the purchaser. The form of the expression is a creation of the author; it is a unique expression of her personality. It follows from this that any use or appropriation of the form entails a violation of the personality of the author. Insofar as the reprinting of a book without the permission of the author represents an appropriation of the author's personality against her will, it is an infringement of her individuality, which is protected as her natural right in virtue of her personhood.

With regard to the uniqueness of ideas, Fichte argues that while ideas can be appropriated by others, the connections between ideas and the way in which the ideas are expressed are unique to every individual. He uses two arguments to prove this proposition. First, he argues that from a probabilistic point of view, it is highly unlikely that two people who do not know each other well would connect ideas or represent them in the same way.[54] His second argument is that, not only is it highly unlikely that two people would structure their thoughts in the same way, in fact, in absorbing ideas from others or from the external world, it is impossible that these thoughts be given the same form or be connected to other thoughts in the same was as they were in the minds of others. This is because ideas must be represented through images, and the only images available to the individual are her own. Without access to the minds of others, there can be no similarity between the connections of ideas in the mind of one individual and the connections in the mind of another. Whenever a person reads a book, the ideas contained in it are appropriated by the reader into his thoughts and given the unique form that the reader's mind generates by analogising the ideas of the author with the ideas and connections between ideas present in the mind of the reader. As Fichte says, "everything that we are to think must be thought in terms of the analogy with our other ways of thinking,"[55] and as a result, our appropriation of the ideas in a book necessarily involves giving them a new form unique to the reader.

It would seem to follow from this argument that the appropriation of the way in which the author expressed a series of ideas is a violation of the unique personality of the author, who has given form to ideas that no one else was capable of giving them. Fichte expresses this conclusion somewhat obscurely by claiming that, because it is impossible for another to appropriate the form of ideas given by the author to them, the author could not have intended that the form of the thoughts and the means by which they are expressed be transferred to the reader. Through this obscure formulation, Fichte emphasizes the innate right of the individual to control aspects of her own personality.

One could argue that if it is impossible for a reader to appropriate the form given to ideas by the author, then the reproduction of these ideas ought not

53. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 6.
54. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 8.
55. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 8.

to be forbidden, since no reader of an illegitimate reproduction could appropriate the personal imprint of the author contained in the expression of the ideas. However, at issue is not the reader's understanding of the ideas, but rather the representation of the form of the expression as authorised by the author. The production of an unauthorised edition is a violation of the author's right because, while it acknowledges that she is the creator of the communication, it ignores the author's right to the form, i.e., the fact that the unique form she has given to the communication of an idea is a representation of a unique aspect of her personality. As Fichte later states, the problem is not that the illegitimate publisher fails to acknowledge that the author wrote the words, but rather, that he fails to recognise her status of author,[56] and thereby the imprint of her personality on the words.

This difference can be made clearer if we recall the distinction between the Enlightenment concept of author and earlier conceptions of authorship. If the author is merely the vessel for some external creative inspiration, then the reproduction of the author's work poses no problem since the author was not its source. But if the author is considered as providing her own inspiration, then the reproduction of the author's work without her permission fails to recognise that she is the source of the ideas, as attested to by the unique form that she has given to the communication.

Hidden behind Fichte's argument is a view about the nature of right itself. In this first section of his argument, Fichte does not appeal to the actual practice of authors and publishers or to existing law. Rather, he appeals to what can be deduced *a priori* from the fact that each person is a unique individual. He points out that the uniqueness of each individual precludes others from claiming as their own those things which express the individual's unique personality. The hidden premise of this argument is that the nature of humans as free and unique individuals entails that their unique personality be free from interference by others. In the case of their physical person, this means recognition of rights in physical property, since the appropriation of the physical property of another would entail violation of the bodily integrity of the person who possesses the object. In the case of intellectual property, the idea of right entails recognition of a right in the form in which ideas are expressed, since the appropriation of this form without permission is a failure to recognise that this form could only arise from the unique manner in which the individual connects ideas and represents them to herself. It is from this idea of right and the nature of human creative expression that Fichte derives the two rights of the author: her right to be recognised as the author of the work and her right to exclude others from appropriating that work.[57]

In deriving an *a priori* right to intellectual property, Fichte provides a more elaborate explanation of a rights-based justification for copyright than Kant. For while Kant contents himself with arguing against the legality of reprinting primarily based on the relationship between the publisher and the author, in which the former is the authorised representative of the latter,[58] Fichte's arguments lead back to a rights-based understanding of law and a rejection of competing

56. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 11.
57. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 9.
58. Kant, "Von Der Unrechtmäßigkeit des Büchernachdrucks, " *supra* note 9 at p. 79. Kant also describes this relationship in terms of the "mandate" given to the publisher by the author (see Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor, ed. (Cambridge University Press, 1996) at p. 72).

utilitarian conceptions. This has led Benoit to claim that Fichte appears "more Kantian than Kant."[59]

5.2. The Proof of the Argument a posteriori

Having deduced the right of the author in her work from the nature of the book and the idea of right entailed by a recognition of human individuality, Fichte then turns to the actual practices of publishers and authors to demonstrate that the rights of the author that he has deduced *a priori* are able to justify this practice. He examines each of the aspects of the book in turn: its physical aspect, its content, and the form in which the content is expressed. With regard to the physical aspects of the book, the existence of libraries demonstrates that the right of the author in a book that has been sold to another is not in the physical object itself. If it were, then the author would have a legitimate claim that libraries are a violation of her rights. However, while it is evidently financially disadvantageous to the author, as the *seller* of books, to have them available in libraries, the fact that the author has no right to prevent the lending of books through libraries demonstrates that, with the sale of the book, the right in the physical object has been transferred to another.[60] This transfer of rights is also evident in the fact that the author has no right to prevent the purchaser from destroying her book.

With regard to the right in ideas, the academic use of books demonstrates that the author has no exclusive right in the content of the book. The ideas are in the public domain, and they can be appropriated by others through study, portrayed in various ways, and applied to different subject matters to yield new results.[61] This fact explains why it is permissible for a person to express the ideas of another (for instance, those heard during a public lecture) in her own words.[62] In contrast, plagiarism, i.e. the direct copying of the words used by another to express an idea, is a violation of the author's rights. In contrast to the views of Reimarus, Fichte's antagonist, plagiarism is forbidden, not because it fails to attribute the words to the author, but because, in ignoring the fact that they were authored by another, it denies the other's right to the expression and thereby violates the very idea of right, i.e. the idea that those things which express a person's intellectual personality must not be appropriated by another. It is not simply that the plagiarist fails to attribute authorship, but that through this failure, he appropriates as his own what belongs to another and thereby denies the other's capacity for authorship.[63]

Thus we see that the proscribed practices, such as plagiarism, as well as the practices that are permitted, such as the lending of books, the destruction of books, the use of their contents and the application of these ideas to new fields, are consistent with Fichte's assertion that the author has a right in the form of the expression but not in the content of the ideas or the physical object once the latter is sold to another.

---

59. Benoit, "En guise d'introduction au texte de Fichte," *supra* note 7 at p. 99.
60. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 10.
61. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 10.
62. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 13.
63. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 11. It is interesting to consider whether Fichte's account of plagiarism is consistent with our modern understanding. The modern concept of plagiarism seems broader than Fichte's, since Fichte says that it is not plagiarism for an author to repeat the ideas of another without attribution, as long as he does not use the author's exact words. See Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 12.

5.3 The Relationship Between Author and Publisher

If the author cannot transfer the form of the book to the publisher, and if the ideas cannot be transferred without in-depth study on the part of the publisher, Fichte questions what the publisher gains from an agreement with the author. He does not acquire a physical object since the manuscript handed over by the author is of little value. What is of value, however, is the right to use the manuscript to make available to the public the opportunity of acquiring the ideas contained in it. In other words, the publisher gains the right to the *usufruct* of the property of the author. The publisher thus acts not on his own behalf, but on behalf of the author as her representative.[64]

That this is what is transferred from the author to the publisher in return for money is again evident from the actions that are permitted and proscribed in practice. The fact that the publisher must seek the permission of the author to print subsequent editions or extend print runs attests to the fact that the contract between the author and the publisher does not transfer the ownership of the book to the publisher, but merely gives him a license to use the book for a limited purpose. Furthermore, the fact that our disappointment in a poorly written book is directed towards the author and not the publisher provides additional proof of the continuing property right of the author in the book. It is to the author that we turn for compensation for a useless, unstimulating or unoriginal book, not to the publisher, who has no control over the content of the book. The deceit of an inferior book is not on the part of the publisher, who is merely the author's representative, but rather it is a result of the actions of the author.[65]

The illegitimate publisher of a work thus makes use of the author's property without entering into a contract that sets out the terms in accordance with which the publisher represents the author. As Fichte explains, the illegitimate publisher

> . . . appropriates, not the property of the author, nor his ideas (this he cannot do for the most part, for if he were not ignorant, he would pursue an honest trade), nor the form of the ideas (this he could not do, even if he were not ignorant), but rather the *use* of the property. He operates in the name of the author, without receiving instructions from him, and without coming to an agreement with him, and arrogates the profits which arise from this representation. He acquires in this way a right to which he is not entitled, and so interferes with the author's exercise of his exclusive right.[66]

Here, Fichte's understanding of the relationship between author and publisher is reminiscent of Kant's argument in his essay on reprinting. In his paper, Kant also distinguishes between the ownership of the material of the book and the ownership of its intellectual aspect. However, here too, a slight difference is introduced between Kant and Fichte's views. Fichte argues that the ownership of the intellectual aspect derives from the unique form that the author has given to the ideas that he expresses. The reprinter of a book appropriates the author's

64. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 14.
65. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 15.
66. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 16.

form without his permission, thereby violating his right to the form. However, Kant characterizes the author's right in the intellectual property of a work as a right to choose whom he will permit to transmit his discourse to the public. For, according to Kant, a book is a discourse of the author transmitted by means of the authorised publisher to the public.[67] The unauthorised reprinter thus wrongs the author by forcing the latter to discourse to the public against his will.[68] Reprinting is thus a personal wrong against the author.[69]

*

6. REJECTION OF THE UTILITARIAN APPROACH

FICHTE QUICKLY REJECTS THE UTILITARIAN JUSTIFICATION for allowing the reprinting of books. It appears that Reimarus's primary argument against allowing the protection of copyright was that the reprinting of books caused no harm to the author or the publisher. Instead, it benefited them by making the author's work more widely known, thereby increasing her reputation.[70] Furthermore, Reimarus argues that the protection of copyright is grounded in a contract between the public and the author that allows for the author to profit from her work for a period of time.[71] The reprinting of a book is not a violation of this contract because it is consistent with the ultimate goal of enhancing social welfare by maximizing the social benefits of creativity while providing a sufficient incentive for the author, namely, increased name recognition. According to Reimarus' view, rights are *created* through the interaction between citizens, rather than being *inherent* in each person as a free human being.

In contrast, Fichte grounds rights, not in contingent contracts, but in the necessity of respecting human individuality. For him, it does not matter whether it is good for society generally to have the contents of books disseminated in the public domain. Any practice which denies a person's individuality by forcing them to give up what is theirs, that is any practice which forces them to give up their property in a book, is a violation of right.[72] Fichte thus articulates the foundational view of the natural rights theory that rights are innate and inalienable and derived from the nature of human existence.[73] This right is not variable depending on contingent, historically emergent social circumstances. Rather, it is eternal[74] because it is deduced from the unchangeable nature of human freedom. Thus, Fichte points out that, had they wished, even the ancients could have protected their works against reproduction.[75]

---

67. Kant, "Von Der Unrechtmäßigkeit des Büchernachdrucks," *supra* note 9 at pp. 80–81; and Kant, *The Metaphysics of Morals*, *supra* note 58 at p. 72.
68. Kant, "Von Der Unrechtmäßigkeit des Büchernachdrucks," *supra* note 9 at p. 81; and Kant, *Practical Philosophy*, supra note 9 at p. 31.
69. Kant, *The Metaphysics of Morals*, *supra* note 58 at p. 72.
70. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 17.
71. Fichte does not attribute this whole argument to Reimarus. He merely says: "the right of the author which is violated by the re-printer is [according to Reimarus] grounded [. . .] on an assumed contract of the author with the public and on a Jesuitical mental reservation in it." Fichte, "Proof of the Illegality of the Reproduction of Books," *supra note* 2 at para 17. However, I have tried to fill in the gap of the argument.
72. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 17.
73. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 17.
74. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 20.
75. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 20.

In Fichte's rejection of Reimarus' utilitarian position, we see in effect a rejection of copyright as a purely economic right and the recognition of the moral rights of the author. While Roberta Rosenthal Kwall attributes the first articulation of the moral rights view to Immanuel Kant,[76] Kant articulates only one aspect of moral rights, namely, the right of disclosure. As Kwall explains, this right entitles the author to refuse to publish a work until he or she deems it ready for publication.[77] This aspect of moral rights is clearly espoused by Kant when he argues that the author has the exclusive right to choose who will present his discourse to the public.[78]

In contrast, Fichte comes nearer to articulating the origin of moral rights in the unique form that the author has given the work, which reflects the unique nature of his thought processes. As well, Fichte justifies the author's intellectual property right in a book by means of a different aspect of moral rights, namely, the right to be recognized as the author of the work (also called a right of paternity).[79] Admittedly, Kant does allude to the right of paternity in his 1885 essay on the illegality of reprinting, in which he states that a book is like a speech, and "it is a contradiction to deliver *in one's own name* a speech that, by one's own announcement and in keeping with the public's demand, is to be the *speech of another.*"[80] However, Kant does not explain what the unique aspects of this speech are that express the personality of the author, thereby forbidding others to appropriate it. In contrast, Fichte's forceful justification of moral rights based on the recognition of the author's personality expressed in the form of the work foreshadows the modern view that "the essence of a moral rights injury lies in its assault upon the author's personality, as that personality is embodied in the fruits of her creation."[81] This justification has been the foundation of developments in continental European copyright law, which has tended to protect moral rights, although these rights have not traditionally been given direct recognition in Anglo-American law.[82]

*

7. OTHER FORMS OF INTELLECTUAL PROPERTY AND THE REJECTION OF THE LABOUR THEORY OF PROPERTY

FICHTE CONTRASTS BOOKS WITH OTHER FORMS of intellectual property. He explains that products of mechanical art differ from books because the form of mechanical art is not an expression of the unique personality of the creator. Rather, its form is determined by the concept behind the functioning of the device. While those who craft mechanical devices can have greater or less skill in the execution of the

76. Roberta Rosenthal Kwall, "'Author-Stories': Narratives Implications for Moral Rights and Copyright's Joint Authorship Doctrine," (2001) 75:1 *Southern California Law Review* 1–64, <http://ssrn.com/abstract=844186> at p. 19.
77. Roberta Rosenthal Kwall, "Copyright and the Moral Right: Is an American Marriage Possible?" (1985) 38:1 *Vanderbilt Law Review* 1–100, <http://ssrn.com/abstract=860324> at p. 5.
78. Kant, "Von der Unrechtmäßigkeit des Büchernachdrucks," *supra* note 9 at p. 81.
79. Kwall, "Copyright and the Moral Right," *supra* note 77 at pp. 5, 7.
80. Kant, *Practical Philosophy*, *supra* note 9 at p. 34.
81. Kwall, "'Author-Stories,'" *supra* note 76 at p. 24.
82. For a comparative history of French and American copyright law in this regard, see Jane C Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," in Sherman and Strowel, *Of Authors and Origins*, *supra* note 12, 131–158.

idea behind a mechanical device, there is a limit to the ways in which the physical elements of the device can be structured so that the machine functions correctly. In contrast, the thoughts contained in books could have been expressed in a different way, or the ideas could have been arranged and connected in a different order. Because the work involved in the production of mechanical devices is similar to that involved in the production of the physical aspects of the book – its binding, printing, etc. – as Fichte mentioned earlier, it is not protected by law. The arrangement of the physical elements of the device does not bear the unique imprint of the craftsman, being determined by the necessity of the functioning of the machine. As a result, the craftsman has no property right in the device.

To some degree, Fichte also rejects the labour theory of intellectual property developed by John Locke. For something to be the property of an individual, it is not sufficient that that individual's labour be mixed with it. Rather, in the case of intellectual property, the thing protected must be a communication with an original form expressing the personality of the creator. Presumably, Fichte intends to carry over this same view to physical property. Physical property is not mine simply because I have laboured on it. Rather, it is mine because to take it away would be a violation of the imprint I make on it through my intention or will to have it as my own. Indeed, in his later works, this is precisely what Fichte maintains. A house, for instance, is a "surrogate" for the owner's body, and as such bears his imprint in the form of an intention to make use of the contents at some future time.[83]

Fichte acknowledges that because the form of a mechanical device or a work of art does not bear the imprint of its creator in the same way as does the form of thoughts expressed in a book, the principle on which the creator's interest in the concept behind the machine or work is protected is different from the case of an author's copyright in a book. The difference between books and mechanical devices is reinforced by the fact that it is often quite simple to discover the principle behind the functioning of a device once one has purchased it. Unlike the case of books, for which the form is unique and irreproducible, a reproduction of a mechanical device, while perhaps not identical with the original, is nonetheless similar enough that the reproduction will serve the same function as the original. Thus, because of the ease of reproducing a mechanical device, and because of the different relationship between the form and concept in the case of such a device in comparison to a book, a different type of protection for the creator's interest in preventing the unauthorised reproduction of mechanical devices and works of art is required.

In Fichte's era, the type of protection available was the system of *privilege* mentioned above. According to Fichte, the justification for the extension of state protection to a mechanical device is based on fairness. It is unfair that the inventor of the device should be deprived of profits gained from the reproduction of the device he has created.[84] Although Fichte does not fully articulate the reason for this unfairness, it appears that he believes that the creator should not be deprived of his property interest in his invention simply because of the contingent fact that

83. Fichte, *Foundations of Natural Right, supra* note 1 at p.242.
84. Vaver, "The Future of Intellectual Property Law," *supra* note 44 at p. 2.

the relationship between the form and the concept in a mechanical device or work of art is such that the expression of the concept entails the appropriation of the form of the work. For instance, while an academic commentator can make the same argument as Kant did in the *Critique of Pure Reason*, his articulation of this idea does not entail the appropriation of the expression used by Kant. The opposite is true of mechanical devices. The expression of the concept behind the functioning of a clock necessarily entails the arrangement of gears in a similar way to those in the original. For Fichte, this difference between the form–content relationship in the case of books and mechanical devices or works of art should not affect the innate natural rights of the creator. The ease with which another can appropriate my property should not be determinative of my property interest in it.

But if this is Fichte's reasoning, why does he feel that the right of the creator should have a time limit? Presumably, the period of privilege is limited because of the necessity of allowing the purchaser of the object to exploit his rightfully-acquired property interest in the device. In the case of mechanical devices, as was the case with books, the purchaser also acquires the possibility of appropriating the concept behind the functioning of the device. And while in the case of books, the uniqueness of the form of the work is such that no one could reproduce it, in the case of mechanical devices and works of art, an understanding of the concept leads to the acquisition of the form, since the concept often dictates the form. The granting of a time-limited privilege to the creator of the work of art or mechanical device thus balances the property rights of both the creator and the purchaser. It does so by allowing the creator to profit from his property interest in the original form he has given to the device, but also by allowing the purchaser to exploit the possibility he has purchased by acquiring the concept behind the device, the exploitation of which necessarily entails the appropriation of the form which the creator has given it.

The difference between books, mechanical devices, and works of art lies in the relationship between concept and form. Where concept dictates form, because the concept (or the possibility of acquiring it) is transferred in the sale of the mechanical good, the interest of the purchaser in making use of his property interest in the concept is in conflict with the creator's interest in the form that he has created to express the concept. This conflict must be resolved by limiting the rights of both parties, the purchaser and the creator. But where the concept and the form are independent, it is possible to protect the property interest of both parties, and so there need not be a limit on the privilege (or copyright) extended to the work.

*

8. THE PARABLE

THE PARABLE THAT FICHTE RELATES IN "Proof of the Illegality of the Unauthorised Reprinting of Books" aims at further discrediting the utilitarian viewpoint by demonstrating how welfare-based argumentation can provide a justification for an intuitively unjust position. The utilitarian position, as parodied in the parable, begins by rejecting the validity of an intellectual property regime premised on

the idea of rights. The principal argument is that by making a product, in this case a medicine, more widely available, information about it will be more widely disseminated, resulting in it being of benefit to a larger group of people, thereby increasing overall welfare.[85] Though Fichte is clear throughout his article that there is a difference between books and other forms of intellectual property, nevertheless, a parallel can be drawn here between medicine and the ideas contained in books. Just as the widespread distribution of medicine will improve overall health and therefore welfare, the more widely a book is distributed, the more widely the information contained in it will be disseminated, resulting in greater benefit to a greater number of people.

The thief in the parable explains that a copyright regime (or a patent regime) does not maximise welfare because it impedes the dissemination of information. The fact that the thief must be "in continual flight" from the original inventor of the medicine symbolizes the wasted resources that are expended in the protection and defence of copyright and patent rights.[86]

The next argument addresses those who claim that without a protection of intellectual property, the incentive for creative people to produce novel products, original ideas, and creative works will be removed. The thief's response to this argument is a combination of romanticism and realism. He argues that the author, inventor, and artist need no incentive other than honour and their muse. Hidden within this argument is a view of human nature which sees the urge to create and to achieve recognition as the primary motivators of the human creative faculty.

As well, the utilitarian also relies on the principle of fairness – he argues that it would be unfair to other publishers that the author be granted an exclusive right in her work. Once the author has received some return on her work and has thereby been made better off than if she had not produced it, it is only fair that others be provided with the opportunity to capitalize on the work's popularity by reproducing. Finally, the thief argues that copyright works against the public interest by encouraging the creator or author to distribute her own work. The very idea of publicity and public distribution is threatened by the protection of copyright, not only because the author is inexperienced in the sale of books and so less efficient than the publisher in distributing them, but also because the protection of copyright puts publishers at the mercy of fickle authors who could take their business to another publisher at any time. Presumably, this dependence of publishers on authors is what is implied when the thief explains to the Caliph that the author would have stolen from the publisher if he could have done so.[87]

From a rhetorical point of view, the parable presented by Fichte is clearly intended to appeal to the reader's intuitions to demonstrate that the utilitarian view is untenable. Of course, Fichte's rhetoric does little to threaten contemporary utilitarian views. The utilitarians that Fichte addresses are intent on preventing the recognition of any form of intellectual property right, a view that is not advocated by many utilitarians today. Nevertheless, Fichte's caricature of utilitarians bears a few remarks.

---

85. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 31.
86. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 32.
87. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 35.

In Fichte's view, the utilitarian position reduces to moral relativism. According to Fichte, utilitarianism depends on the identification of human interests. By maximizing the fulfilment of these interests, social welfare can be improved. However, completely opposing moral conclusions can be reached depending on how these interests are characterized. For instance, the thief in the parable characterizes the interests of the author and the publisher in erroneous but intuitively appealing ways. For instance, the thief claims that an author's welfare would be improved through greater dissemination of the author's ideas and works. Since dissemination can be maximized through unauthorised reprinting, the author's welfare is increased through the denial of the author's property interests. In essence, Fichte regards utilitarianism as dependent on a particular psychological anthropology. The welfare calculus is affected by whether we take the romantic view that the author derives happiness merely through communication of her creativity, the practical view that an author is a labourer seeking to use her creative talents as a means for earning money, or the view that the author derives happiness from the recognition of her authorship of the work. Fichte seeks to oppose such a relativistic approach with a principled, rights-based approach.

*

9. TOWARDS A THEORY OF RIGHT: THE SEEDS OF FICHTE'S THEORY OF RIGHTS IN THE "PROOF OF THE ILLEGALITY OF THE UNAUTHORISED REPRINTING OF BOOKS"

HAVING SURVEYED THE ARGUMENTS FOR THE PROTECTION of intellectual property set out in "Proof of the Illegality of the Unauthorised Reprinting of Books," I will now trace the development of these ideas in Fichte's later works by addressing three main issues. First, in this early article, Fichte fails to distinguish between ethics and law. This differs from the Kantian approach—an approach later adopted by Fichte—which makes a clear distinction between morality and legality. Second, Fichte provides little justification in this article for the uniqueness of the form in which ideas are expressed. However, his later epistemological views will provide a fuller justification for the originality of each individual's thoughts. Finally, I will argue that the article on the reprinting of books foreshadows the development of Fichte's unique argument, presented in the *Foundation of Natural Right*, that the idea of right is grounded in self-consciousness. In addition, although Fichte's early work in many ways parallels the development of Kant's thought on the nature of right, I will also highlight the differences between them.

9.1. The Relationship Between Morality and Legality

Fichte's later legal philosophy is characterized, like Kant's, by a separation between morality and legality. The failure to clearly distinguish between these two domains in "Proof of the Illegality of the Unauthorised Reprinting of Books" is therefore one of the work's most noteworthy characteristics. As Luc Ferry points out, as late as 1793, when Fichte wrote the *Beiträge zur Berichtigung der Urtheile des Publicums über die französische Revolution* [*Considerations to Correct the*

Public's Judgement of the French Revolution], he grounds law on the moral recognition of human freedom.[88] Law is not just about permissible restrictions on human freedom, but about how humans *must* act towards each other. In other words, legal norms compel by their own necessity as do moral norms. Thus in this early work, the law is not simply a series of rules that must obtain for the mutual co-existence of free beings.

Frederick Neuhouser also notes the shift in Fichte's thought from his early works to a more Kantian separation between legality and morality in his later works.[89] Fichte's position prior to and during 1793 was that right could be derived from morality. This meant, not that right could be derived in its totality from morality, but that the natural rights that the individual possesses in virtue of his humanity (i.e. human rights) are rights that the individual has because he has a duty to obey moral laws. As Neuhouser puts it, "the obligation we have to respect the natural rights of others is itself a moral one. It is not derived from the consent of freely choosing individuals but is grounded in our nature as rational beings capable of moral autonomy."[90]

A second way in which morality and legality are linked in Fichte's early works, according to Neuhouser, is that the state has the obligation to ensure that individuals have the tools necessary to realize their nature as morally autonomous beings. In particular, this means that state must provide an education (*Bildung*) that is able to "transform the natural desires and inclinations of citizens in such a way that their reformed sensibilities are consistent with and serve the ends of morality rather than standing in opposition to those ends."[91]

We thus see that, for the early Fichte, the continuity of right and morality means that the ends of the law are the same as those of morality. Both the political state and the individual as a moral being must act to facilitate the realization of human existence as a morally autonomous existence.[92] A distinction remains, however, between political and moral theory, in that the former deals with the social structures and institutions that must be in place in order to realize moral autonomy, while the latter deals with the conditions and principles that must obtain in order for an individual to act morally.[93]

It thus becomes clear that the whole argument in "Proof of the Illegality of the Unauthorised Reprinting of Books" is premised on the continuity between morality and the law that characterises Fichte's early work. From the outset, Fichte argues that the right to property is necessary, requiring no proof.[94] The institution of property is thus not contingent on the coexistence of free human beings interacting with each other, as is the case for Kant. Rather, it is a moral

88. Luc Ferry, "The Distinction between Law and Ethics in the Early Philosophy of Fichte," (1988) 19:2–3 *The Philosophical Forum* 182–196 at p. 185. See also Alexis Philonenko, *Théorie et Praxis dans la pensée morale et politique de Kant et de Fichte en 1793* (Vrin, 1968) at p. 115; and Daniel Breazeale, "'More than a Pious Wish': Fichte and Kant on Perpetual Peace," in Hoke Robinson, ed., *Proceedings of the Eighth International Kant Congress* (Marquette University Press, 1995) 943–959, for a discussion of the shift in Fichte's thought during this period.
89. Frederick Neuhouser, "Fichte and the Relationship between Right and Morality," in Daniel Breazeale and Tom Rockmore, eds., *Fichte: Historical Contexts/Contemporary Controversies* (Humanities Press, 1994) 158–180 at p. 158.
90. Neuhouser, "Fichte and the Relationship between Right and Morality," *supra* note 89 at p. 160.
91. Neuhouser, "Fichte and the Relationship between Right and Morality," *supra* note 89 at p. 161.
92. Neuhouser, "Fichte and the Relationship between Right and Morality," *supra* note 89 at pp. 161–162.
93. Neuhouser, "Fichte and the Relationship Between Right and Morality," *supra* note 89 at p. 162.
94. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 5.

necessity, and therefore deducible *a priori* from moral principles. Indeed, Fichte emphasises that the plagiarist is not merely violating a legal right of the author, but is in fact acting immorally:

> [It has universally] been acknowledged as contemptible to literally transcribe a work without naming the actual author, and we have labelled writers who do this with the dishonourable title of plagiarist. This disapproval does not relate to the intellectual poverty of the plagiarist, but to an *amoral element in his behaviour.*[95]

9.2. The Originality of Ideas as Explicated in Fichte's Epistemology

As mentioned earlier, Fichte's writings on epistemology shed light on his view in "Proof of the Illegality of the Unauthorised Reprinting of Books" that ideas bear the imprint of the author's personality. These writings thus elaborate on a point which Fichte makes in passing in his article, namely, that it is the personal imprint of the author's personality on the form she gives to her written work that grounds her property right in it. As Fichte explains in "Proof of the Illegality of the Unauthorised Reprinting of Books," learning involves the processing of foreign thoughts by drawing analogies between these thoughts and our own. But this process of analogising itself entails the recognition of the impossibility of taking up foreign thoughts precisely as they are presented. In other words, learning entails the recognition that a free and rational being exists outside of us upon whose freedom we cannot intrude.

Let us look briefly at Fichte's later epistemology to shed some light on the brief assertion in "Proof of the Illegality of the Unauthorised Reprinting of Books" that ideas are the unique expression of their author. It was Fichte's view that "[i]t is the role of critical philosophy to show that we do not require a bridge [between the external and the internal]. Everything which appears in our minds can be completely explained and understood from out of the mind itself."[96] Thus all of our knowledge of external objects is attributable, not to the effects of external things on us, but to the human sensible capacity. For Fichte, this sensible capacity in turn can be led back to the ego, the "I," which itself is not empirically accessible, but which we can nonetheless come to know through intellectual intuition.[97] We intuit ourselves (our "I"), not separately as a datum of empirical consciousness, but rather as a necessary component of every sensible intuition. In Fichte's words:

> [T]he philosopher discovers [. . .] intellectual intuition as a fact of consciousness. (It is a fact for him; for the original I it is an Act.) He does not, however, discover it immediately, as an isolated fact within his consciousness, but only insofar as he

95. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 11 (emphasis added).
96. Johann Gottlieb Fichte, "Recension des Aenesidemus oder über die Fundament der vom Herrn Prof. Reinhold in Jena gelieferten Elementar-philosophie," in Immanuel Hermann Fichte, ed., *Johann Gottlieb Fichtes sämmtliche Werke* (Veit & Comp., 1845/6); reprinted in Immanuel Hermann Fichte, ed., *Fichtes Werke*, vol. 1 (Walter de Gruyter & Co., 1971) at p. 15, quoted in Rohs, *Johann Gottlieb Fichte, supra* note 28 at pp. 43–44 (author's translation).
97. Johann Gottlieb Fichte, "Second Introduction to the *Wissenschaftslehre*. For Readers Who Have a Philosophical System of Their Own," in Daniel Breazeale, ed. and trans., *Introductions to the Wissenschaftslehre and other Writings* (Hackett, 1994) 36–105 at p. 44.

> introduces distinctions into what is present as a unity within ordinary consciousness and thereby dissolves this whole into its components.[98]

According to Fichte, Kant had a passive understanding of perception. For Kant, perception is the result of "things in themselves" that are ultimately unknowable acting on our sensory apparatus. However, Fichte held a different view. For him, the object, the "not-I," limits the activity of the I. The "I" only perceives itself as an intellectual intuition that is part of every sensible intuition. As a result, Fichte does not posit a Kantian "thing in itself," since it is from within the experience of the "I" that the "I" comes to understand the necessity of something other than it. As Fichte explains in the *Foundations of the Entire Science of Knowledge*, the existence of external things is corroborated, not through the fact of passive receptivity of sensory perceptions caused by it, but rather through a limitation of the self, "some check on the self." The "impossibility of further extension [of the self] would [. . .] delimit [. . .]; it would not set bounds to the activity of the self; but would give [the self] the task of setting bounds to itself."[99]

How does this help us to understand Fichte's view that ideas are unique? Knowledge is created through the interplay of the self and the limitation on the self represented by the not-self (i.e. the object). These are unified through our imagination. This process of unification is unique to each individual because it is a constant process of unification with the unique imprint of each person. This is the origin of the uniqueness of an individual's ideas. To follow this argument, we must understand that for Fichte, knowledge is the result of a synthesis of the activity of the "I" and of the "not-I". This synthesis is brought about through our imagination.[100] The power of the imagination is to unite the infinity of the self with the finitude of the object, which limits the power of the self to act. Fichte describes this interplay as follows:

> This interplay of the self, in and with itself, whereby it posits itself at once as finite and infinite—an interplay that consists, as it were, in self-conflict, and is self-reproducing, in that the self endeavors to unite the irreconcilable, now attempting to receive the infinite in the form of the finite, now, baffled, positing it again outside the latter, and in that very moment seeking once more to entertain it under the form of finitude—this is the power of *imagination*.[101]

The imagination is constantly synthesizing the "I" and the "not-I." In Fichte's view, the boundary between the "I" and the "not-I" is never fixed and is constantly changing. For if the boundary did not shift, the "I" would completely determine the totality (i.e. the synthesis of the subject and object), and so the passivity of the "I" in encountering the "not-I" as limit would be completely illusory, and the "I" would be the complete ground of all perception. As a result, the limit on the "I" represented by the "not-I" is a real limit, and so the synthesis of the

98. Fichte, "Second Introduction to the *Wissenschaftslehre*," *supra* note 97 at pp. 48–49.
99. Johann Gottlieb Fichte, "Foundations of the Entire Science of Knowledge," in Peter Heath and John Lachs, eds. and trans., *Fichte: Science of Knowledge (Wissenschaftslehre) with the First and Second Introductions* (Appleton-Century-Crofts, 1970) 89–287 at p. 189. First published in 1794 as *Grundlage der gesamten Wissenschaftslehre*.
100. Fichte, *Foundations of the Entire Science of Knowledge*, *supra* note 99 at p. 193.
101. Fichte, *Foundations of the Entire Science of Knowledge*, *supra* note 99 at p. 193.

"I" and the "not-I" must be achieved at every moment, rather than achieved statically as a determinate relation between the "I" and the "not-I." For this reason, Fichte says that the "opposites are to be conjoined in the concept of mere *determinability* (not that of determination)."[102] Given the dynamic process in which the imagination is constantly involved, it is clear that the form given to an expression, insofar as it is the expression of a representation in an individual's consciousness, is the unique product of the infinitely variable process of synthesis within that individual's consciousness. This process is not determined by a determinate rule, but rather it is being continuously determined through the ongoing synthesis undertaken by our power of imagination.

Thus for Fichte, every perception of an object is undertaken by a free being, and so it bears "within itself some imprint of this free being," for only in this way "can what is real become an object for a free being."[103] Insofar as my thoughts contain both an ideal element (the constitutive power of my imagination) and a real element (the resistance of what is not-I), they are always unique to me, because they bear the imprint of the self's freedom on them.

Fichte's epistemological claim supports his legal claim that the unique personality of others is to be respected. The epistemology provides a justification for why the thoughts of each individual are separate from those of others, and hence unique to them. At a general level, we have seen that the uniqueness of the individual's thoughts, viz. the uniqueness of the form the individual gives to them, derives from the relationship between thought and our facticity, i.e. the social and historical aspects of our existence. At a deeper level, Fichte's epistemology explains how every thought necessarily bears within it the mark of the self's activity. This activity is that of the imagination, which unites the manifold of perceptions into an object on the basis of the sequence and spatial positioning of the subject. Every thought thus bears the mark of the unique standpoint of the individual, since in constructing the objects which we perceive, the imagination's infinite power to create is limited by the data received from the unique location of the subject in space and time. The subject is limited by the object, but this limitation is itself generated out of the self through its activity. Thus unlike Kant, who posited things in themselves that exist independently of the self, for Fichte, the limit on the self is the result of the spontaneous activity of the self, and thus every thought and perception is marked by the acts of the self.

9.3. Fichte's Intersubjective Conception of Property Guarantees Property For All, Including Authors

The final issue foreshadowed in Fichte's article on the reprinting of books is the intersubjectivity of right, which grounds the legal conception of property. The importance of mutual recognition as the foundation of right is adumbrated in "Proof of the Illegality of the Unauthorised Reprinting of Books." According to Fichte, the freedom of the author is only realised once another recognizes her freedom by not interfering with the indicia of her personality present in the form

102. Fichte, *Foundations of the Entire Science of Knowledge*, *supra* note 99 at p. 193.
103. Johann Gottlieb Fichte, "(Wissenschaftslehre) nova method," (1986/99), in Daniel Breazeale, ed. and trans., *Foundations of Transcendental Philosophy: (Wissenschaftslehre) Nova Methodo* (Cornell University Press, 1992) at p. 438.

of the literary work. This is clear from Fichte's emphasis that the author has two rights. The first is the right "to prevent anyone from completely denying the author ownership of the form (i.e. to demand that everyone recognise her as the author of the book)." The second is the right "to prevent anyone from taking possession of her exclusive right in the form of the work and to make it their property."[104] An author is not merely the person to whom a particular expression is attributed. She is also someone who is able to control the use of her words, i.e. she is able to exert her right to property in them in her interaction with others.

From Fichte's idea of mutual recognition, it necessarily follows that the recognition of one author's right in her work entails the respect of the right of other authors in their works. Fichte's discussion of the practice of attributing direct quotations demonstrates that the process of publication necessarily entails limiting one's own property claims by not infringing those of others. Similarly, his discussion of plagiarism emphasises that this process of mutual recognition is not an empirical recognition of a particular other, but rather a general principle underlying legality. A person is a plagiarist not merely because she copies the works of known authors, but even when she copies from an anonymous work.[105] Legality thus involves the limitation of my rights by recognising the rights of others, even if they are not present before me. Or as Fichte will later state, "I can expect a particular rational being to recognize me as a rational being, only if I myself treat him as one."[106]

As previously mentioned, the full articulation of Fichte's theory of right is not elaborated until his later works such as *Foundations of Natural Right*. In this work, Fichte's formulation of the nature of right is very similar to Kant's in the *Metaphysics of Morals*, though it appeared approximately six months before Kant's work.[107] Fichte's formulation reads: "Every relation of right is determined by this proposition: each person is to limit his freedom through the possibility of the other's freedom."[108] It is a deduction of the concept of right from the presupposition of intersubjectivity.[109] As we have seen, the condition for the possibility of self-consciousness is consciousness of the other.[110] Furthermore, the thought that every being is free requires that every person limit her freedom to accommodate the freedom of others.[111] For Fichte, this relationship between two free human beings defines the juridical relationship.[112] Thus in conceiving the realm of her own freedom, the individual must necessarily take into account the limits on this freedom imposed by the necessity of recognising the freedom of others.[113]

104. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 9.
105. Fichte, "Proof of the Illegality of the Reproduction of Books," *supra* note 2 at para. 11.
106. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 44.
107. Jean-Christopher Merle, "Eigentumsrecht," in Jean-Christophe Merle, ed., *Grundlage des Naturrechts* (Akademie Verlag, 2001) 159–172 at p. 161. See also the editor's note in the Cambridge edition of Fichte's *Foundations of Natural Right*, *supra* note 1 at vii.
108. Fichte, *Foundations of Natural Right*, *supra* note 83 at p. 120: "Alles Rechtsverhältnis ist bestimmt durch den Satz: jeder beschränke seine Freiheit durch die Möglichkeit der Freiheit des Anderen."
109. Susan Shell, "'A determined stand': Freedom and Security in Fichte's *Science of Right*," (1992) 25:1 *Polity* 95–122 at p. 97.
110. Fichte points out that "the rational being cannot posit itself as a rational being with self-consciousness without positing itself as an *individual*, as one among several rational beings that it assumes to exist outside itself, just as it takes itself to exist." Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 9.
111. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 10.
112. Shell, "'A determined stand': Freedom and Security in Fichte's *Science of Right*," *supra* note 109 at p. 99.
113. Shell, "'A determined stand': Freedom and Security in Fichte's *Science of Right*," *supra* note 109 at p. 99.

When it comes to applying this intersubjective conception of rights to property, Fichte takes a somewhat different approach than Kant. The difference is that Kant does not entitle the individual to a particular amount of property beyond the minimum necessary for sustenance,[114] while Fichte does. I will now explain briefly how Fichte concludes that each individual is entitled to property, and then I will develop the consequences for intellectual property.

Fichte conceives of property as "that part of the sensible world that is known to me and subjected to my ends – even if only in thought."[115] As Jean-Christophe Merle points out, the addition of "even if only in my thoughts"[116] emphasizes the fact that physical possession is not a pre-requisite of acquiring property.[117] The result is that, for Fichte, a property right extends to a thing as long as it falls within the sphere of the individual. Furthermore, it is possible that the same physical object can be possessed by many people in common, as long as the uses to which each puts the object are not inconsistent with the use to which others would put it.[118] Given that the influence of each person extends itself potentially (and in many cases, actually) across all things in the world, then the distribution of property potentially affects the freedom of all individuals. Or as Merle puts it, for Fichte, property rights are a part of distributive justice, and the regime of property implicates the just distribution of this property.[119]

What is the principle on the basis of which property is to be distributed? Modern theories of distributive justice often depend on a principle of equality. Fichte defines property on the basis of the individual using an object for a particular purpose. For contemporary liberal theorists, this purpose is not predetermined; the individual is free to choose her own ends. But for Fichte, only those ends are to be taken into account that all humans pursue.[120] For him, the end that all humans pursue is to live (i.e. survive). In Fichte's words, "[t]o be able to live is the absolute, inalienable property of all human beings."[121] Since the individual's labour is the means by which the individual gains what is necessary to live, it is the obligation of the state to ensure that it is possible for the individual to live from her labour. As Fichte points out, "all have promised [in the civil contract] that their labor really ought to be the means for attaining this end [i.e. living], and the state must make arrangements to insure this."[122] This means that "if someone is unable to make a living from his labor, he has not been given what is absolutely his."[123] Two consequences follow from this. The first is that the individual must be provided with the means to live if she is not able to live by her labour. The second is that if a certain type of labour is recognised as valuable in a society, then the government has an obligation to ensure that the individual can make a living through her chosen type of labour.

The latter concept is, as we have seen, active in Fichte's early essay on

114. Weinrib, "Poverty and Property in Kant's System of Rights," *supra* note 50.
115. Fichte, *Foundations of Natural Right*, *supra* note 1 at 106; Fichte, *Grundlage des Naturrechts*, *supra* note 83 at p. 116. The original reads: "den mir bekannten, und meinen Zwecken, sei es auch nur in Gedanken, unterworfenen Teil der Sinnenwelt . . . ."
116. Merle, "Eigentumsrecht," *supra* note 107 at p. 163.
117. Merle, "Eigentumsrecht," *supra* note 107 at p. 163.
118. Merle, "Eigentumsrecht," *supra* note 107 at p. 164.
119. Merle, "Eigentumsrecht," *supra* note 107 at pp. 165, 172.
120. Merle, "Eigentumsrecht," *supra* note 107 at p. 167.
121. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 185.
122. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 185.
123. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 185.

the illegality of the reproduction of books. In that essay, Fichte said that the reproducer of mechanical goods has a right to make a living. This right requires placing a limit on the property right in mechanical devices.[124] Only in this way can the right of the producer of mechanical devices be balanced with the right of the inventor to make a living by means of his mechanical invention. What does Fichte mean by the right to make a living? Fichte does not deal with intellectual property directly in the *Foundations of Natural Right*. But the author falls within a category of property rights holders which Fichte calls the "artists." For Fichte, the social contract guarantees that the individual will always be able to survive based on her labour. In the case of artists, this means that the artist is guaranteed to be provided with the appropriate products necessary to produce her wares: "[T]he state must arrange things so that the artist, in exchange for all of his labor or articles, receives the quantity of products he needs in order *to live during the time that he is making the articles*."[125] As Fichte explains, *money* is a sign of the value of particular products. Thus, in the case of the author, the state must ensure that the author is able to earn enough money so that she can live to continue her labour (assuming that what she produces is desired by others in the state). This means that the state must ensure that she can make money through her efforts in order to buy what she needs—paper, pen, food, drink, lodging, clothing, etc. A regime that respects property rights in intellectual property is thus justified as a system of arrangements that guarantee that the author is able to receive money in proportion to the service that she is rendering to society.[126] While Fichte speaks mainly about the right of the reproducer of mechanical works to make a living, it is clear that, as an artist, the author, too, must have a means of earning a living from her trade. The copyright system is a means for ensuring that this is possible.

To summarize, in this section, I have pointed out three of the ways in which Fichte's article on the illegality of the reprinting of books differs from or foreshadows some of his later philosophical views. As we have seen, "Proof of the Illegality of the Unauthorised Reprinting of Books" seems to be consistent with Fichte's early views about the continuity between morality and legality, a view he later denied. I have also explained how Fichte's view about the originality of the form of ideas presupposes some of his later epistemological views. Finally, as we have seen, Fichte's intersubjective understanding of property requires that the state organize its intellectual property regime to ensure that authors are able to live from their trade. I turn now to a few brief conclusions.

*

10. CONCLUSION: THE ORIGINALITY OF FICHTE'S VIEWS

FOR FICHTE, CREATIVE WORKS EXPRESS THE INDIVIDUALITY of their creators, and the recognition of this individuality, which forms the basis of Fichte's later intersubjective theory of legal rights, entails the recognition of a property interest in creative works. Or to use Vaver's words to articulate Fichte's theory, Fichte recognizes that

124. Fichte, "The Illegality of the Reproduction of Books," *supra* note 53 at para. 22.
125. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 204.
126. Fichte emphasizes the importance of there being an exact balance between raw products received by the artist and finished articles produced. Fichte, *Foundations of Natural Right*, *supra* note 1 at p. 204.

"everyone should own the product of their own mind." This theory about the nature of intellectual property is a unique contribution to the natural rights theory of intellectual property. It articulates a modern view that is distinguished from that of Fichte's contemporaries. As well, as we saw in the context of mechanical works, Fichte also considers the recognition of a right to property as protection against unfair competition. It would be unfair for the creator of a unique mechanical work not to receive time-limited compensation given the amount of labour he has put into the creation and the ease of reproducing the work once it is made public. Here, too, Fichte mirrors Vaver's concern about unfair competition, which Vaver expresses in economic terms as follows:

> IP rights [encourage] the financing of research and development, and the distribution of the products of such R & D. Without IP rights, competitors could freely copy creative work more cheaply because they have not incurred any initial R & D costs.[127]

Fichte's view of intellectual property is a natural rights view because it does not see property rights as a way of creating incentives that will maximize social utility. Instead, it bases property on an idea of right derived from an essential aspect of human existence. For both Kant and Fichte, this essential aspect of human existence is freedom. But whereas for Kant the idea of human freedom is an *a priori* rational presupposition,[128] for Fichte, right is derived from the mutual recognition of freedom—it presupposes intersubjectivity. It is for this reason that in "Proof of the Illegality of the Unauthorised Reprinting of Books," Fichte justifies the granting of rights in original works on the basis of a phenomenological argument about our experience of our own ideas and the inability of experiencing the ideas of others as they experience them due to the unique form with which their personality endows them. The essay on the reproduction of books thus serves to forecast Fichte's unique intersubjective view of rights that distinguishes him from his contemporaries.

Finally, Fichte's view addresses the deficiencies of many contemporary theoretical justifications for protecting intellectual property rights. First, it deals at length with the difficulties presented by a utilitarian justification for copyright. The utilitarians that Fichte addresses are straw men of sorts, since their view that a person should have a right to be recognized as the author of a work but have no property rights in the work is not a view held by modern utilitarians. Furthermore, Fichte's view would be unconvincing to modern utilitarians: He rejects their claim that there is no property in a book that can be deduced from principles of right, arguing that copyright is necessary to recognize the unique personality of the author that is expressed in the form of the work. But this refutation does not address the arguments of modern utilitarians who do not accept that morality or law is derived from any inherent rights that a person has in virtue of being human.

127. Vaver, "The Future of Intellectual Property Law," *supra* note 44 at p. 2.
128. As Allen Wood points out, for Kant, "freedom is a necessary presupposition of any use of reason at all." This is because "it would be self-refuting to judge that one is not free, and to represent oneself as making this judgment on the basis of good reasons." Allen W Wood, "Kant's Practical Philosophy," in Karl Ameriks, ed., *The Cambridge Companion to German Idealism* (Cambridge University Press, 2000) 57–75 at p. 67. This presupposition permits Kant to ground his moral philosophy on the presupposition of human freedom.

Fichte is more successful in addressing a major lacuna in the Lockean labour-based view of property. His epistemological view about the creation of ideas, outlined in the work on the reprinting of books and further elaborated in later philosophical works, is able to explain how it is that our intellectual work is a unique expression of our personality. He thus addresses one of the major concerns with the Lockean view, namely, that it is hard to see what unique, personal element labour adds to things that entails a property interest in them. For Fichte, the form of our thoughts is the unique element that cannot be produced by another except through copying.

Thus, despite its flaws and incomplete arguments, Fichte's essay on the illegality of the reproduction of books, in addition to its entertaining prose and amusing parable, provides some insights into the concerns that motivated natural rights theorists in the late eighteenth century.

TRANSLATION OF *BEWEIS DER UNRECHTMÄSSIGKEIT DES BÜCHERNACHDRUCKS: EIN RÄSONNEMENT UND EINE PARABEL.*[1]

By J.G. Fichte

The essay originally appeared in the Berlinische Monatsschrift, Vol. 21, No. 1 (1793), pp. 443-483.

Beweis der Unrechtmäßigkeit des Büchernachdrucks: Ein Räsonnement und eine Parabel

1. Wer schlechte Gründe verdrängt, macht bessern Platz. So urtheilte unlängst ein durch seinen Rang, und mehr noch durch seine Gerechtigkeit, ehrwürdiges Gericht; und so dachte der Verfasser des Aufsatzes: "Der Bücherverlag in Betrachtung der Schriftsteller, der Verleger, und des Publikums, nochmals erwogen" im *Deutschen Magazin*, April 1791. Die Unrechtmäßigkeit des Büchernachdrucks schien nehmlich Hrn. Reimarus durch die bis jetzt angeführten Gründe noch nicht erwiesen; und er wollte durch eine scheinbare Vertheidigung desselben die Gelehrten auffordern, auf bessere gegen denselben zu denken. Denn unmöglich konnte es ihm dabei Ernst sein; unmöglich konnte er wollen, daß die Vertheidigung eines Verfahrens sich behaupte, gegen welches jeder Wohldenkende einen innern Abscheu fühlt.

2. Seine Abhandlung theilt sich, der Natur der Sache gemäß, in die zwei Fragen: über die *Rechtmässigkeit*, und über die *Nützlichkeit* des Büchernachdrucks. In Absicht der erstern, behauptet er: daß bis jetzt noch kein,

Proof of the Illegality of the Unauthorised Reprinting of Books: An Argument and a Parable.[2]

1. [223] He who displaces bad reasons makes room for better ones. Thus has a venerable court, respected for its rank, and even more for its justice, recently judged. And so thought the author of the essay "The Publishing House Considered Once More in Relation to Writers, Publishers, and the Public" ("Der Bücherverlag in Betrachtung der Schriftsteller, der Verleger und des Publicums, nochmals erwogen"), published in the *Deutsches Magazin*, April 1791. The illegality of reprinting books seems not yet to have been proven for Herr Reimarus by the reasons provided until now, and he wanted, through his apparent defence of the practice, to invite scholars to think of better reasons against it. For he could not possibly have been in earnest. He could not have wanted that a practice be defended against which every thoughtful person has an inner revulsion.

2. In accordance with the nature of the matter, his treatise is divided into two questions: [the first] about legality, and [the second] about the usefulness of [the unauthorised] reprinting of books. With regards to the first question, he observes

1. Other translations include Emmanuel Kant, *Qu'est-ce qu'un livre ? Textes de Kant et de Fichte, Jocelyn Benoist* (trans.) (Paris: Presses Universitaires de France, 1995) and JG Fichte, "Proof of the Illegality of Reprinting: A Rationale and a Parable," Martha Woodmansee (trans.), <http://www.case.edu/affil/sce/authorship/syllabus.html>.
2. I would like to thank Hartwig Mayer, who reviewed my original English translation of Fichte's text and produced his own independent translation to aid me in revising mine. Numbers in the English translation refer to pages in the German standard edition of Fichte's works, Immanuel Hermann Fichte (ed.), *Fichtes Werke*, vol. 3 (Berlin: Walter de Gruyter & Co., 1971), at pp. 223-244.

offenbar nur aus einem *fortdaurenden Eigenthume* des Gelehrten an seinem Buche, abzuleitendes Recht desselben, oder seines Stellvertreters, des rechtmäßigen Verlegers, den Nachdruck zu verhindern, nachgewiesen sei; woraus natürlich eine Befugniß zum Nachdrucke folgen würde: mithin die Frage: Ob der Nachdruck in polizirten Staaten zu dulden sei? nach ihrer Abweisung vom Richterstuhle der vollkommnen Rechte, von der Beantwortung der weiteren Frage abhängen würde: Ob er nützlich sei? Herr Reimarus beantwortet diese Frage bejahend, mithin auch die erste; schlägt jedoch zum Vortheile des Verfassers, und seines rechtmäßigen Verlegers, einige Einschränkungen der allgemeinen Erlaubniß des Büchernachdrucks vor.

that, until now, there has been no right to prevent reprinting derived either from the perpetual property [right] of the scholar in his book, or from that of his representative, the legitimate publisher. [224] As a result, it follows from this that there is a right to reprint books, and there thus arises the question whether reprinting ought to be tolerated in a state governed by law once it has been rejected by a court of perfect right. The answer to this question depends on the answer to the further question—is the practice useful? Herr Reimarus answers this second question affirmatively, and therefore also the first question. However, he does suggest a few restrictions on the general permissibility of reprinting books to the benefit of the author and his legal publisher.

3. Herr Reimarus — denn wir gestehen, daß wir nicht nöthig gefunden haben, die Verfasser, welche er für eben diese Meinung anführt, nachzulesen, da wir natürlicher Weise voraussetzen konnten, daß er ihre Gründe benutzt, und daß die letzte Schrift dafür, die seinige, auch die stärkste sein werde. — Herr Reimarus also hat nicht erwiesen, noch zu erweisen gesucht, daß überhaupt kein dergleichen fortdaurendes Eigenthum des Verf. möglich sei; sondern nur gesagt, daß man bis jetzt es noch nicht klar dargelegt habe, und einige Instanzen angeführt, die seiner Meinung nach, gegen die Allgemeinheit, und mithin auch Vollkommenheit eines solchen vom Eigenthume abgeleiteten Rechts streiten würden. Wir haben also gar nicht nöthig ihm Schritt vor Schritt zu folgen, und uns auf seine Gründe einzulassen. Können wir nur ein dergleichen fortdaurendes Eigenthum des Verfassers an seine Schrift wirklich beweisen, so ist geschehen, was Er verlangte, und Er mag nun seine Instanzen selbst mit demselben zu vereinigen suchen. Ferner haben wir dann auch seinen Erweis der Nützlichkeit des Büchernachdrucks nicht zu beantworten; denn es kömmt

3. We confess that we need not read the authors which Herr Reimarus cites to support this opinion, since we can naturally assume that Herr Reimarus uses their arguments, and that the most recent treatise advocating this position, i.e., his own, will be the strongest. Herr Reimarus has not proven, nor does he seek to prove, that absolutely no such continuing property right of the author is possible. Rather, he says that this right has not yet been clearly presented, and he provides a few examples which, in his opinion, argue against the generality and completeness of such a right derived from property. We thus need not follow him step by step, nor address his reasons. For if we can truly prove the existence of such a continuing property right of the author in his text, then what Herr Reimarus requests of us is accomplished, and he can try himself to reconcile the examples with this right. Furthermore, we also need not address his proof of the usefulness of the reprinting of books,

sodann darauf gar nicht mehr an, da nie geschehen darf, was schlechthin unrecht ist; sei es, so nützlich es wolle.

4. Die Schwierigkeit, welche man fand, ein *fortdaurendes Eigenthum des Verfassers an sein Buch* zu beweisen, kam daher, weil wir gar nichts Aehnliches haben, und das, was demselben einigermaßen ähnlich zu sein scheint, wieder in Vielem sich gar sehr davon unterscheidet. Ebendaher kömmt es, daß unser Beweis ein etwas spitzfindiges Ansehen bekommen muß, welches wir aber so gut als möglich zu poliren suchen werden. Aber der Leser lasse sich ihn dadurch nicht verdächtig werden; denn es wird sehr leicht möglich sein, ihn in Konkreto klar zu machen, und zu erhärten. — Es sind nehmlich eine Menge Maximen über diesen Gegenstand im Umlaufe, welche jeder von der Sache Unterrichtete, Wohldenkende, und für das Gegentheil nicht Interessirte annimmt, Anderer Verhalten in Dingen der Art darnach beurtheilt, und das seinige selbst einrichtet. Lassen sich diese alle leicht und natürlich auf unsern als Princip aufgestellten Satz zurückführen, so ist dies gleichsam seine Probe; und es wird dadurch klar, daß er der Grundsatz ist, welcher allen unsern Urtheilen über diesen Gegenstand, obgleich dunkel und unentwickelt, zum Grunde lag.

5. Zuerst der Grundsatz: *Wir behalten nothwendig das Eigenthum eines Dinges, dessen Zueignung durch einen Andern physisch unmöglich ist*. Ein Satz, der unmittelbar gewiß ist, und keines weitern Beweises bedarf. Und jetzt die Frage: Giebt es Etwas von der Art *in einem Buche*?

6. Wir können an einem Buche zweierlei unterscheiden: das *Körperliche* desselben, das bedruckte Papier; und sein *Geistiges*. Das Eigenthum des erstern geht durch den Verkauf des

since this becomes irrelevant. For what is in itself unjust may not occur, no matter how useful it might be.

4. The difficulty that has been encountered in proving a perpetual property right of the author in his book arose because we have nothing similar to a book, and that which appears in some way to be similar seems in fact to differ in many ways. As a result, our proof will naturally seem somewhat quibbling, though we will try to polish it as much as possible. [225] But the reader need not become suspicious as a result of this, since it will be very easy to clarify and substantiate this viewpoint *in concreto*. There are many maxims circulating about this subject that every person accepts who is informed about the matter, who is well-meaning, who does not have an interest in the opposing view, who judges the behaviour of others in such matters accordingly, and who adjusts his own behaviour. If these maxims can be easily and naturally led back to the principle we have proposed, then this is itself its proof, and it will thereby become clear that this principle is the foundational principle which represents the basis of all of our judgments about this subject, no matter how obscure and underdeveloped they may be.

5. First, the principle: We necessarily maintain property in a thing whose acquisition by another is physically impossible. This principle is incontrovertibly certain and needs no further proof. And now the question: Is there something of this kind in a book?

6. We can distinguish two things about a book: its physical aspect, the printed paper, and its intellectual aspect. The ownership of the physical aspect is undeniably transferred to the purchaser

Buchs unwidersprechlich auf den Käufer über. Er kann es lesen, und es verleihen, so oft er will, wiederverkaufen an wen er will, und so theuer oder so wohlfeil er will oder kann, es zerreißen, verbrennen; wer könnte darüber mit ihm streiten? Da man jedoch ein Buch selten auch darum, am seltensten bloß darum kauft, um mit seinem Papier und Drucke Staat zu machen, und damit die Wände zu tapeziren; so muß man durch den Ankauf doch auch ein Recht auf sein Geistiges zu überkommen meinen. Dieses Geistige ist nehmlich wieder einzutheilen: in das *Materielle*, den Inhalt des Buchs, die Gedanken die es vorträgt; und in die *Form* dieser Gedanken, die Art wie, die Verbindung in welcher, die Wendungen und die Worte, mit denen es sie vorträgt. Das erste wird durch die bloße Uebergabe des Buchs an uns offenbar noch nicht unser Eigenthum. Gedanken übergeben sich nicht von Hand in Hand, werden nicht durch klingende Münze bezahlt, und nicht dadurch unser, daß wir ein Buch, worin sie stehen, an uns nehmen, es nach Hause tragen, und in unserm Bücherschranke aufstellen. Um sie uns zuzueignen, gehört noch eine Handlung dazu: wir müssen das Buch lesen, seinen Inhalt, wofern er nur nicht ganz gemein ist, durchdenken, ihn von mehrern Seiten ansehen, und so ihn in unsre eigne Ideenverbindung aufnehmen. Da man indeß, ohne das Buch zu besitzen, dies nicht konnte, und um des bloßen Papiers willen dasselbe nicht kaufte; so muß der Ankauf desselben uns doch auch hierzu ein Recht geben: wir erkauften uns nehmlich dadurch die Möglichkeit, uns die Gedanken des Verfassers zu eigen zu machen; diese Möglichkeit aber zur Wirklichkeit zu erheben, dazu bedurfte es unsrer eignen Arbeit. — So waren die Gedanken des ersten Denkers dieses und der vergangenen Jahrhunderte, und höchstwahrscheinlich eines der Ersten aller künftigen, vor der Bekanntmachung

when it is sold. The purchaser may read the book, lend it as often as he wishes, resell it to whomever he wishes as expensively or as cheaply as he wants or is able to, rip it up or burn it, and who could argue with him? But since one seldom purchases a book in order to impress people with its paper and printing, or to use it as wallpaper, one must also intend to acquire a right to its intellectual component through the purchase. This intellectual aspect can be further divided into its *material* aspect, i.e., the content of the book and the ideas which it presents, and the *form* of the thoughts, i.e., the way in which, the connections by means of which, the words and expressions with which the ideas presented in the book stand in relation to each other. The first aspect is clearly not yet our property through the mere handing of the book to us. Thoughts are not given from hand to hand, and cannot be paid for with hard cash. They do not become our own when we acquire the book in which they are contained, [226] take it home, and place it on our bookshelf. In order to acquire the ideas, one more action is necessary—we must read the book, think through its contents if these are not very simple, consider them from various angles, and so incorporate them into our own system of ideas. As one could not do this without possessing the book, and because one does not buy a book merely for the sake of its paper, the purchase of the book must thus also give us a right to its intellectual aspect. Through the purchase, we acquire the possibility of making the ideas of the author our own. But to make this possibility a reality, our own effort is required. Thus the thoughts of the foremost thinker of this and the previous century, and most likely also of the future, were his sole property before the publication of his famous works, and

seiner merkwürdigen Werke, und noch eine geraume Zeit nachher, sein ausschließendes Eigenthum; und kein Käufer bekam für das Geld, welches er für die Kritik der reinen Vernunft hingab, ihren Geist. Jetzt aber hat mancher hellsehende Mann sich denselben zugeeignet: und das wahrlich nicht durch Ankauf des Buchs, sondern durch fleißiges und vernünftiges Studium desselben. Dieses Mitdenken ist denn auch, im Vorbeigehn sei es gesagt, das einzig passende Aequivalent für Geistesunterricht, sei er mündlich oder schriftlich. Der menschliche Geist hat einen ihm angebornen Hang, Uebereinstimmung mit seiner Denkungsart hervorzubringen; und jeder Anschein der Befriedigung desselben ist ihm die süßeste Belohnung aller angewandten Mühe. Wer wollte lehren vor leeren Wänden, oder Bücher schreiben die Niemand läse? Das, was für dergleichen Unterricht an Gelde entrichtet wird, für Aequivalent anzusehen, wäre widersinnig. Es ist nur Ersatz dessen, was der Lehrer denen geben muß, die während der Zeit, daß er für Andere denkt, für ihn jagen, fischen, säen, und ernten.

for a considerable time after this. And no purchaser of the *Critique of Pure Reason* has acquired its spirit merely in return for the money he has handed over. But by now a few clear-thinking people have acquired this spirit, certainly not through the purchase of the book, but through a diligent and sensible study of it. It must be said, in passing, that thinking through a book while reading it is the sole acceptable equivalent of intellectual education, be it oral or written. The human spirit has an innate tendency to bring about agreement with its manner of thinking, and every apparent satisfaction of this tendency is the sweetest reward for effort applied for this purpose. Who wishes to teach facing empty walls, or write books that no-one reads? It would be ridiculous to regard the money that is paid for such teaching as equivalent [compensation]. Money is only the substitute that the teacher must give those who, while he is thinking for others, hunt, fish, sow and harvest for him.

7. Was also fürs erste durch die Bekanntmachung eines Buchs sicherlich feilgeboten wird, ist das *bedruckte Papier*, für jeden der Geld hat, es zu bezahlen, oder einen Freund, es von ihm zu borgen; und der *Inhalt* desselben, für jeden der Kopf und Fleiß genug hat, sich desselben zu bemächtigen. Das erstere hört durch den Verkauf unmittelbar auf, ein Eigenthum des Verfassers (den wir hier noch immer als Verkäufer betrachten können) zu sein, und wird *ausschließendes* des Käufers, weil es nicht mehrere Herren haben kann; das letztere aber, dessen Eigenthum vermöge seiner geistigen Natur Vielen gemein sein kann, so daß doch jeder es ganz besitze, hört durch die Bekanntmachung eines Buchs freilich

7. Thus what is certainly offered through the announcement of a book is the *printed paper*, which is available to each who has money to pay for it, or who can borrow it from a friend, and the content of the book, which is available to everyone who [227] has enough brains and diligence to absorb it. The printed paper, which becomes the exclusive property of the purchaser, ceases immediately to be the property of the author (whom we are here regarding as seller) through its sale, since the book cannot have multiple owners. The content, however, which can be the common property of many thanks to its intellectual nature, which allows anyone to possess it entirely, ceases to be the

auf, *ausschliessendes* Eigenthum des ersten Herrn zu sein (wenn es dasselbe nur vorher war, wie dies mit manchem heurigen Buche der Fall nicht ist[)], bleibt aber sein mit Vielen gemeinschaftliches Eigenthum. — Was aber schlechterdings nie jemand sich zueignen kann, weil dies physisch unmöglich bleibt, ist die *Form* dieser Gedanken, die Ideenverbindung in der, und die Zeichen, mit denen sie vorgetragen werden.

exclusive property of its first owner (if it was so to begin with, which is not always the case with a book nowadays), but remains his property in common with many others. But that which can simply never be appropriated by anyone, since it is physically impossible, is the *form* of the thoughts, the connections between ideas, and the signs by means of which the ideas are presented.

8. Jeder hat seinen eignen Ideengang, seine besondere Art sich Begriffe zu machen, und sie untereinander zu verbinden; dies wird, als allgemein anerkannt, und von jedem der es versteht, sogleich anzuerkennend, von uns vorausgesetzt, da wir hier keine empirische Seelenlehre schreiben. Alles was wir uns denken sollen, müssen wir uns nach der Analogie unsrer übrigen Denkart denken; und bloß durch dieses Verarbeiten fremder Gedanken, nach der Analogie unsrer Denkart, werden sie die unsrigen: ohne dies sind sie etwas Fremdartiges in unserm Geiste, das mit nichts zusammenhängt, und auf nichts wirkt. Es ist unwahrscheinlicher als das Unwahrscheinlichste, daß zwei Menschen über einen Gegenstand völlig das Gleiche in eben der Ideenreihe, und unter eben den Bildern, denken sollen, wenn sie nichts voneinander wissen, doch ist es nicht absolut unmöglich; daß aber der Eine, welchem die Gedanken erst durch einen Andern gegeben werden müssen, sie in eben der Form in sein Gedankensystem aufnehme, ist absolut unmöglich. Da nun reine Ideen ohne sinnliche Bilder sich nicht einmal denken, vielweniger Andern darstellen lassen, so muß freilich jeder Schriftsteller seinen Gedanken eine gewisse Form geben, und kann ihnen keine andere geben als die seinige, weil er keine andere hat; aber er kann durch die Bekanntmachung

8. Each person has his own manner of thinking, and his own unique way of forming concepts and connecting them. Since we are not writing an empirical theory of the mind, we assume this to be universally acknowledged and immediately accepted by anyone who understands it. Everything that we are to think must be thought in terms of an analogy with our other ways of thinking. And we can only appropriate the thoughts of others by means of an analogy with our own way of thinking. Without this process, something foreign would exist in our minds that would not be connected with anything else, and which would not affect anything. It is more improbable than the most improbable thing that two people who know nothing of each other should have identical thoughts about an object using the same series of thoughts and the same images, though it is not completely impossible. But it is absolutely impossible that a person to whom thoughts are given by another take up these thoughts in his system of thinking precisely in this form. Since pure ideas cannot be thought without sensible images, far less presented to others without such images, so must every writer give his thoughts a particular form. And he cannot give these thoughts any other form than his own, because he has no other. However, through the publishing of his [228] ideas, the author could not

seiner Gedanken gar nicht Willens sein, auch diese Form gemein zu machen: denn Niemand kann seine Gedanken sich zueignen, ohne dadurch daß er ihre Form verändere. Die letztere also bleibt auf immer sein *ausschliessendes Eigenthum*.

9. Hieraus fließen zwei Rechte der Schriftsteller: nehmlich nicht bloß, wie Herr R. will, das Recht zu verhindern, daß Niemand ihm überhaupt das Eigenthum dieser Form abspreche (zu fordern, daß jeder ihn für den Verf. des Buchs anerkenne); sondern auch das Recht, zu verhindern, daß Niemand in sein ausschließendes Eigenthum dieser Form Eingriffe thue, und sich des Besitzes derselben bemächtige.

10. Doch ehe wir weitere Folgerungen aus diesen Prämissen ziehen, laßt sie uns erst ihrer Probe unterwerfen! — Noch bis jetzt haben die Schriftsteller es nicht übel empfunden, daß wir ihre Schriften verbrauchen, daß wir sie Andern zum Gebrauch mittheilen, daß wir sogar Leihbibliotheken davon errichten, ungeachtet dies (denn wir sehen sie hier noch immer als Verkäufer an) offenbar zu ihrem Schaden gereichet; und wenn wir sie zerreißen oder verbrennen, so beleidigt dies den Vernünftigen nur alsdann, wenn es wahrscheinlich in der Absicht geschieht, ihm dadurch Verachtung zu bezeugen? Noch haben sie uns also bis jetzt durchgängig das völlige Eigenthum des körperlichen ihrer Schriften zugestanden. — Ebensowenig sind sie dadurch beleidigt worden, wenn man, bei wissenschaftlichen Werken, sich ihre Grundsätze eigen machte, sie aus verschiedenen Gesichtspunkten darstellte, und auf verschiedene Gegenstände anwendete; oder bei Werken des Geschmacks ihre Manier, welches ganz etwas anders ist als ihre Form, nachahmte. Sie haben dadurch eingestanden, daß das *Gedankeneigenthum* auf Andere übergehen könne.

desire that this *form* become common property, for no one could appropriate his ideas without changing the form. The latter [i.e., the form of the ideas] thus remains forever the exclusive property of the author.

9. From this flow two rights of the author: Namely, not only the right, as Herr R. maintains, to prevent anyone from completely denying the author ownership of the form (i.e., to demand that everyone accept him as the author of the book), but also the right to prevent anyone from interfering with his exclusive right in the form and making it his property.

10. But before we draw further conclusions from these premises, we must first test them. Until now, no author has taken offence when we use his works, or when we share them with others, or when we build lending libraries, even though these practices do them some harm (for we are still regarding authors as sellers). And when we rip up or burn books, this only offends a reasonable person when it occurs with the intention of demonstrating our contempt. Until now, authors have completely conceded full ownership of the physical aspect of their texts to the purchaser, and they have been just as little offended when we make their principles our own in our academic works, portray these from various perspectives, and apply them to different subjects. Nor have they taken exception to works of fashion that imitate their style, which is something quite different from form. In this way, they have conceded that the ownership of ideas can be given to others.

11. Aber immer ist es allgemein für verächtlich angesehen worden, *wörtlich auszuschreiben*, ohne den eigentlichen Verfasser zu nennen; und man hat dergleichen Schriftsteller mit dem entehrenden Namen eines Plagiars gebrandmarkt. Daß diese allgemeine Mißbilligung nicht auf die Geistesarmuth des Plagiars, sondern auf etwas in seiner Handlung liegendes Unmoralisches gehe: ist daraus klar, weil wir im ersten Fall ihn bloß bemitleiden, aber nicht verachten würden. Daß dieses Unmoralische, und der Grund des Namens den man ihm giebt, gar nicht darin gesetzt werde, weil er durch den Verkauf eines Dinges, welches Käufer schon besitzt, diesen um sein Geld bringt: ergiebt sich daraus, daß unsre schlechte Meinung von ihm nicht um das Geringste gemildert wird, wenn er ein höchstseltenes etwa nur auf großen Bibliotheken vorzufindendes Buch ausgeschrieben hat. Daß endlich diese Ungerechtigkeit nicht etwa darin bestehe, daß er, wie Herr R. meinen könnte, dem Verfasser seine Autorschaft abspreche: folgt daraus, weil er diese gar nicht läugnet, sondern sie nur ignorirt. Auch würde man sie vergeblich darauf zurückführen, daß er dem Verfasser die rechtmäßige Ehre nicht erzeige, indem er ihn nicht nenne wo er ihn hätte nennen sollen: indem der Plagiar nicht weniger Plagiar genannt wird, wenn er auch das Buch eines Anonymus ausgeschrieben hat. Wir können sicher jeden ehrliebenden Mann fragen, ob er sich nicht in sich selbst schämen würde, wenn er es sich nur als möglich dächte, daß er etwa eines unbekannten verstorbenen Mannes Handschrift, oder ein Buch dessen einziger Besitzer er wäre, ausschreiben könnte? ... Diese Empfindungen können, nach allem Gesagten, in nichts, als in dem Gedanken liegen: daß der Plagiar sich eines Dinges bemächtiget, welches nicht sein ist. — Warum denkt man nun über den Gebrauch der *eignen Worte* eines

11. But it has generally been acknowledged as contemptible to quote literally from a work without naming the actual author, and we have labelled writers who do this with the degrading title of plagiarist. That this disapproval does not relate to the intellectual poverty of the plagiarist, but to an immoral element in his behaviour, is clear from the fact that were the former the case, we would merely pity him [229] rather than despise him. That this immorality and the reason for the title of plagiarist which we give to such a person have nothing to do with the fact that the plagiarist sells an object that the seller already possesses, thereby depriving him of his money, can be concluded from the fact that our negative opinion is not changed in the least if he has copied from a very rare book that can only be found in large libraries. The true injustice does not consist, as Herr. R. maintains, in the denial of the authorship of the actual writer. This follows because the plagiarist does not deny authorship, but merely ignores it. Furthermore, it would be in vain to lead the wrong back to the fact that the plagiarist does not accord rightful honour to the actual author by not naming him where he could have, for a plagiarist is no less a plagiarist if he has copied a book by an anonymous author. We could certainly ask any honourable person if he would not be ashamed of himself if he copied the writing of a deceased, unknown person, or copied from a book of which he was the sole possessor? . . . After all that has been said, these sentiments could only be based on the idea that the plagiarist seizes something which is not his own. Now, why do we think completely differently about the use of the actual words of the author and the use of his ideas? In the latter case, we are using that which can be our property in

Schriftstellers ganz anders, als über die Anwendung seiner *Gedanken*? Im letztern Fall, bedienen wir uns dessen, was unser mit ihm gemeinschaftliches *Eigenthum* sein kann, und beweisen daß es dieses sei, dadurch, daß wir ihm *unsere Form* geben; im ersten Fall, bemächtigen wir uns *seiner Form* welche nicht unser, sondern sein ausschließendes, Eigenthum ist.

common with the author, and we attest to this by giving the ideas our own form. But in the first case, we appropriate the form, which is not our own, but rather the exclusive property of the author.

12. Eine Ausnahme macht man mit den *Zitaten*: nehmlich, nicht nur solchen, wo von einem Verfasser bloß gesagt wird, daß er irgend etwas entdeckt, erwiesen, dargestellt habe, wobei man sich weder seiner Form bemächtigt, noch eigentlich seine Gedanken vorträgt, sondern auf sie nur weiter fortbaut; sondern auch solchen, wo die eignen Worte des Verfassers angeführt werden. Im letzten Falle bemächtigt man sich wirklich der Form des Verfassers, die man zwar nicht für die *seinige* ausgiebt, welches jedoch hier nichts zur Sache thut. Diese Befugniß scheint sich auf einen stillschweigenden Vertrag der Schriftsteller untereinander zu gründen, einander gegenseitig mit Anführung der eignen Worte zu zitiren; doch würde auch hier es niemand billigen, wenn ein Anderer, ohne sichtbares Bedürfniß, besonders große Stellen, ausschriebe. Mit nur halbem Rechte stehen unter den Ausnahmen die Blumenlesen, die *Geiste* (esprits), zu deren Verfertigung gemeinhin nicht viel Geist gehört, und dergleichen kleine Diebereien, die Niemand sehr bemerkt, weil sie Niemanden viel helfen, noch viel schaden.

12. An exception is made for quotations. This is not only the case when we acknowledge that the author has discovered, demonstrated or described something and, without adopting the author's form or actually presenting his ideas, build upon them, but it is also the case when we quote the actual words of the author. In the latter case, one actually adopts the author's form, [230] even if one does not pass it off as one's own, though this is not relevant here. The permission to quote seems to be founded on a silent agreement between authors to quote each other by citing the actual words. However, even in this case, no one would approve if one author, without any obvious need, copied particularly long passages. Florilegia[3] such as *Die Geiste (esprits)*, [collections of] witticisms that do not normally require much wit to produce, along with similar minor thefts that nobody notices, are only partly covered by this exception, since they neither help nor hurt anyone to any great degree.

13. Kein Dozent duldet es, daß jemand seine Vorlesungen abdrucken lasse; noch nie aber hat Einer etwas dagegen gehabt, wenn seine Zuhörer sich seinen Geist und seine Grundsätze eigen zu machen gesucht, und sie mündlich oder schriftlich weiter verbreitet haben. — Worauf gründet sich dieser Unterschied? Im letzten Fall tragen sie seine Gedanken

13. No lecturer would tolerate that someone print his lectures. And yet no one has ever objected when his listeners in the audience attempt to make his ideas and principles their own, and pass these on in oral or written form. On what, then, is the distinction based? In the latter case, the listeners are stating the ideas of the lecturer that, through

3. Anthology

vor, die durch ihr eignes Nachdenken, und die Aufnahme derselben in ihre Ideenreihe, die ihrigen geworden sind; im erstern, bemächtigen sie sich seiner Form, die nie ihr Eigenthum werden kann, kränken ihn also in seinem vollkommnen Rechte.

14. Und jetzt diese a priori erwiesenen, und a posteriori durch die aus ihnen mögliche Erklärbarkeit dessen, was in Sachen der Art für Recht gehalten wird, erprobten Grundsätze, auf das Verhältniß des Verfassers und des Verlegers angewandt! Was überträgt der Erstere an den Letztern, indem er ihm seine Handschrift übergiebt? ... Ein *Eigenthum?* Etwa das der *Handschrift?* Aber die Gelehrten werden gestehen, daß diese größtentheils des Geldes nicht werth sei; und warum verzeihen sie es sich denn nicht, mehrere von eben der Schrift an mehrere Verleger zu verkaufen? Das Eigenthum der darin enthaltenen Gedanken: Dies überträgt sich nicht durch eine bloße Uebergabe; und selten würde dem Verleger viel damit gedient sein. — Noch weniger das der *Form* dieser Gedanken: denn diese ist, und bleibt auf immer, ausschließendes Eigenthum des Verfassers. — Der Verleger bekommt also durch den Kontrakt mit dem Verfasser überhaupt *kein Eigenthum*, sondern unter gewissen Bedingungen nur das Recht eines gewissen *Niessbrauchs* des Eigenthums des Verfassers, d. i. seiner Gedanken in ihre bestimmte Form eingekleidet. Er darf an wen er will und kann, verkaufen — nicht die Gedanken des Verfassers, und ihre Form, sondern nur die durch den Druck derselben hervorgebrachte *Möglichkeit* sich die erstern zuzueignen. Er handelt also allenthalben nicht in seinem Namen, sondern im Namen und auf Auftrag des Verfassers.

the process of their own thinking, and the taking up of these ideas in their own thought processes, become their own ideas. In the first case, the form of the lecturer's ideas, which cannot become the property of others, is appropriated, which infringes the lecturer's exclusive rights.

14. And now let us apply the principles, which we have proven *a priori* and tested *a posteriori* by demonstrating that they explain what is considered right in these matters, to the relationship between the author and the publisher. What does the former give over to the latter when he hands over his manuscript? Property? Perhaps his property in the *manuscript*? But scholars will admit that the manuscript is for the most part not worth any money. And why, then, do they not forgive themselves if they sell copies of the same manuscript to several publishers? The property in the manuscript cannot be transferred merely by turning over the manuscript [to another], and it is seldom that the latter would be very useful to the publisher. Still less is it the property in the *form* of these ideas, since this remains forever the exclusive property of the author. The publisher thus does not receive any property at all through the contract with the author, but rather [231] receives only the right, under certain conditions, to the *usufruct* of the property of the author, i.e., to his thoughts clothed in a particular form. The publisher may sell to whomever he can or wishes to sell to, not the thoughts of the author and their form, but only the *possibility* of appropriating the thoughts that arises through their printing. The publisher thus in every case is acting, not in his own name, but in the name of and on behalf of the author.

15. Auch diese Begriffe zeigen sich in allgemein angenommenen Maximen. Warum wird selbst der rechtmäßige Verleger allgemein getadelt, wenn er eine größere Anzahl Exemplare abdrucken läßt als er mit dem Verfasser verabredet hat? Das Recht des Verfassers dies zu hindern, gründet sich zwar auf einen Kontrakt, der aber nicht über das Eigenthum, sondern den Nießbrauch abgeschlossen ist. Der Verleger kann höchstens Eigenthümer dieses Nießbrauchs heißen. — Warum dann, wenn er eine zweite Auflage besorgt, ohne Erlaubniß des Verfassers? Wie kann der Verfasser, bei einer zweiten Auflage, auch wenn er nichts Neues hinzusetzt noch umarbeitet, von neuem Honorar vom Verleger für die bloße Erlaubniß der neuen Auflage fordern? Wären diese Maximen nicht widersprechend, wenn man annähme, daß das Buch ein Eigenthum des Verlegers würde, und nicht beständiges Eigenthum des Verfassers bliebe, so daß der Verleger fortdaurend nichts ist als sein Stellvertreter? Wäre es nicht widersprechend, daß das Publikum, wenn es, durch einen prächtigen Titel getäuscht, ein Buch gekauft hat, in welchem es nichts als das Längstbekannte, aus den bekanntesten Büchern ärmlich zusammengestoppelt findet; an den Verfasser des Buchs Regreß nimmt, und nicht an seinen Verleger sich hält? Ein Recht uns zu beklagen, haben wir allerdings; wir wollten nicht bloß ein paar Alphabete gedrucktes Papier, wir wollten zugleich die *Möglichkeit* erkaufen, uns über gewisse Gegenstände zu belehren. Diese ward uns versprochen, und nicht gegeben. Wir sind getäuscht, wir sind um unser Geld. Aber gaben wir dies nicht dem Verleger? War er es nicht, der uns das leere Buch dagegen gab? Warum halten wir uns nicht an ihm, als an dem letzten Verkäufer, wie wir es sonst bei jedem Kaufe thun? Was sündigte

15. These ideas also appear in generally accepted maxims. Why is even the legal publisher criticized when he allows a greater number of copies to be printed than he had agreed with the author? The right of the author to prevent this is indeed founded on a contract, which, however, is not concluded with regard to ownership, but rather with regard to use. The publisher can at most be considered the owner of the *usufruct*. And what about when the publisher issues a second edition without the permission of the author? How can the author, when he does not add anything new or re-work the original manuscript, demand additional money from the publisher merely for granting permission for a new edition? Would not these maxims be contradictory if one were to assume that the book becomes the property of the publisher, and did not remain a continuing possession of the author, such that the publisher is nothing other than his representative? Wouldn't it be contradictory if the public, when it buys a book under a magnificent title and finds in it nothing but well-known ideas poorly compiled from the most well-known books, is disappointed and blames the author of the book rather than the publisher? Of course we have the right to complain. We did not want mere paper printed with letters, but rather, we wanted to buy the *possibility* of being instructed about particular subjects. This is what was promised to us and was not provided. We have been deceived, and we have been swindled of our money. But did we not pay this money to the publisher? Was not it he, who gave us the empty book? Why do we not seek redress from him, as the most recent seller, as we would in the case of any other purchase? [232] How was the poor author at fault? This is how we would necessarily be obliged to think

der arme Verfasser? ... So müßten wir nothwendig denken, wenn wir den Erstern nicht als bloßen Stellvertreter des Letztern betrachteten, der bloß in jenes Namen mit uns handelte, und, wenn wir betrogen wurden, in jenes Namen, auf jenes Geheiß, und oft ohne selbst das geringste Arge daraus zu haben, uns betrog.

if we considered the publisher to be not merely the representative of the author who deals with us in his name, and who, when we were cheated, cheated us in the author's name and at his behest, and often without the least malice on his own part.

16. So verhalten sich Schriftsteller, Verleger, und Publikum. Und wie verhält sich zu ihnen der *Nachdrucker*? Er bemächtigt sich — nicht des Eigenthums des Verfassers, nicht seiner Gedanken (das kann er größtentheils nicht; denn wenn er kein Ignorant wäre, so würde er eine ehrlichere Hanthierung treiben), — nicht der Form derselben, (das könnte er nicht; auch wenn er kein Ignorant wäre); — sondern des *Niessbrauchs* seines Eigenthums. Er handelt im Namen des Verfassers, ohne von ihm Aufträge zu haben, ohne mit ihm ' übereingekommen zu sein, und bemächtigt sich der Vortheile, die aus dieser Stellvertretung entstehen; er maaßet sich dadurch ein Recht an, das ihm nicht zusteht, und stört den Verfasser in der Ausübung seines vollkommnen Rechts.

16. It is in this manner that the author, the publisher and the public conduct themselves. And how is the reprinter of books related to these parties? The re-printer appropriates, not the property of the author, nor his ideas (this he cannot do for the most part, for if he were not ignorant, he would pursue an honest trade), nor the form of the ideas (this he could not do, even if he were not ignorant), but rather the *use* of the property. He operates in the name of the author, without receiving instructions from him, and without coming to an agreement with him, and arrogates the profits which arise from this representation. He acquires in this way a right to which he is not entitled, and so interferes with the author's exercise of his exclusive right.

17. Ehe wir das endliche Resultat ziehen, müssen wir noch ausdrücklich erinnern, daß die Frage gar nicht von dem *Schaden* ist, welchen der Nachdrucker hierdurch dem Verfasser entweder unmittelbar, oder mittelbar in der Person seines Stellvertreters, zufüge. Man zeige soviel man will, daß dadurch weder dem Verfasser noch dem Verleger ein Nachtheil entstehe; daß es sogar der Vortheil des Schriftstellers sei, recht viel nachgedruckt zu werden, daß dadurch sein Ruhm über alle Staaten Deutschlands von der Stapelstadt der Gelehrsamkeit bis in das entfernteste Dörfchen der Provinz, und von der Studierstube des Gelehrten bis in die Werkstätte des Handwerkers verbreitet

17. Before we arrive at the final conclusion, we must expressly remind ourselves that we are not talking about the harm that the re-printer does to the author, either directly, or indirectly through his representative. One can demonstrate as much as one wishes that no harm is caused to the author or the publisher, and that it is even to the advantage of the writer to have his works reprinted often so that his reputation is spread through all the states of Germany, from the centres of scholarship to the most distant little village in the provinces, from the study of the scholar to the workshop of the craftsman. But can something become right that was

werde. Wird dadurch *Recht*, was einmal Unrecht ist? Darf man jemandem wider seinen Willen und sein Recht Gutes thun? Ein jeder hat die vollkommene Befugniß, seinem Rechte nichts zu vergeben; sei es ihm auch so schädlich, als es wolle. Wann wird man doch ein Gefühl für die erhabene Idee des Rechts, ohne alle Rücksicht auf Nutzen, bekommen? — Man merke ferner, daß dieses Recht des Verfassers, welches der Nachdrucker kränkt, sich nicht, wie Herr Reimarus glaubt, auf einen vermeinten Kontrakt desselben mit dem Publikum, und auf eine Jesuitische Mentalreservazion in demselben gründet; sondern daß es sein natürliches, angebornes, unzuveräußerndes Eigenthumsrecht ist. Daß man ein *solches* Recht nicht verletzt sehen wolle, wird wohl ohne ausdrückliche Erinnerung vorausgesetzt; vielmehr müßte man dann es sagen, wenn man auf die Ausübung desselben Verzicht thun wollte.

once not right? Should one be allowed to do someone good against his right and will? Each person has complete authority not to give up his rights, be this as harmful to him as may be. When will we acquire a respect for the sublime idea of right, without any consideration for utility? [233] One should further observe that the right of the author which is violated by the re-printer is not grounded, as Herr Reimarus believes, on an assumed contract of the author with the public and on a Jesuitical mental reservation in it, but rather on his natural, innate, inalienable right to property. That one cannot wish to see a right violated can be assumed without requiring that we be expressly reminded of this fact. Moreover, one would have to state this if one wished to renounce the exercise of this right.

18. Dies alles als erwiesen vorausgesetzt, muß, wenn jeder ein Dieb ist, der um Gewinstes willen den Genuß des Eigenthums Andrer an sich reißt, der Nachdrucker ohne Zweifel einer sein. Wenn ferner jeder Diebstahl dadurch, daß er an Dingen geschieht, die ihrer Natur nach nicht unter Verwahrung gehalten werden können, sträflicher wird; so ist der des Nachdruckers, welcher an einer Sache verübt wird, die jedem offenstehen muß, wie Luft und Aether, einer der sträflichsten. Wird er es endlich dadurch noch mehr, an je edlern Dingen er geschieht; so ist der an Dingen, die zur Geisteskultur gehören, der allersträflichste: daher man denn auch schon den Namen des Plagiats, der zuerst Diebstahl an Menschen bedeutete, auf Bücherdiebereien übergetragen hat.

18. Assuming this all to have been proven, if a person who for profit steals the enjoyment of another's property from him is a thief, then the re-printer is one without a doubt. And furthermore, if a theft becomes more criminal because it is a theft of something that cannot be locked up, then the theft of the re-printer is one of the most criminal, since it is exercised in relation to a thing that must remain accessible to all just as air and ether. And if the theft becomes more criminal the more noble the object that is stolen, then theft of things which belong to the sphere of culture is by far the most criminal of all. But this is why the title of plagiarist, which originally referred to the theft of human beings, has been applied to the theft of books.

19. Und jetzt zu einigen Instanzen des Herrn Reimarus! "Wer es denn sei, der den Nießbrauch des fortdaurenden

19 And now, let us turn to some of the examples cited by Herr Reimarus! "Who is it, who has use of the continuing

Eigenthums der Verfasser bei den alten Autoren, der es bei Luthers Bibelübersetzung habe?" fragt derselbe. — Wenn der Eigenthümer einer Sache, und seine Erben und Erbnehmer ausgestorben, oder nicht auszumitteln sind, so erbt die Gesellschaft. Will diese ihr Recht aufgeben, und es gemein werden lassen; will es der Eigenthümer selbst; — wer kann es wehren?

20. "Ob das auch ein Raub des Büchereigenthums sein würde," fragt Herr R. weiter, "wenn jemand ein Buch einzeln, oder in größerer Anzahl abschreiben, und die Abschriften verkaufen wolle?" Da die Liebhaber, welche ein Buch lieber in Handschrift, als gedruckt besitzen wollten, selten sein, mithin durch diese Vervielfältigung der Exemplare weder dem Verfasser noch dem Verleger großer Nachtheil entstehen möchte; da der Gewinn bei dieser mühsamen Arbeit nicht groß, und der Verkaufswerth wohl größtentheils kümmerliche Bezahlung der angewandten Mühe sein, mithin die ungerechte Habsucht des Abschreibers weniger auffallen würde: so möchten vielleicht der Erstere, und der Zweite dazu schweigen. Sind aber unsere eben ausgeführten Sätze erwiesen, so bleibt an sich jeder Nießbrauch des Buchs, sei er so wenig einträglich, als er wolle, ungerecht; und diejenigen, welche das Buch in Abschrift zu besitzen wünschten, oder der Abschreiber, müßte darüber in Unterhandlung mit dem Verfasser treten. — Wenn die alten Schriftsteller über den möglichen Nießbrauch der Autorschaft nicht nachgedacht hatten, oder, weil sie sein nicht begehrten, das Abschreiben ihrer Bücher jedem freistellten, dem es beliebte, und durch ihr Stillschweigen die Einwilligung dazu gaben; so hatten sie das vollkommenste Recht, — wie jeder es hat — ihr Recht aufzugeben; wenn sie aber gewollt hätten, so hätten sie es ebensowohl geltend machen können, als

property right of the author in the case of ancient authors, or in the case of Luther's translation of the Bible?" he asks. If the owner of an object and his heirs and descendants die out or cannot be found, then society inherits ownership. If society wishes to give up its right and transform it into a common right, it is the owner who undertakes to do this, and who can fight it?

20. "Would it not be theft of the property in books," inquires Herr R. further, "if someone were to make a single or multiple handwritten copies of the book and then sell them?" Since the book lover who would rather have a book in hand-written rather than printed form is quite rare, his reproductions do not cause much harm to the author or to the publisher [234]. And because the profit made by means of such tedious work is not great, and the sale price represents for the most part meagre payment for the effort applied, the unjust greed of the copyist attracts less attention, and both the author and the publisher will likely keep quiet about it. But if the propositions that we have made are proven, then every usufruct of a book is in itself wrong, no matter how small the profit might be. And so those who wish to have a hand-written copy of a book, or else the copyist himself, must enter into negotiations with the author. If ancient authors had not thought about the possible usufruct of authorship, or if, because they had no interest in it, they gave everyone who wished it the right to copy these books with the consent of their silence, they had the perfect right to do so, just as everyone has the right to give up his rights. But if they had wanted, they could have made this right just as valid as we ourselves can today,

die unsrigen: denn was heute Recht ist, war es ewig.

21. Diese Grundsätze werden durch Anwendung auf Dinge, die man oft mit ihnen verglichen und verwechselt hat, noch deutlicher werden. So hat man *Produkte der mechanischen Kunst* mit Büchern, und das Nachmachen derselben zum Nachtheil des Erfinders mit dem Nachdrucke verglichen; wie passend oder unpassend, werden wir sogleich sehen. Auch ein solches Werk hat etwas Körperliches: die Materie, aus der es verfertigt ist, Stahl, Gold, Holz und dergleichen; und etwas Geistiges: den Begriff, der ihm zum Grunde liegt (die Regel, nach der es verfertigt ist). Von diesem Geistigen kann man nicht sagen, daß es eine dem Verfertiger eigenthümliche Form habe, weil es selbst ein Begriff einer *bestimmten* Form ist — die Form der Materie, das Verhältniß ihrer einzelnen Theile zur Hervorbringung des beabsichtigten Zwecks; — welches folglich nur auf einerlei Art, einem deutlich gedachten Begriffe gemäß, bestimmt sein kann. Hier ist es das Körperliche, welches, *insofern es nicht durch den Begriff bestimmt wird*, eine besondre Form annimmt, von welcher die Nettigkeit, die Eleganz, die Schönheit des Kunstwerks in so fern sie nicht auf den hervorzubringenden Zweck bezogen wird, abhängt: an welcher man z.B. die Arbeiten der Engländer, die Arbeiten eines gewissen bestimmten Meisters, von jeder andern unterscheidet, ohne eigentlich und deutlich angeben zu können, worin der Unterschied liege. Diese Form des Körperlichen kann auch ein Buch haben, und durch sie wird die Reinheit und Eleganz des Drucks bestimmt; in dieser Rücksicht ist es Produkt der mechanischen Kunst, und gehört unter die nun leicht zu entwickelnden Regeln derselben.

for what is right today has always been right.

21. These principles become even clearer when they are applied to things that one often compares with and confuses with books. For instance, people have compared books with *products of mechanical art*, and compared the disadvantage that the reproduction of these products represents for the inventor with the re-printing of books. We will soon see whether this is a fitting or unfit comparison. Such a work also has a physical element: the material out of which it is made—steel, gold, wood, and so on—and an intellectual aspect—the concept on which it is based (the rule in accordance with which it is produced). One cannot say of this intellectual element that it has a form that is unique to the producer, since it is itself a concept with a *determinate* form—the form of the material, the relationship of its separate parts for the production of the intended purpose—which, it follows, can be defined only in one particular manner in accordance with a clearly thought out concept. Here it is the physical which, *insofar as it is not determined by the concept*, takes on a particular form on which depend the grace, [235] the elegance and the beauty of the work of art, in as much as it is not related to the intended purpose. It is on this basis that one can distinguish the products of the English, or those of a particular master, from the works of any other, without being able to actually and clearly determine wherein the difference lies. A book can also have this corporeal form, and by means of this form the purity and elegance of the printing is determined. In this regard, it is the product of a mechanical art, and belongs to the easily developed rules of this art.

22. Angenommen, was allgemein anzunehmen ist, daß durch den Verkauf einer Sache dem Käufer das Eigenthum alles desjenigen übertragen werde, dessen Zueignung physisch möglich ist; was wird durch den Verkauf eines solchen Kunstwerks dem Käufer übertragen? Jedem ohne Zweifel das Eigenthum des materiellen Körperlichen, nebst der Möglichkeit das Werk zu dem verlangten Zwecke zu gebrauchen, wenn er will, ihn kennt, und ihn dadurch zu erreichen weiß. Die Möglichkeit, sich den dem Werke zu Grunde liegenden Begriff (nehmlich die Regel, nach der es verfertigt ist) zuzueignen, ist nicht die Absicht des Verkaufs, und gemeinhin auch nicht des Kaufs, wie bei einem Buche, wo dies offenbar die Absicht ist. Auch wird sie, durch den Verkauf nicht jedem, sondern bloß dem, der dazu die nöthigen Kenntnisse hat, übergeben. Das Eigenthum dieses Begriffs aber wird durch den Verkauf gar nicht übergeben; sondern zur Zueignung desselben gehört noch die Handlung des Käufers, daß er das Werk untersuche, es vielleicht zerlege, darüber nachdenke, u. s. w. Aber dennoch ist es nicht nur physisch möglich, sondern auch oft sehr leicht, die Regel der Verfertigung des Werks zu finden. Diesen Begriffen nun seine Form zu geben, muß man selbst Künstler, und zwar Künstler in dieser Kunst sein. Die Form des ersten Verfertigers wird man dem Körperlichen nie geben; aber es kommt darauf nicht an, der Unterschied ist meistens ganz unbemerkbar, und oft wird der zweite Verfertiger ihm eine weit schönere geben. Man kann folglich nicht nur das Eigenthum der Materie, sondern unter gewissen Bedingungen auch das des Begriffs, nach welchem sie bearbeitet ist, sich erwerben; und da man das Recht hat, sein Eigenthum auf jede beliebige Art zu benutzen, so hat man ohne Zweifel auch das, dies Kunstwerk nachzumachen.

22. If we assume that which can generally be assumed, that through the sale of a thing, the ownership of everything which is physically acquirable is given over to the purchaser, then what is given over to the purchaser in the case of the sale of such a work of art? Without a doubt, the buyer acquires ownership of the corporeal material, in addition to the possibility of using the work for its intended purpose if the purchaser so desires, and if he knows the purpose and knows how to achieve it. The possibility of transferring the concept on which the work is based (namely, the rule in accordance with which it has been produced) is not the purpose of the sale, and generally also not the purpose of the purchase, as it is in the case of a book, where this is obviously the intention. And this possibility is not transferred to each person through the purchase, but rather only to that person who has the necessary knowledge. The ownership of this concept is not transferred through the purchase. Rather, part of the transfer of the concept must occur through the actions of the buyer, who must study the work, perhaps take it apart, think about it and so on. However, it is not only physically possible, but also often very easy to determine the rule by means of which the work was produced. But to give this concept its form, one must oneself be an artist, and indeed an artist in this field. One will never be able to give the material object the form given to it by the first producer, but this is not important, since the difference will for the most part be unnoticeable, and often the second producer is able to give the work a far more beautiful form. It thus follows that one can acquire not only a property right in the material, but under certain conditions, [236], also a right in the concept in accordance with which the work was made. And since

Allein, die Ausübung dieses Rechts ist nicht billig: es ist nicht billig, daß der Mann, welcher Jahre lang Fleiß Mühe und Kosten aufwendete, durch die erste Bekanntmachung des Resultats seiner jahrlangen Arbeit, welches von der Art ist, daß jeder desselben sich bemächtigen kann, der es siehet, um alle Frucht dieser Arbeit gebracht werde. Da aber in Sachen des Gewinstes auf die Billigkeit Andrer nicht sehr zu rechnen ist, so tritt der Staat ins Mittel, und macht durch ein ausdrückliches Gesetz, genannt *Privilegium*, dasjenige Rechtens, was vorher nur Sache der Billigkeit war. Weil indeß durch ein solches Gesetz das natürliche Recht Andrer allerdings eingeschränkt, und sie dessen beraubt werden, besonders dadurch beraubt werden, daß man das, was von ihrem guten Willen abhing, und ihnen ein Verdienst geben konnte, ihnen abnöthigt, und sie dadurch wenigstens der Entdeckung dieses Verdienstes beraubt; so hebt der Staat dies Gesetz wieder auf, sobald seine Absicht, den ersten Erfinder zu entschädigen, erreicht ist, und giebt den Menschen ihr angebornes und durch Nachdenken und Studium behauptetes Recht wieder.

one has the right to use one's property in any way one wishes, without a doubt one also has the right to imitate a work of art. But the exercise of this right is not fair: it is not fair that a person who for years has worked diligently and expended money and effort be deprived of the fruit of his labour when the first public appearance of this work is such that the work can be acquired by all who see it. But in the matter of profits, one cannot reckon on the fairness of others, and so the state enters into the matter and, through an express law called *privilege (Privilegium)*, makes legal something that previously was only a matter of fairness. Because the natural rights of others are restricted by this law, they are effectively robbed of them. In particular, they are robbed of that which depended on their good will and which could have provided them merit. And since one has at least taken away from them the ability to discover this merit, the state removes the law as soon its intention to compensate the first discoverer is achieved, and thereby returns to people their innate right which is confirmed again and again by both thought and study.

23. Ein solches Privilegium geht also auf den Gebrauch des erworbenen Begriffs; und nur dasjenige Bücherprivilegium würde mit ihm zu vergleichen sein, welches verböte, innerhalb zehn Jahren nichts *über gewisse Materien*, als z. B. keine Metaphysik, keine Naturlehre, zu schreiben. Verwechselte etwa Herr R., dessen Vorschläge bei Bücherprivilegien eben dahin auslaufen, Bücher mit mechanischen Kunstwerken, als ob zu ihrer Verfertigung nichts weiter gehöre, als etwa ein Rezept ein Buch zu machen im Kopfe, und übrigens gelenke Finger, Papier und Dinte?

23. Such a privilege relates to the use of the acquired concept, and only that kind of book privilege could be compared with it, which would forbid one from writing about certain topics for ten years, for instance about metaphysics, natural sciences, etc. Did Herr R., whose suggestions about privilege relating to books tends in this direction, perhaps mistake books with mechanical works of art as if one would need nothing more for the production of books than a recipe for making one in one's head and skilful fingers, paper and ink?

24. Das Recht des Käufers, das Gekaufte nachzumachen, geht, soweit die physische Möglichkeit geht, es sich zuzueignen; und diese nimmt ab, je mehr das Werk von der Form abhängt, welche wir uns nie eigen machen können. Diese Gradazion geht, in unmerklichen Abstufungen, von der gemeinen Studierlampe bis zu Correggio's Nacht. Letztere hat nie um ein Privilegium nachgesucht, und ist darum doch nicht nachgemacht worden. Zwar Farben auftragen, Licht und Schatten, und ein Kind und eine junge Frau malen, kann jeder Pinsler; aber es ist uns nicht darum, es ist uns um die nicht zu beschreibende, aber zu fühlende Form des Vortrags zu thun. — Kupferstiche von Gemälden sind keine Nachdrücke: sie verändern die Form. Sie liefern Kupferstiche, und keine Gemälde; und wem sie den letztern gleich gelten, dem bleibt es unbenommen. Auch Nachstechen schon abgestochner Gemälde ist nicht Nachdruck: denn jeder giebt seinem Stiche seine eigene Form. Nachdruck wäre nur das, wenn jemand sich der Platte des anderen bemächtigte, und sie abdruckte.

24. The right of the buyer to imitate his purchase extends as far as the physical possibility of appropriating it allows. And this possibility diminishes the more the work depends on its form, which we can never make our own. This gradation [237] proceeds in imperceptible steps from the common study lamp to Corregio's *Night*. The latter has never sought any privilege, and has nonetheless never been imitated. Applying paint on a canvas, painting light and shadow, or a child and a young woman, are all things that any painter can do, but we are not concerned with this. We are interested in the form of the composition, which cannot be described, but only felt. Copper engravings of paintings are not re-prints—they change the form. They produce copper engravings and not paintings. Yet whoever wants to equate them is welcome to do so. Engravings based on previous engraved paintings are not reprints, since each person gives an engraving his own form. It would only be a reprint if someone stole the copper plates of another and used them to produce a print.

25. Und nach dieser Unterscheidung nun die Frage: Was ist ein Bücherprivilegium? Ein Privilegium überhaupt ist Ausnahme von einem allgemein geltenden Gesetze der natürlichen, oder der bürgerlichen Gesetzgebung. Ueber Büchereigenthum ist bis jetzt kein bürgerliches Gesetz vorhanden; also muß ein Bücherprivilegium eine Ausnahme von einem Naturgesetze sein sollen. Ein dergleichen Privilegium sagt, ein gewisses Buch solle nicht nachgedruckt werden; es setzt mithin ein Gesetz der Natur voraus, welches so lauten müßte: jeder hat ein Recht, jedes Buch nachzudrucken. — Es ist also doch wahr, daß das Nachdruckerrecht selbst von denen, in deren Hände die Menschheit alle ihre Rechte zur Aufbewahrung

25. And after making this distinction, we now pose the question: What is book privilege (*Bücher privilegium*)? Privilege in general is an exception to a generally valid rule of natural or civil law. As yet there is no civil law regarding property in books, and as a result, book privilege has to be an exception to a natural law. Such a privilege states that a given book is not to be reprinted. It presupposes a natural law which would read as follows: Everyone has the right to reprint any book. Is it true that the right to reprint is recognised as a universally valid right by those in whose hands humanity has delivered their rights for protection, namely the rulers? And is it true that even the scholars recognise this right?

überlieferte, von den Regenten, für ein allgemein gültiges Naturrecht anerkannt werde? Doch wahr, daß selbst die Gelehrten es dafür anerkennen; denn was kann die Bitte um ein Privilegium anders heißen als: Ich erkenne an, daß vom Tage der Publikazion meines Werkes, jeder wer will, das unbezweifelte Recht hat, sich das Eigenthum und jeden möglichen Nutzen desselben anzumaßen, bitte aber um meines Vortheils willen, die Rechte der Menschheit einzuschränken. — Hat man sich je einen Freibrief gegen Straßenräuber geben lassen? — "Aber ein Bücherprivilegium ist kein Freibrief gegen Straßenräuber; es ist eine Bedeckung von Husaren", sagt man mir. Wenn dies wahr wäre, wenn es in Ländern wahr sein könnte, wo die Straßenräuber nicht, wie in Arabien, ungebändigt in den Wäldern herumstreifen, sondern zu jeder Stunde durch die obrigkeitliche Gewalt abgelangt werden können, so ständen wir vor einer andern Untersuchung.

What can the request for a privilege mean but: I acknowledge that from the day of publication of my work, everyone who wishes to do so has the undisputed right to appropriate the book and receive every possible profit related to it as his property, but I request for my own benefit that the rights of humanity be limited. Has one ever been given a charter against robbers? "But a book privilege is not a charter against robbers; it is a guard of Hussars," I am told. If this were true [238], even if it could be true in countries in which thieves do not roam wild in the woods as they do in Arabia, but are liable to be caught at any time by the police, then we would be faced with quite a different investigation.

26. Die Tr*** nehmich, Sch***, die W*** sind freilich Räuber; aber sie sind *privilegirte* Räuber. Sie haben — denn die Bemerkung, daß eins von beiden, entweder das Privilegium, welches den Nachdruck verbietet, oder das welches ihn erlaubt, widersinnig sein muß, wollen wir schenken — sie, sage ich, haben nicht die mindeste Schuld. Unbekannt mit dem, was Recht oder Unrecht sei, weil es für sie zu tief lag, fragten sie die, welche es wissen sollten. Man sagte es ihnen, und sie glaubten. Freilich gefiel es dem englischen Kaufmanne nie wohl, wenn ein französischer Kaper ihm sein Schiff und seine Waaren wegnahm. Er beklagte sich über diese Ungerechtigkeit. "Das ist nicht Unrecht, das ist Kriegsrecht," sagte der Kaper, und zeigte ihm seinen Kaperschein vor; und während der Engländer diesen untersuchte, um sich von der Rechtmäßigkeit der Behandlung die er erfuhr, zu überzeugen,

26. The Tr. . . . , the Sch. . . the W. . . are admittedly thieves, but they are privileged thieves. If we grant that either the concept of privilege which forbids reprinting or that which permits it is absurd, then I say that they are not in the least guilty. Ignorant of what is right or wrong, since it is too profound for them, they asked those who should know. Someone answered them, and they believed what they were told. Admittedly the English merchant did not like it when a French privateer deprived him of his ship and his wares. He complained about this injustice. "That is not injustice, that is the law of war," he was told by the privateer, who brandished his privateer's charter. And while the Englishman inspected it in order to convince himself that this treatment was legitimate, the privateer went through his pockets, as

durchsuchte ihm Jener die Taschen, und er hatte darin Recht.

27. Aber, mit welchem Rechte nur überhaupt die Hummeln den Bienen den Krieg ankündigen? ... Welcher Vertheidiger des Büchernachdrucks wird uns dies erklären? — "Es würde doch von einem Staate viel verlangt heißen, sagt man, daß er befehlen solle, fremde theure Waare in sein Land einzuführen." Das würde allerdings viel verlangt heißen; aber die Forderung, daß er sich dann, wann sie ihm zu theuer ist, ganz ohne sie behelfen möge, wäre so unbillig eben nicht. Joseph II. hatte allerdings das vollkommne Recht, die Einfuhr der holländischen Häringe in seine Staaten zu verbieten: wer könnte ihm dies abstreiten? Aber hätte er darum auch wohl das Recht gehabt — da holländische Häringe sich nun einmal nicht nachdrucken lassen — Kaper auszusenden, welche den Holländern aufpassen, und ihnen ihre Häringe abnähmen? Und wenn diese fremde theure Waare — denn Bücher sind in diesem System freilich nicht mehr und nicht weniger Waare, als Häringe und Käse — überhaupt nicht eingeführt werden soll, wovon soll man sie denn im Lande abdrucken? ... Ei ja! wir werden uns wohl hüten, die Einfuhr fremder Bücher eher zu verbieten, als bis wir sie erst nachgedruckt haben.

was his right.

27. But with what right did the bumblebees declare war against the bees? What defender of the reprinting of books will explain this to us? "It would be to demand much of the state," one says, "that it should order that expensive foreign wares be imported into its country." That would certainly be to demand a lot. But the demand that the state do without the goods if they are too expensive would not be unfair. Joseph II certainly had the perfect right to forbid the importation of Dutch herring into his states—who could dispute this? But would he therefore also have had the right, since Dutch herring cannot be reprinted, to send out privateers to await the Dutch fishermen and take their herring? And if these expensive foreign wares—for in this system books are no more or less wares than herring and cheese [239]—were not to be imported at all, what could one use in that country to reprint them? Of course, we shall be careful not to forbid the importation of foreign books until we have at least reprinted them.

28. "Es sei ja für den Vortheil des Verfassers völlig gleichgültig, ob in einem Lande, wo die Einfuhr seiner rechtmäßigen Ausgabe verboten sei, ein Nachdruck verkauft werde oder nicht, da er aus diesem Lande einmal keinen Gewinn ziehen könne." sagt man auch noch. Und man hat Recht, und übrig Recht, in einem Systeme, in welchem nichts Unrecht ist, als das was schadet.

28. People also add that "it would be completely irrelevant to the benefit of the author whether a reprint is sold or not in a country in which the importation of his legitimate edition is forbidden, since he cannot make any profits from that country." And they would be right in a system in which nothing is unjust except that which harms someone.

29. Ist jetzt Alles klärlich erwiesen, was erwiesen werden sollte: — daß der

29. If everything has been clearly proven which was to be proven—that the author

Verfasser ein fortdaurendes Eigenthum an sein Buch behalte, und das vollkommne Recht habe, jeden zu verhindern, wider seinen Willen Nutzen aus dem, was der Natur der Sache nach sein bleibt, zu ziehen; daß mithin der Nachdruck eine offenbare, und zwar eine der sträflichsten Ungerechtigkeiten sei, — so ist bei Untersuchung seiner Zuläßigkeit davon gar nicht mehr die Frage, ob er nützlich sei; und wir können uns gänzlich enthalten, sie zu beantworten. Weder Herr R. noch das Publikum wird also etwas dagegen haben, wenn wir statt dieser Untersuchung eine Parabel erzählen. Was sie, da wir nach obiger Erinnerung mit Büchern gar nichts Aehnliches haben, erläutern könne, was sie nach allem schon Erwiesenen noch zu erläutern habe, wird jeder einsehen.

has a continuing property right in his books and the perfect right to prevent anyone from making a profit against his will from that which, according to the nature of the matter, remains his property; and that therefore re-printing is an obvious, and indeed one of the worst crimes—then the question of whether it is useful does not arise during the investigation of the question of whether it is allowed. Neither Herr R. nor the public could object when, instead of an investigation, we relate a parable. What this parable can explain will be clear after all that we have already proven since, as was shown above, we do not have anything similar to books.

30. Zur Zeit des Khalifen Harun al Raschid, der wegen seiner Weisheit in der Tausend und Einen Nacht, und sonst berühmt ist, lebte, oder könnte gelebt haben, ein Mann, der, wer weiß aus welchen Salzen und Kräutern einen Extrakt verfertigte, der gegen alle Krankheiten, ja gegen den Tod selbst helfen sollte. Ohne nun eben alle die Wirkungen zu haben, welche sein Verfertiger von ihm rühmte — er war selbst ein wenig kränklich — war er doch immer eine trefliche Arznei. Um in seinen chemischen Arbeiten durch nichts gestört zu werden, wollte er sich nicht selbst mit dem Handel befassen, sondern gab ihn in die Hände eines Kaufmanns, der allein im ganzen Lande damit handelte, und einen beträchtlichen Gewinn dadurch erwarb. Darüber wurden nun seine Mitbrüder, die übrigen Arzneihändler, neidisch, und verschrien ihn, und seinen Extrakt. Ganz anders aber benahm sich dabei Einer unter ihnen. Dieser paßte den Leuten des Alleinhändlers auf, wenn sie das Arkanum vom Chemiker brachten, nahm es ihnen ab, raubte es wohl gar aus dem Waarenlager selbst; und das vermochte

30. During the time of the Caliph Harun al Raschid, who is famous for his wisdom in the Thousand and One Nights and elsewhere, lived (or could have lived) a man who, out of who knows what salts and herbs, produced an extract which was supposed to help against all illnesses, even against death itself. Without having all of the effects which the manufacturer—who was himself a bit sickly—claimed it had, it was nonetheless an excellent medicine. In order not to be disturbed during his chemical labours, he did not want to be involved in selling the extract, but rather handed it over to a merchant, who alone sold it throughout the whole country, and thereby made a considerable profit. [240] His fellow merchants, the other medicine dealers, became envious and slandered him and his extract. However, one of these merchants behaved quite differently. He waylaid the servants of the sole [authorized] merchant when they were bringing the secret remedy from the chemist and took it from them – possibly even robbed the storehouse

er, denn er war ein handfester Kerl. Er vereinzelte es darauf auf allen Jahrmärkten, in allen Flecken und Dörfern, und weil er es wohlfeil gab, und den Leuten sehr einlobte, so hatte er reißenden Abgang. Darüber erhob dann der Alleinhändler ein Geschrei im ganzen Lande; und es fielen mitunter auch wohl Diebe, Räuber, und dergleichen Benennungen, die bei solchen Gelegenheiten zu fallen pflegen, und die dem Andern auch richtig überbracht wurden. Gern hätte der Alleinhändler ihm wieder etwas abgenommen, aber jener hatte nichts, das der Mühe des Nehmens werth war. Schon lange hatte er ihm nachgestellt, um seiner habhaft zu werden; aber jener war schlauer, als er, und entging allen seinen Schlingen. Endlich, wie denn das stete Glück unvorsichtig macht, fiel er doch noch durch Unachtsamkeit in die Hände seines Feindes, und ward von ihm vor den Khalifen geführt. Hier brachte der Arzneihändler seine Klage gegen jenen an, die mit der Klage unsrer Buchhändler gegen die Nachdrucker ziemlich gleichlautend war. Jener, ohne sich bange werden zu lassen, — er hatte bei seinem Marktschreiergewerbe seine Dreistigkeit vermehrt, und eine gewisse Beredsamkeit sich eigen gemacht — führte seine Vertheidigung folgendermaaßen:

itself—which he was able to do, since he was a stalwart fellow. He sold it at every fair, and in every hamlet and village, and since he sold it cheaply and praised it highly, his merchandise sold like hotcakes. The original merchant raised a hue and cry about this throughout the land, and used words such as 'thief', 'robber', and other such names, as happens on such occasions, and this was conveyed to the new merchant. The first merchant would gladly have taken something from the thief, but the latter had nothing that was worth taking. For a long time, he tried to catch him, but the thief was more clever and escaped all of his traps. Finally, since luck always makes one careless, the thief fell into the hands of his foe as a result of his carelessness, and he was led before the Caliph. Here the medicine dealer brought his complaint against the thief, which is somewhat similar to that brought by our book dealer against the reprinters. The thief, without even the least anxiety—he had gained a certain audacity and eloquence through selling the extract—defended himself in the following way:

31. Glorwürdigster Nachfolger des Propheten! ich liebe nach Prinzipien zu verfahren. Der einzig richtige Maaßstaab der Güte unsrer Handlungen ist bekanntermaaßen ihre Nützlichkeit. Je ausgebreitetere und je wichtigere Vortheile eine Handlung stiftet, desto besser ist sie. Es giebt zwar noch einige finstere Köpfe, die sich etwas erkünsteln, was sie, glaub ich, Recht nennen: ein Hirngespinnst, das sich im Leben nicht realisiren läßt; denn kann man nicht bei aller Rechtschaffenheit verhungern? Doch fern sei es, daß dergleichen altfränkische Ideen die aufgeklärten

31. Most glorious successor of the Prophet! I love to follow principles. As is well known, the only correct measure of the value of our actions is their usefulness. The more widespread and significant the advantages produced by an action, the better it is. There are naturally a few idiots who talk about something they call 'justice' (*Recht*)—a mere fabrication that is not realisable in life. For can one not starve to death being just? But far be it for such old-fashioned ideas [241] to dishonour the enlightened era of your majesty's glorious rule. If I therefore prove that

Zeiten von Eurer Majestät glorwürdigen Regierung entweihen sollten! — Wenn ich mithin beweise, daß mein Verfahren den ausgebreitetsten Nutzen stiftet, so beweise ich dadurch ohne Zweifel, daß es lobenswürdig ist; und dies ist so leicht zu erweisen. Daß meine Handlung von den vortheilhaftesten Folgen für das Publikum sei, sollte man das erst zeigen müssen? Ich verkaufe das Arkanum weit wohlfeiler als der Kläger; der gemeinste Mann wird also dadurch in den Stand gesetzt, es sich anzuschaffen, was er bei dem hohen Preise des Alleinhändlers nicht kann; ich nöthige es dem unaufgeklärten Haufen durch meine Betriebsamkeit und durch alle Künste der Beredsamkeit auf, und brenne so von Eifer für das Beste Andrer, daß ich sie fast zwinge, sich durch diese heilsame Arznei gesund zu machen. Welch' ein Verdienst um die leidende Menschheit! Könnte ich doch Eurer Majestät das Aechzen der Leidenden, das Röcheln der Sterbenden recht lebhaft malen, die durch die von mir gekaufte Arznei gerettet worden sind! Wie vielen Kindern habe ich ihre Väter, die bereits in den Händen des Todes waren, wieder zurückgegeben! ihnen die Möglichkeit zu guten Staatsbürgern gebildet zu werden, und einst wieder ihre Kinder, und vermittelst dieser ihre ganze Nachkommenschaft zu guten Staatsbürgern zu bilden, dadurch erhalten! Man berechne die Arbeiten, welche Jeder, dem durch diese wunderthätige Arznei einige Jahre zu seinem Leben hinzugesetzt werden, in diesen Jahren noch zur Kultur des Landes verrichten kann; die noch größere Kultur desselben, die hierdurch wieder möglich wird, und so ins Unendliche fort; berechne die Menge der Kinder, die er in diesen Jahren noch zeugen kann, und die Kinder dieser Kinder: und ziehe das Resultat der vergrößerten Volksmenge, und Kultur, die dadurch erfolgt, und welche schlechterdings nicht möglich war, wenn ich nicht dem Kläger seine wohlthätigen

my actions produce the widest benefits, then I have proven without a doubt that they were worthy of praise. And it is so easy to demonstrate this. Does one really have to show that my conduct has the most beneficial consequences for the public? I sell the secret remedy for much cheaper than the plaintiff, and so even the most common person is able to obtain it, which would have been impossible for him given the high prices of the [original] merchant. I push it on the unenlightened masses by means of my hustling and through the art of my eloquence, and I burn so intensely with eagerness for the best of others, that I almost force them to become healthy by means of the healing medicine. What service to ailing humanity! If I could only vividly describe to your Majesty the groans of the sufferers and the death-rattles of the dying who have been saved by means of the medicine purchased from me. How many fathers, who were in the hands of death, have I returned to their children in order that they may have the possibility of becoming good citizens, and that in turn their children and through them all of their descendants be brought up to become good citizens? Imagine the contribution to the culture of the land that those who have been able to add a few more years to their life by means of this wonderful medicine will be able to add during these extra years. Calculate the increase in culture made possible in this way, and so on into eternity. Calculate the number of children that such a man can beget in these years, and the children of these children, and calculate the result of the increases in population and culture achieved in this way, which would never have been possible if I had not robbed the plaintiff

Tropfen raubte.

32. Es sagen zwar freilich verläumderische Zungen, daß das Arkanum gemeinhin ein wenig verdorben bei mir gekauft worden; und wenn ich ihnen auch — ich liebe die Wahrheit — sollte zugestehen müssen, daß an der Sache etwas sei: so ist das warlich nicht meine Schuld. Ich würde lieber, wenn ich könnte, ihm noch größere Kraft geben, damit man es allein bei mir kaufte, und mein Kläger alle seine Kunden verlöre; und das bloß aus Liebe zum allgemeinen Besten. Aber wie sollte es mir bei der beständigen Flucht, auf der ich vor meinem Gegner sein muß, und bei der Beschimpfung, die er meiner Handthierung anthut, und die mich nöthigt die lockersten Gesellen anzunehmen, möglich sein, es mit der gehörigen Sorgfalt aufzubewahren? Wenn nur einmal meinem Gewerbe völlige Ehre und Sicherheit zugesprochen sein wird, wie ich um der großen Nützlichkeit desselben hoffe, so werde ich dadurch zugleich in Stand gesetzt werden, auf die Konservazion desselben mehr Sorgfalt zu wenden.

33. Ich werde angeklagt, dem Verfertiger des Arkanums, und dadurch mittelbar dem Publikum zu schaden, weil Kläger, wenn ich in die Länge fortfahre ihm seine Tropfen wegzunehmen, nothwendig verarmen, und außer Stand gesetzt werden müsse, den Chemiker weiter zu bezahlen, weshalb denn dieser nothwendig die Arbeit werde einstellen müssen. — Allein, da kennt man den Mann nicht. Er wird sie darum nicht einstellen; denn es ist einmal seine Liebhaberei, und er arbeitet ja so nur um der Ehre willen. Im Gegentheil, je mehr ich seinem Unterhändler wegnehme, und je weniger dieser ihm für die Arznei wird bezahlen können; desto mehr wird er arbeiten müssen, um kümmerlich zu leben: desto mehr wird folglich diese heilsame Arznei

of his beneficial drops.

32. It is true that slanderous tongues will say that the medicine bought from me is somewhat contaminated. And even if I admit (and I do love truth), that there is something to this, it is surely not my fault. I would rather, if I [242] could, give the medicine powers such that people would only buy it from me, and the plaintiff would lose all of his customers, and all this out of love for the common good. But how can I preserve the medicine with the proper care when I have to be in continuous flight from my enemy and, as a result of the slander which he directs at my actions, am driven to hire the most careless workers? If only my trade were to be given its rightful honour and security as I hope will happen because of its great usefulness, then I would be able to take more care in carrying it out.

33. I have been accused of harming the producer of the medicine, and thereby indirectly harming the public, since the plaintiff, if I keep on stealing his drops, would necessarily be made poorer and would no longer be able to pay the chemist, as a result of which the latter will have to give up his work. But this means that you do not know the man. He would not stop his work as a result of this, since it is what he loves to do, and he works only for the sake of honour. On the contrary, the more merchandise I steal from his agent, and the less the latter is able to pay him for the medicine, the harder he will have to work in order to make a bare living, and the more this healing medicine will be produced. And will not his fame be

vervielfältiget werden. Und wird nicht sein Ruhm durch mich in die entferntesten Dörfer verbreitet? posaune ich ihn nicht, mit lauter Stimme, an jedem Jahrmarkte, aus meiner Bude? steht nicht sein Namen auf allen meinen Büchsen und Gläsern mit großen Buchstaben, in Golde? Ist ihm das nicht Ehre genug? braucht er dazu noch Brot? Er mag von der Ehre leben!

spread to the most distant villages? Do I not trumpet his name in a loud voice from my stall at every fair? Is not his name written on all my vials and tins in large gold letters? Is this not enough honour for him? Does he also need money on top of this? He ought to live from honour alone!

34. Endlich soll ich Klägern Nachtheil verursachen. — Aber ich muß gestehen, daß hier mich mein kaltes Blut verläßt. Ich muß Ihnen sagen, mein Herr, daß Sie sich der Unbilligkeit dieser Anklage schämen sollten. Haben Sie nicht schon genug durch Ihren Alleinhandel gewonnen? Ach! dürfte ich doch den Verlust, den Sie zu haben vorgeben, mit Ihnen theilen! Warum wollen Sie mir denn nicht erlauben Ihnen zu stehlen, was ich fortbringen kann? Warum wollen Sie mir denn nicht erlauben eine kleine Nachlese zu halten? Giebt es nicht noch jetzt, seitdem ich diese reichlich halte, Leute genug, die entweder um der vermeinten größern Güte Ihrer Arznei willen, die doch wenig betragen kann, oder aus einem altfränkischen Vorurtheile für rechtmässigen Besitz, und vermeinter Theilnahme an der Dieberei Andrer, lieber ihre theure Waare kaufen, als meine wohlfeile; — als ob ich nicht auch, wenn man denn einmal von Rechtmäßigkeit reden will, dadurch das rechtmäßige Eigenthum Ihrer Waare erhielte, daß ich mir die Mühe gebe, sie zu stehlen?

34. Finally, I am accused of having caused harm to the plaintiff. Here I have to admit that I lose my temper. I must tell you, sir, that you should be ashamed of the unfairness of this accusation. Haven't you made enough money through your exclusive business? Ach! If only I could share the losses which you pretend to have suffered! Why [243] won't you allow me to steal from you whatever I can carry away? Why won't you allow me to benefit from a few gleanings? Are there not still people who prefer to buy your expensive wares to my cheap ones, though this surely amounts to little, either because they think they are of better quality, or because they have an old-fashioned bias in favour of legitimate property and against participating in the assumed thievery of others? As if I, if one wants to talk about legitimacy, did not acquire a legitimate right to your merchandise by going to the trouble of stealing it?

35. Vielmehr habe ich, wenn Sie kalt darüber nachdenken wollen, eben um Sie Selbst das größte Verdienst. Sie kennen noch Ihren Chemiker nicht. Schon längst dachte er, voll Neid über den Gewinn, den Sie durch sein Arkanum machen, darauf, sich des Handels mit demselben selbst zu bemächtigen. Er hat zwar seine Zeit weit nöthiger zur Verfertigung desselben; er versteht zwar nichts vom Arzneihandel; er

35. Actually, if you think about it sensibly, it is to you that I have rendered the greatest service. You do not know your chemist. For a long time, envious of the profits which you make as a result of his extract, he has been contemplating taking over the distribution of the medicine himself. He actually needs his time more for the manufacture of the medicine, and he knows nothing of sales.

ist zwar bei einigen Versuchen im Kleinen schon sehr übel angekommen: aber dennoch — glauben Sie mir's auf mein Wort — er hätte Sie des Handels beraubt. Nur, schlau wie er ist, merkte er meinen Anschlag auf Ihren Waarenkasten, und wollte lieber Sie, als sich selbst, bestehlen lassen. Wenn Sie also überhaupt noch in einigem Besitze des Handels sind, so haben Sie es mir zu verdanken.

He has already fared badly with small attempts to sell it. But believe me, he would have robbed you of your business. Only, clever as he is, he observed my attack on your warehouses and prefers that you be robbed rather than him. Thus it is thanks to me that you still have any part in the business.

36. Dies sind die beträchtlichen Dienste, Glorwürdigster Nachfolger des Propheten, die ich dem gläubigen Volke, die ich dem nützlichen Verfertiger des Extrakts, die ich dem Kläger selbst leiste. Und ich nun, was habe ich dafür? Wenn man den geringen Preis, um den ich das Arkanum verkaufe, gegen die Kosten, die ich auf desselben Konservazion doch wende, die Reisen, die ich mache, berechnen will; so wird man finden, daß mir die Mühe sie zu stehlen, sehr gering bezahlt wird, und daß ich die Verläumdungen meines Gegners, die Schurken und Diebe, die er gegen mich ausstößt, fast ganz umsonst hinnehmen, oder nur sehr niedrig in Anschlag bringen muß. Durch diese Verunglimpfungen wird mir nun mein ehrlicher Namen, auf welchen die Menschen einen so großen Werth setzen sollen, jämmerlich abgeschnitten, so daß rechtliche Leute schon anfangen sich sehr zu bedenken, ob sie mir abkaufen wollen. Ich bin also ein Märtyrer für das Beste der Welt; und wenn eine Handlung dadurch gewinnt, daß man recht viel bei ihr aufopfert, so ist die meinige eine der verdienstlichsten. Dies Verdienst möchte ich mir nun nicht gern rauben lassen, wenn nicht durch die Ehrlosigkeit, die dadurch auf mein Gewerbe fällt, der Fortgang desselben gehindert, und dem allgemeinen Besten Abbruch gethan würde. Ich bitte demnach Eure Majestät anzubefehlen, daß hinführo Jeder mein Gewerbe für ein ehrliches halte, bei namhafter Strafe; und daß Kläger gehalten sei, mir

36. These are the considerable services, glorious successor of the prophet, which I provide to the faithful, to the useful producer of the extract, and to the plaintiff himself. And I, what do I get in return? If one reckons the small price for which I sell the extract against the costs of preserving it and of travelling, one would find that the trouble of stealing it is paid very poorly. Furthermore, I have to suffer the slanders of my enemy, as well as the villains and thieves he sends after me, almost for free or at most for very little money. Through this slander my honourable name, on which people should place great value, has been so damaged that honest people have already begun to wonder whether they should purchase things from me. I am therefore a martyr for the good of the world. And if an action gains merit when much is sacrificed to perform it, then my action has the highest merit. I do not want to have this merit taken away if it means that through the dishonour that is heaped on my business, it will not continue, thus harming the common good. I thus ask your majesty to decree that from now on, under the threat of punishment, everyone is to consider my business to be honest. Furthermore, you should not only order the plaintiff to apologise, make honourable reparations, and thank me publicly for the services I provide, but also order that from now on he allow me to steal from him as much as I want.

nicht nur Abbitte und Ehrenerklärung zu thun, und öffentlichen Dank für den geleisteten Dienst abzustatten, sondern auch inskünftige sich von mir bestehlen zu lassen, so viel ich will.

37. So redete der Marktschreier. Wie würde Herr Reimarus, wie würde jeder Gerechtigkeitsliebende hierbei geurtheilt haben? — Ebenso urtheilte der Khalif. Er ließ den nützlichen Mann aufhängen.

37. So spoke the charlatan. How would Herr Reimarus, or how would any justice-loving person have judged in this case? The Caliph ruled the same way. He had the useful man hanged.