Kant, copyright and communicative freedom

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Abstract

The rapid recent expansion of copyright law worldwide has sparked efforts to defend the 'public domain' of non-propertized information, often on the ground that an expansive public domain is a condition of a 'free culture. Yet questions remain about why the public domain is worth defending, what exactly a free culture is, and what role (if any) authors' rights might play in relation to it. From the standard liberal perspective shared by many critics of copyright expansionism, the protection of individual expression by means of marketable property rights in authors' works serves as an engine of progress towards a fully competitive 'marketplace of ideas' – though only if balanced by an extensive public domain from which users may draw in the exercise of their own expressivity. This article shows that a significantly different, and arguably richer, conception of what a free culture is and how authors' rights underpin it emerges from a direct engagement with the philosophy of Immanuel Kant. For Kant, progress towards a fully emancipated (i.e. a 'mature' or 'enlightened') culture can *only* be achieved through the critical intellectual activity that public communication demands: individual expressive freedom is only a condition, not constitutive, of this 'freedom to make public use of one's reason in all matters'. The main thesis defended in this article is that when Kant's writings on publicity (critical public debate) are read in relation to his writings on the legal organization of publishing, a necessary connection emerges between authors' rights – as distinct from copyrights – and what Jürgen Habermas and others have named the public sphere. I conclude that it is the public sphere, and not the public domain as such, that should serve as the key reference point in any evaluation of copyright law's role in relation to the possibility of a free culture.

Keywords: Kant; authors' rights; copyright; intellectual property; public reason; public sphere; Habermas.

Introduction

As currently institutionalized, copyrights are property rights that subsist in the 'works' of authors, where works are legally defined to include all the intellectual products marketed by the cultural and information industries as publications, broadcast and online content, and software. Copyrights have two key features that they share with other species of property right: they are alienable, and they equip their holders with the power to exclude all others from the (intangible) objects in which they subsist. The power of exclusion is by no means absolute: for example, copyrights are limited in duration and in extent,[1] and copyright law recognizes would-be users of the works that

[1] A copyright in a work in fact comprises an array of property rights to control reproduction of the work, various forms of distribution of copies of the work (paradigmatically by sale), and all kinds of

it protects as having privileges to use them for certain purposes without incurring liability.[2] Nonetheless, the subsistence of a copyright in a work entitles the holder of the copyright to control (i.e. veto or licence, in return for royalties) certain uses of the work by anyone else within the jurisdiction, and indeed beyond.[3]

In common law jurisdictions, the copyright system has on the whole tended to be justified in liberal-utilitarian terms, more particularly in terms of its contribution to achieving an efficient allocation of society's scarce resources. According to the standard economic analysis, an efficient regime of copyright protection is a 'balanced' regime that limits the unpaid use of 'information goods' just enough to ensure that incentives are available to motivate their production, but no more. In the past couple of decades this paradigm for understanding copyright law has been challenged by what Mark Lemley has described as an 'absolute protection' or 'full value' view of intellectual property (IP),[4] informed by neoclassical property rights theory and defined by a strong commitment to the idea that private property rights should ideally extend to every valued use of information goods, such that users would be required by law to pay the owner's price for any such use except in atypical instances of unavoidable market failure. Arguably, the expansion that copyright law has undergone at national, regional and international levels over the last two decades in particular has been legitimated by the rise to ascendancy of this way of thinking, the underlying assumption of which is that cultural development and the advancement of knowledge are best secured by privatizing the 'raw materials' of these processes.

This assumption is contested in a large literature (and an associated political movement) that has emerged by way of a backlash against IP expansionism and the hegemony of its justificatory theory. Here the category of the 'public domain' plays a key role. In ordinary parlance, information is said to be in the public domain when it is publicly available, i.e. not secret. In the context of the contemporary resistance to IP expansionism, however, it generally refers to "information resources that are unencumbered by intellectual property rights"[5] as well as being publicly available in that sense. Defenders of this public domain argue strenuously against its colonization

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public communication (including public performance and electronic transmission) of the work. (See e.g. the Copyright, Designs and Patents Act (UK), c.48 ss.17-21 (1988); US Copyright Act, 17 USC §106 (1976).) However a copyright is not an ownership right (compare Honoré's list of the 'standard incidents' of full ownership: Anthony M. Honoré, "Ownership" in Anthony G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford: Clarendon, 1961). In Hohfeldian terms, it could be said that the 'bundle of rights' comprised in a copyright is relatively thin.

[2] For example, Chapter III of the UK's Copyright, Designs and Patents Act 1988 exempts 'fair' use of a work in some circumstances for certain approved purposes – non-commercial research and private study, criticism or review, and news reporting – and includes a lengthy catalogue of more narrowly defined exemptions.

[3] The Berne Convention for the Protection of Literary and Artistic Works sets out minimum standards of copyright protection that must be available in every signatory state to nationals of other signatory states. Further, Article 9.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights – one of the agreements administered by the World Trade Organization (WTO) – puts WTO members under an obligation to comply with the Berne Convention, and adds a substantial number of additional obligations that go beyond those imposed by membership of the Berne Union.

[4] Mark A. Lemley, "Property, Intellectual Property, and Free Riding" *Texas Law Review* 83 (2005) pp.1031-1075 (criticizing the absolute protection view).

[5] Pamela Samuelson, "Challenges in Mapping the Public Domain" in L. Guilbault and P. B. Hugenholtz (eds.) *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer: Alphen aan den Rijn, 2006), pp.7-25.

via the 'second enclosure movement'[6] that they claim is represented by IP expansionism and legitimated by neoclassical economic theory. They argue for a positive re-valuation of non-propertized 'information resources': overcoming the negative representation of the public domain as a kind of wasteland, "a sad jumble of things that don't deserve to be protected by intellectual property laws or … a netherworld where old information goes to die,"[7] as one sympathetic commentator has put it. There is now a well-established tendency to conceptualize the public domain as a kind of cultural 'environment,'[8] which in turn has yielded calls for strategies of 'environmental preservation' analogous to those around which the environmental movement took shape in the 1970s. Yet these tendencies are frequently underpinned by concerns to emphasize the *economic* value of the public domain and the *inefficiencies* that can result from privatizing its contents, and this tends only to reinforce liberal-utilitarianism's hegemony as the privileged lens through which to view copyright law and the fields that it affects.[9] So while it is easy to be sympathetic towards the general ambition underlying these arguments, the arguments themselves have not so far been premised on a particularly rich understanding of what 'culture' is, what its social dynamics are, and what exactly, therefore, is threatened by IP expansionism in general and copyright expansionism in particular. This article forms part of an ongoing project to address these questions.

One promising starting point from which to begin to address them is the idea that an author is a kind of speaker (i.e. one who creates works with a view to communicating with a public), that 'culture' is the realm in which dialogue between speakers occurs, and that copyright law rightly forms part of the legal framework that facilitates this dialogue. Theorists of copyright law who adopt this starting point frequently assume that authorial rights (as well as limits on these rights) are legitimated by a more general individual right to freedom of expression, with copyright law – as the United States Supreme Court famously put it in 1985 – serving as the 'engine' of free expression by establishing marketable rights in expressive products.[10] On this standard liberal view, culture is envisioned on the model of a 'marketplace of ideas', underpinned by an actual market in authors' works, which in turn is underpinned in various ways by law. In so far as copyright law helps to produce the conditions in which competitive markets in authors' works can flourish, it is said to be consistent with freedom of expression.[11] Its recent expansionary tendencies – which have made copyrights ever less like the limited property rights they were originally designed to be, and ever more like rights of absolute dominion over intellectual creations – have yielded a standard diagnosis of how copyright law can threaten freedom of

[6] James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" *Law & Contemporary Problems* 66 (2003) pp.33-74.
[7] Samuelson, "Challenges in Mapping the Public Domain," p.7.
[8] See e.g. the papers published as a special issue of *Law and Contemporary Problems* on the theme of 'Cultural Environmentalism @ 10' (2007, Vol. 70, No. 2), and James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven & London: Yale University Press, 2008).
[9] On this see Anne Barron, "Copyright Infringement, 'Free-Riding' and the Lifeworld" in Lionel Bently, Jennifer Davis and Jane Ginsburg (eds.) *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge: Cambridge University Press, 2010), pp.93-127.
[10] *Harper & Row, Publishers, Inc. v. Nation Enterprises* 471 U.S. 539 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas" (ibid. p. 558)).
[11] For an exemplary study in this vein, see Neil Weinstock Netanel, *Copyright's Paradox* (Oxford: Oxford University Press, 2008).

expression. Given the oligopolistic structure of markets for cultural commodities, bloated copyrights produce a 'permission culture' that chills expression (since permission to use copyright material as raw material for follow-on creativity "is not often granted to the critical or independent").[12] The negative liberty of individuals is thereby endangered; some have argued that space for the self-cultivation of each individual's potentialities ('autonomy' as understood within the tradition that includes J.S. Mill and Joseph Raz) is also restricted.[13] Consequently, the benefits that accrue to society as a whole from the clamour of competing claims and perspectives – a diversity of opinions and forms of creativity, information which is reliable because tested in the heat of public debate, the dissemination of knowledge, a more effective democracy – are diminished. From the perspective of this liberalism, a free culture emerges from the freedoms of individuals to say what they choose to say and experience what others choose to say, unhindered in either dimension by intellectual property rights unless aggregate welfare (or on the Razian view, liberal-democratic culture as a 'common good')[14] is thereby advanced.

My claim in this article is that a significantly different, and arguably richer, conception of what a free culture entails and how the rights of authors relate to it emerges from a direct engagement with the philosophy of Immanuel Kant.[15] The immediate justification for turning to Kant in this context is that he dealt very directly with the issue of authors' rights – first in an essay published in 1785[16] (hereinafter '1785 Essay') and again briefly in a section – entitled "What is a Book" – of his late work of political philosophy, Part I of *The Metaphysics of Morals*.[17] Moreover, he theorized these rights as speech rights, and not as rights of property in works

[12] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2004), p.10.

[13] Yochai Benkler's critique of copyright's expansionary tendencies seems to proceed from a liberal perfectionism indebted to Joseph Raz and ultimately to J.S. Mill (see in particular his "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain" (1999) 74 *N.Y.U. L.Rev.* 354 and "Siren Songs and Amish Children: Autonomy, Information and Law" 76 (2001) *N.Y.U. L. Rev*. 23). For an accessible statement of Benkler's position, see his *The Wealth of Networks* (New Haven and London: Yale University Press, 2006), esp. Ch. 5 (arguing that the 'industrial' organization of information production, underpinned by strong copyrights, enables the flow of information to individuals to be shaped by a few large corporations, limiting individuals' capacities to 'author their own lives').

[14] From the Razian perspective, a liberal-democratic culture is a common good because it not only serves the interests of individual rights-bearers but also advances the conditions under which all members of a society could achieve personal autonomy (see e.g. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988). On the relationship between the utilitarian principle of aggregate utility and Raz's conception of the common or general good, see generally Joseph Chan, "Raz on Liberal Rights and Common Goods" *Oxford Journal of Legal Studies* 15 (1995) pp.15-31.

[15] Page references to all of Kant's works cited in this article – except those collected in H. Reiss (ed.) *Kant's Political Writings* (2nd ed.) (Cambridge: Cambridge University Press, 1991) – include in parentheses references by volume:page number to the Prussian Academy edition of Kant's works. References to the *Critique of Pure Reason* include in parentheses references to the pagination of the first and second editions, indicated by the letters 'A' and 'B' respectively.

[16] Immanuel Kant, "On the Wrongfulness of Unauthorized Publication of Books" (1785), in Mary J. Gregor (ed.) *Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press 1998) pp.29-35 (8:79-87). (References to the Essay are all to this translation.)

[17] Immanuel Kant, *The Metaphysics of Morals* (1797), in Gregor (ed.), *Immanuel Kant: Practical Philosophy*, pp.353-603, at pp.437-438 (6:289-291). (References to *The Metaphysics of Morals* are all to this translation.)

considered as crystallizations of their authors' communications.[18] The most well-known of the arguments contained in these writings can be briefly outlined. Kant's premise is that a book considered as a material object must be distinguished from a book considered as the vehicle for an activity of authorial speech. On the one hand, an author's manuscript, and every printed copy of it, is an ordinary object of property attracting an ordinary right of property vested in whomever is legitimately in possession of the object. This right would include the right to use the object, to sell the object and indeed to copy the object. On the other hand, a published book (considered as the vehicle of its author's speech) is also a communication from publisher to public in the name of the author. Hence it is also an action, and as such it has its existence in a person – the person of the author. For Kant, it follows that unauthorized publication of copies of the author's text – though not unauthorized reproduction as such – is wrongful. By selling copies of an author's text to the public, the unauthorized publisher is not just dealing with commodities – printed books – in his own name, but is disseminating an author's speech, thus compelling the author to speak against his will,[19] to acknowledge the book as his own and be responsible for it.[20] Actions "belong exclusively to the person of the author, and the author has in them an inalienable right always *himself* to speak through anyone else, the right, that is, that no one may deliver the same speech to the public other than in his (the author's) name"[21] or deliver a fundamentally altered speech *in* his name.[22] However if

[18] This has been contested, most influentially by Kant's younger contemporary, Johann Fichte. In 1793, Fichte – citing Kant's 1785 Essay in support – argued that an author has a "natural, inborn, and inalienable right of ownership" in his work (Johann G. Fichte "Proof of the Unlawfulness of Reprinting" (*Berlinische Monatschrift* (1793), pp. 443-482, p.461 and 472-3 (trans. Martha Woodmansee, in L. Bently & M. Kretschmer (eds.) *Primary Sources on Copyright* (1450-1900), available at: www.copyrighthistory.org). An author's book, Fichte argued, consists of three aspects. It has a physical aspect (the manuscript or printed book), and an ideal aspect which is in turn divisible into two: the ideas expressed by the author and the 'form' of the author's expression of those ideas: "the way in which, the combination in which, the phrasing and wording in which they are presented" (ibid p. 447) Although ideas become the common property of all as soon as a book is published, the form in which they are expressed, Fichte argued, "remains forever … [the author's] exclusive property" (ibid p. 451). Fichte claimed that this followed from Kant's argument in the 1785 Essay that a book is a use of the author's faculties. That activity, according to Fichte, consists in giving form to thoughts, "so that it is through [the author] – and only in that particular form which he has defined for it – that the book is able to exist" (ibid p. 472). Fichte's claim here appears to be that because each individual's process of giving form to thoughts is unique to him- or herself, the resulting form is that person's exclusive and inalienable property. Nothing in the 1785 Essay supports this claim. Moreover, it is not in accordance with Kant's thinking, because it depends on an idea of self-actualization through ownership to which Kant did not adhere. Fichte here, as on many other questions, is closer to his intellectual successor Hegel than to his predecessor Kant (see further Allen Wood, *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), Ch. 4 and 5; Jay Lampert, "Locke, Fichte and Hegel on the Right to Property" in M. Baur and J. Russon (eds.) *Hegel and the Tradition: Essays in Honour of H.S. Harris* (Toronto: University of Toronto Press, 1997), pp.40-73; Alan Patten, *Hegel's Idea of Freedom* (Oxford: Oxford University Press, 2002), Ch. 5).

[19] "The author and someone who owns a copy can both, with equal right, say of the same book, 'it is my book,' but in different senses. The former takes the book as writing or speech, the second merely as the mute instrument of delivering speech to him or the public, i.e. as a copy. This right of the author is, however, not a right to a thing, namely to the copy (for the owner can burn it before the author's eyes), but *an innate right in his own person, namely, to prevent another from having him speak to the public without his consent*, which consent certainly cannot be presumed because he has already given it exclusively to someone else" (Kant, "On the Wrongfulness of Unauthorized Publication of Books" p.35 (footnote to text at 8:87), emphasis added).

[20] Ibid. p.33 (8:84).

[21] Ibid. p.35 (8:86).

the work is indeed so altered that it would be wrong to attribute it to the author, it can rightfully be published in the modifier's name.[23]

These remarks on authors' rights have not gone unnoticed by copyright lawyers. On the contrary, Kant's 1785 Essay is often cited as inspiration for the theory – now institutionalized in international copyright law – that authors ought to have inalienable 'moral' rights in relation to their works.[24] These are enforceable legal rights which are 'moral' in the sense that they concern authors' non-pecuniary interests in relation to their works (such as the interest in being identified as author, and in ensuring that one's works are published only in the form in which they were created); and they contrast with the economic rights (e.g. to control the reproduction and distribution of copies) which protect authors' pecuniary interests in the commercial exploitation of their works. Yet moral rights in practice afford far less protection to authors than the theory would suggest, and transferable economic rights to the most commercially valuable works are more often than not held by corporate investors. And since it is economic rights which are the focus of concerns about copyright expansionism and its implications for the public domain, the formal recognition of a doctrine of moral rights has done little to allay these concerns.

However, in the fairly recent past, there has been renewed scholarly interest in exploring not only the 1785 Essay, but also Kant's better-known philosophical texts, for more comprehensive insights about how copyright law in general might be re-thought so as to give more weight to the rights of 'transformative' authors – those who, in re-using authored material, also modify that material – and thereby also imbue the public domain of freely re-usable intellectual artefacts with a richer normative significance. Against the grain of Kant's own writings, Leslie Kim Treiger-Bar-Am has attempted to derive a right to what she calls 'autonomy of expression' from a conception of *moral* autonomy that she takes from Kant's ethical theory. She argues that the 1785 Essay can be read as defining a structure of authorial rights to autonomy of expression, necessitated by the respect due to individual dignity, which in turn is grounded in a universal capacity for moral autonomy.[25] From this structure

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[22] For Kant, this inalienable personal right only arises in relation to a particular class of thing: manuscripts or books incorporating writings. While the literary 'action' can always be distinguished from the printed book, in the work of visual art the idea or intellectual element cannot be separated from the material object, and for this reason Kant excludes paintings and sculptures from the category of works protected by a personal right to prevent the distribution of copies: a work of visual art, it would seem, is merely a thing (ibid. p.34 (8:85-6)).

[23] Ibid. p.35 (8:86-7).

[24] There are extensive literatures on the historical emergence of authors' moral rights and on their conceptual relationship with authors' economic rights (for an exemplary analysis, see Stig Strömholm, *Le Droit Moral de l'Auteur* (2 Vols.) (Stockholm: P.A. Norstedt & Söners Förlag, 1967)). It suffices for present purposes to say that, as currently understood, moral rights rest on a theorization of authors' works as manifesting the author's person, and hence as attracting a species of inalienable 'personality' right that is specific to authors (see further on the rise to global dominance of this theorization, Cyrill P. Rigamonti, "The Conceptual Transformation of Moral Rights" (2007) 55 *Am. J. Comp. L.* 67). It is not uncommon for proponents of this theorization to seek to support it by reference to Kant's 1785 Essay (see e.g. Strömholm, *Le Droit Moral de l'Auteur* pp.184-95). The analysis of the Essay I propose here, however, suggests that these interpretations miss the point of Kant's reflections on authors' rights.

[25] Leslie Kim Treiger-Bar-Am, "Kant on Copyright: Rights of Transformative Authorship" *Cardozo Arts and Entertainment Law Journal* (2008) pp.1059-1103. "The autonomy that affords the capacity to self-legislate is the ground of a rational being's dignity…. Because we are autonomous, we deserve respect for our dignity…. Autonomy therefore grounds both [the unconditional and universal right to respect for] the dignity of autonomous beings and also their obligation to respect the dignity of others"

of authorial rights, she argues, it can be inferred that the transformative re-use of a first author's work by a second author ought to attract the same rights (and the same correlative duties) as the first author's expressive act. Abraham Drassinower too has invoked the 1785 Essay in the process of reaching similar conclusions regarding transformative authorship.[26] However in contrast to Treiger-Bar-Am, Drassinower has tended to orient himself by reference to Kant's philosophy of law, although he too at times seeks to account for the rights of authors in general in terms of the 'respect' owed to the 'autonomy' or 'dignity' of the individual:[27] terms that derive from Kant's ethical theory. In a series of thoughtful and important articles, Drassinower has for example drawn on the principle of equal external freedom that animates Kant's legal theory to elaborate a conception of the public domain (of intellectual materials which may be freely used by others) as a necessary limit to the author's right, generated by the internal logic of that right itself. His central theme has been that a justifiable copyright regime must be one that secures equal expressive freedom as between authors and users of copyright material.

Helpful though these contributions have been in rescuing the 1785 Essay from relative obscurity and making it relevant to contemporary debates – including in particular those sparked by the rise of Web 2.0 and the ubiquity of (re)user-generated digital 'content' – they do not in the end depart from the standard liberal model of expressive freedom that was outlined above. Effectively, they assimilate Kant's conception of freedom to the idea(s) of freedom embedded in that model, thereby continuing the habit – most recently exemplified in the IP context by Robert P. Merges's *Justifying Intellectual Property*[28] – of representing Kant as the originator of a liberal individualism now widely associated with figures such as Ronald Dworkin and John Rawls. In what follows, I contest this representation on the ground that it is inconsistent with both the letter of Kant's texts and the spirit animating his philosophical system. In particular, it involves conflating conceptions and forms of

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(ibid. pp.1099-1100).

[26] Abraham Drassinower "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" *Canadian Journal of Law and & Jurisprudence* 16 (2003) pp.3-21; "Taking User Rights Seriously" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law*, (Toronto: Irwin Law, 2005), pp.462-479; "Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-Mark" *Michigan State Law Review* 1 (2008) pp.199-232; "From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law" 34(4) (2009) *Journal of Corporation Law* pp. 991-1007; "Copyright Infringement as Compelled Speech" (2011) (draft article on file with the author).

[27] See especially "A Rights-Based View of the Idea/Expression Dichotomy," "Taking User Rights Seriously" and "Copyright Infringement as Compelled Speech."

[28] Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011). Proclaiming a loss of faith in the utilitarianism that has hitherto guided his writings on IP, Merges here seeks to incorporate a reading of Kant's theory of property (together with those of Locke and Rawls) into "a liberal theory of intellectual property law" (ibid. p.13) that he hopes will equip the field with a more credible normative foundation. Kant is important to this project because, for Merges, "[h]is thought upends amorphous concepts of collective interest and utilitarian balancing, replacing them with [an] … idea of personal autonomy" (ibid. p.17) as "the ability to steer oneself according to one's own plan and design" (ibid. p.18). Taking Kant seriously thus results in "a more clear-headed focus" (ibid.) on intellectual property as an individual – though alienable (ibid. p.81) – right which takes precedence over "third-party *interests*" (ibid. p.17). From this interpretation of the centrality of personal autonomy and individual rights to Kant's philosophy – an interpretation broadly congruent with that of Treiger-Bar-Am and Drassinower – Merges is able to reach a diametrically opposed conclusion: "An infusion of Kant promises to help *correct* the recent and intense emphasis on the rights of users and consumers of IP" (ibid., emphasis added).

freedom that for Kant were quite distinct, albeit closely related – agency and autonomy; moral autonomy and intellectual autonomy; expressive freedom and communicative freedom; individual liberty and collective emancipation. I argue that a full appreciation of the significance for copyright law of the1785 Essay requires that these distinctions be kept firmly in mind, which in turn requires that the Essay be read in relation to Kant's philosophical project as a whole, but in particular his vindication of "the freedom to make public use of one's reason in all matters."[29] Drawing especially on Onora O'Neill's interpretation of the various writings in which Kant explains the basis and significance of this freedom,[30] I argue that what he envisages here is a *principled* freedom – a freedom to engage in what O'Neill has called 'tolerant' communication. On one hand, 'toleration' names a particular attitude toward – indeed a practice in relation to – the communications of other persons: it is a *response* to communication[31] which involves at the very least a recognition on the part of the addressee that she is addressed by another's communication. On the other hand, toleration also names the act of communicating itself in so far as it aspires towards what Kant called 'maturity' – that is, in so far as it aims to be critical and reflective in relation to what we would now call dominant worldviews, hegemonic ideologies, homogenized cultures, embedded traditions or established forms of expertise – while also being open to the mature perspectives of others. To communicate in this spirit of toleration is to participate in a communication community which is engaged in a collective project: that of advancing towards a fully mature, or truly emancipated, culture. It is the possibility of this community, I argue, that is truly at stake in contemporary resistances to copyright expansionism. Rethinking authors' rights as a structure of equal and reciprocal freedoms for individual authors and their addressees is only one aspect of what a Kantian approach to copyright law demands. More broadly, Kant's philosophy calls for an interrogation of how copyright law and the practices it underpins relate to that process of collective emancipation which is enabled by tolerant communicative interactions.

The structure of the article is as follows. Section 1 presents an analysis of the understanding of freedom contained in Kant's practical philosophy. In 1.1 the core elements of Kant's ethical theory – and in particular his understanding of (moral) autonomy – are briefly introduced. However the bulk of this section (1.2) is devoted to Kant's legal theory (in particular his Doctrine of Right), because it is of more direct relevance to the interpretation of the 1785 Essay on authors' rights. Having noted the centrality to this theory of the idea of progress towards a just political order, and the position Kant assigns to 'publicity' (open public debate) as the motor of this progress, I move in Section 2 to an analysis of the meaning and significance, for Kant, of free public criticism more generally. In Section 3, I consider the 1785 Essay against the backdrop formed by Kant's critical philosophy as a whole – but in particular the Doctrine of Right and his conception of public reason – with a view to uncovering the systematic connections uniting all of these dimensions of his thought. Once these connections are appreciated, it will be apparent that Kant's philosophical system yields a rich and complex picture of the significance of authors' rights; and, as I argue

[29] Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" (1784) [hereinafter "What is Enlightenment?"] in Gregor (ed.) *Immanuel Kant: Practical Philosophy* pp.17-22 (8:35-8:42), p.18. (All references to "What is Enlightenment?" are to this translation.)
[30] Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989).
[31] Ibid. p.32

in Section 4, can inspire a more radical rethinking of copyright law's role in relation to communicative freedom than has thus far been imagined.

1 Kant's Understanding of Practical Freedom

1.1 *Freedom as Autonomy: Kant's Ethical Theory*

The idea of autonomy occupies a central place in contemporary liberal thought.[32] As we shall see, it is also central to Kant's philosophy – but it is a mistake to assume that 'it' is the same idea of autonomy. When contemporary liberals refer to autonomy, they generally have in mind the vision of positive freedom set out by John Stuart Mill in his classic essay *On Liberty*:[33] *personal* autonomy as the free development of 'individuality' through the self-cultivation of one's natural potentialities. Autonomy in this sense presupposes a private domain in which to make one's own choices and form one's own life-plans free of interference from others except to the extent that those plans prejudice the legitimate interests of other individuals.[34] More particularly, it involves turning one's wants and inclinations into expressions of one's own nature, as developed by sustained activities of self-formation and self-government. This conception of autonomy is very different from – and in many ways at odds with – Kant's account of moral autonomy as the *submission* of subjectively experienced wants and inclinations to the jurisdiction of an objectively valid moral law.[35] Involved in his account is a characterization of the human capacity to will as manifesting itself in two ways. As *Willkür*, the will can be considered as a kind of legislative and executive authority, determining our rules of action and implementing them through action; as *Wille*, it can be regarded as a kind of constitutional authority, testing our ordinary rules of action against the supreme moral law ordained by pure reason. In ordinary practical reasoning, the rules legislated by *Willkür* have a hypothetical form: 'if I want x, I ought to do y'. Viewed from a Kantian perspective, Millian autonomy engages only *Willkür*, albeit in a particularly refined way: it presupposes a process of 'intelligent self-mastery', through which we decide between our wants with a view to satisfying those that will realize our potentialities most completely. For Kant, however, action which is conditioned in *any* way by wants or 'inclinations' is not autonomous, but heteronomous. Certainly, the will's process of legislating and executing ordinary rules of action exhibits a kind of freedom – the freedom to choose which of our wants to pursue and how to pursue them. But action governed by such rules is not completely self-determined, because the rules themselves are dictated in

[32] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1991). For critical reflections, see John Christman and Joel Anderson, *Autonomy and the Challenges to Liberalism* (Cambridge: Cambridge University Press, 2005); Katrin Flikschuh, *Freedom: Contemporary Liberal Perspectives* (Cambridge: Polity Press 2007).

[33] John Stuart Mill, *On Liberty* (1859) (London: Penguin, 1974), esp. Ch. III.

[34] Treiger-Bar-Am's notion of 'autonomy of authorial expression' is clearly informed by this liberal conception of autonomy: see her "Kant on Copyright" pp.1070-1; 1075-6 1082-4; 1093-99. So too is the conception of the creative individual's personal autonomy invoked by Robert Merges in his *Justifying Intellectual Property*: see ibid. pp.70-83. The fundamental problem with these analyses is that they proceed from the erroneous assumption that this conception of autonomy is also Kant's.

[35] The key texts in which the elements of Kant's moral theory are presented are: *Groundwork for the Metaphysics of Morals* (1785), in Gregor (ed.) *Immanuel Kant: Practical Philosophy*, pp.41-108 (4:385-4:463); *Critique of Practical Reason* (1788), in Gregor (ed.) *Immanuel Kant: Practical Philosophy* pp.137-271 (5:1-5:163); and Part II of *The Metaphysics of Morals* (1797), in Gregor (ed.) *Immanuel Kant: Practical Philosophy* pp.507-603 (6:373-6:493).

part by something merely given: the object of a want. It follows that what ultimately causes one's action here is this object – or, broadly, 'nature.' The will takes as given a naturally occurring inclination and decides only on the means of its fulfilment.

Nonetheless, the limited form of freedom involved with these operations of *Willkür* necessarily, for Kant, presupposes a still higher form of freedom, whereby action is determined by reason alone. Kant calls this higher form of freedom free will, or 'autonomy', and argues that it is engaged when *Wille* tests our rules of action for their moral validity. *Wille*'s 'pure' use of practical reason involves transcending our empirically given wants and deciding what we ought to do from the viewpoint of pure reason; and it is only when we act according to reason that we are truly autonomous. The first formulation of Kant's Categorical Imperative captures what this entails: *Wille* mandates that in any action situation, our rules of action be universalizable as laws that any rational being could adopt to govern their actions.[36] In observing this 'constitutional' principle, we disregard any motive for action that could only be attributable to our particular inclinations, and realize the capacity of the human will to be truly autonomous. Kant took the view that every human being must be regarded as having the capacity for freedom in this sense. Hence the second formulation of the Categorical Imperative requires respect for the rational autonomy (or 'dignity') inhering in every human being: 'act so that you treat humanity, whether in your own person or in the person of any other, always as an end and never as a means only.'[37] To treat a person as an end and never simply as a means to one's ends is to treat that person as a being who could rationally endorse the reasons underlying one's actions.

1.2 *Freedom as Agency: Kant's Legal Theory*

Kant himself does not base authors' rights – or rights generally – directly on the idea of moral autonomy. Rather, he elaborates a distinct philosophy of law, the Doctrine of Right (the *Rechtslehre*, which comprises Part I of *The Metaphysics of Morals*) precisely in order to deal with the contradiction between the idea of self-determination in accordance with a universal moral law, and the idea of Right as that set of universal moral norms which may be *enforced*: a right, after all, is "an authorisation to use coercion"[38] against another. It is Kant's Universal Principle of Right, not his Categorical Imperative, which provides the moral justification for this use of force. The need for a distinct principle authorising coercion arises from the inevitability of conflict between human beings in a context of finitude: a spatially limited planet, limited resources, and (consequently) human competition for the means of survival in a shared world. The concept of Right emerges from the interplay of these unavoidable empirical conditions with the (moral) principles according to which relations between persons should be formed.

Both Kant's ethical theory and his theory of Right are organized around the idea of freedom in conformity with law (and so are united as distinct parts of his overarching moral philosophy), but in different senses: they concern internal and external freedom respectively. Internal freedom depends on how one is motivated to act; external freedom depends on whether, in acting, one is impeded by the actions of other

[36] See e.g. Kant, *Groundwork of the Metaphysics of Morals*, in Gregor (ed.) *Immanuel Kant: Practical Philosophy* p.73 (4:421). (References to the *Groundwork* are all to this translation.)
[37] Ibid. p.80 (4:429).
[38] Kant, *The Metaphysics of Morals* p.389 (6:232).

persons.[39] If the Categorical Imperative imposes a duty on me to universalize my subjective *reasons* for acting – to render what I will compatible with what anyone else could rationally will – the Universal Principle of Right (UPR) requires that my *actions* be able to "coexist with everyone's freedom [of action] in accordance with a universal law."[40] According to this principle, then, freedom of action is morally limited by reference to what is right, and the rightfulness of any individual's action hinges on its implications for *others*' freedom.[41] From this principle, Kant claims to derive an entire system of rights (otherwise put, a system of reciprocal and coercible limits on action) which is morally required to reconcile conflicts between persons' freedoms.

'Action' here presupposes choice – the choice of which ends to pursue *and* which means to adopt in pursuit of them.[42] One person's action can interfere with another's freedom of action either by depriving the other of the means for pursuing his or her ends, or by instrumentalizing those means towards ends not chosen by that other.[43] The central idea underlying Kant's principle of Right is that such interferences are wrongful because they are incompatible with the other's *agency*: in the first case destroying the capacity for agency; in the second case usurping it. Moral autonomy is not directly in issue here: the UPR is concerned only with the conditions under which the freedom of persons *as agents* – beings with the capacity to formulate ends and deploy means for their attainment – could be secured. If agents are to co-exist as such, the external freedom of each must be limited so as to be compatible with the equal freedom of every other.[44] It follows that the system of rights required by the UPR must render persons' spheres of external freedom mutually consistent; and that, as a system of restrictions on external freedom, it should apply 'in accordance with a universal law' – that is, the same restrictions should apply equally to all.[45]

Occupying the first level within Kant's system of rights is an 'innate' right to freedom, borne by human beings conceived of *simply* as agents: that is, as having recourse to nothing other than their innate means (their own bodily and mental

[39] Ibid.
[40] Ibid. p.387 (6:230).
[41] Adherence to rational principle – and the acknowledgement of others as equally rational beings – is therefore *constitutive* of external freedom, no less than internal freedom. On the propensity of this view of freedom to trouble liberal individualist readings of Kant, see Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000), esp. Ch. 3 and 4.
[42] Kant, *The Metaphysics of Morals* pp.374-5 (6:213) (distinguishing between choosing an end and merely wishing it); Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) p.14. Agency is thus what distinguishes persons from things, which can only be objects of persons' choices (Kant, *The Metaphysics of Morals* p.378 (6:223)).
[43] On this, see in particular Ripstein, *Force and Freedom* pp.43-5.
[44] "Right is … the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom." (Kant, *The Metaphysics of Morals* p.387 (6:230)). Or as Kant puts it elsewhere, "*Right* is the restriction of each individual's freedom so that it harmonises with the freedom of everyone else (in so far as this is possible within the terms of the general law)" (Immanuel Kant, "On the Common Saying: That may be Correct in Theory, but it is no use in Practice" [hereinafter "Theory and Practice"] in Gregor (ed.) *Immanuel Kant: Practical Philosophy* pp.279-309 (8:275-8:309), p.290 (8:290)) (References to "Theory and Practice" are all to this translation.).
[45] Thomas W. Pogge, "Kant's Theory of Justice" *Kant-Studien* 79 (1988) pp.407-433, 413.

powers) to pursue their ends in the empirical world.[46] It entails a right to use one's own powers as one sees fit subject to the equivalent right of everyone else (hence, for example, using one's powers to enslave others is wrongful). For Kant, however, freedom requires that persons also be able to have 'external objects of choice' at their disposal. Thus, a second level of Right – private right, regulating persons' use of these means for pursuing their ends – can be rationally 'postulated' as an extension of the innate right to freedom and thereby also of the UPR. Invoking the divisions of Roman private law, Kant presents private right as necessarily reducible to three categories: property rights (subsisting in respect of things), contract rights (subsisting in respect of others' actions) and what he calls domestic rights (subsisting in respect of other persons as such).[47] Private right is however impossible except in "a rightful condition, under an authority giving laws publicly."[48] Thus the third level in Kant's system is public right, whereby a public authority exercising legislative, executive and judicial functions can enable private rights to be legitimately acquired, enforced and applied. Kant illustrates the problems arising in a 'state of nature' (a condition in which innate rights are insecure, and private rights can apply only provisionally, because of the absence of public right[49]) through his discussion of what is involved in initially acquiring a property right. This acquisition – though itself an exercise of external freedom – is a unilateral act that purports to exclude all others from the putative object of property, and so compromises the freedom of everyone else by subjecting them to the choice of the acquirer. A state of nature, then, is a condition in which everyone is at all times subject to the unilateral choices of everyone else.[50] Since this condition is inconsistent with the possibility of anyone's agency, a 'civil' condition in which individual rights could be endorsed, and rendered secure and determinate, by a *public* will – a public authority that acts for all – is morally required.

Public right in turn has three dimensions. The first (just considered) regulates the relations of citizen-subjects within a state; the second is a system of international right, regulating relations between states; and the third is a system of what Kant calls 'cosmopolitan' right, regulating the relations of 'citizens of the world' (that is, individuals considered apart from their membership of any state) to foreign states. In the *Rechtslehre* and in "Toward Perpetual Peace" (an essay published in 1795) Kant defines the content of cosmopolitan right as limited to a 'right of hospitality:'[51] "the right of a foreigner not to be treated with hostility because he has arrived on the land

[46] "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with universal law, is the only original right belonging to every man by virtue of his humanity" Kant, *The Metaphysics of Morals* p.393 (6:238). Kant defines this 'innate' right as "that which belongs to everyone by nature, independently of any act that would establish a right" (ibid. (6: 237)) and distinguishes it from an acquired right, "for which such an act is required" (ibid).

[47] Domestic rights recall the Roman law of persons. For Ripstein, they are rights of 'status' (*Force and Freedom* pp.70-77), characterized by the incapacity of the party in respect of whom they are held to consent to the choices made for him or her by the right-holder. He claims that for Kant, such rights are exceptional and strictly limited: an example would be the rights of parents in respect of their children.

[48] Kant, *The Metaphysics of Morals* p.409 (6:255).

[49] On this see Ripstein, *Force and Freedom* Ch. 6.

[50] Ibid. p.38.

[51] Immanuel Kant, "Toward Perpetual Peace" (1795), in Gregor (ed.) *Immanuel Kant: Practical Philosophy* pp.315-351 (8:341-386), at pp.328-331 (8:357-360) (references to "Toward Perpetual Peace" are all to this translation); Kant, *The Metaphysics of Morals* pp.489-90 (6:352-353).

of another."[52] Arguably, however, Kant sees the totality of rightful relations – comprising all three dimensions of public right – as forming a cosmopolitan *polity*. For Kant, all forms of public law have only provisional validity until such a polity has been established, because only in that event could a condition of war – an international state of nature – be definitively brought to an end in a context of global interdependence.[53] "[We] must work toward establishing perpetual peace and the kind of constitution that seems to us most conducive to it (say, a republicanism of all states, together and separately)."[54] Involved in Kant's concept of Right, then, is an idea of *progress towards* a just political order:[55] a global system of reciprocal external freedom, realized through law. The establishment of sovereign states is only the first step towards this end. Central to Kant's account of how further progress is possible are two interrelated principles: the principle of the independence of every member of each state as a citizen – "that is, as a co-legislator"[56] – and the principle of publicity.

Citizenship is a pivotal concept in Kant's political theory, but his use of the concept is apt to confuse. He defines the quality requisite to citizenship – "apart from the natural one (of not being a child or a woman)"[57] – as "only that of being one's own master (sui juris), hence having some property … that supports him."[58] This in turn means that the citizen is one who is able to sustain himself (*sic*) only by alienating what belongs to him and not by providing services to others: only then can it be said that he has that civic independence which qualifies him as 'serving only the commonwealth.' One way of reading this stipulation is as revealing a bias towards propertied men as solely equipped and entitled to participate in the polity. Yet Kant's property requirement can also be interpreted as implying only that the capacity for agency must be supported by the material conditions under which it is possible to be one's own master: that, to be meaningful, political agency must be substantive and not merely formal. Further, because Kant clearly intended to offer a dynamic account of the forces that might move political institutions towards the ideal of justice, citizenship here can be understood not as a static condition for which a person either is or is not qualified, but as an ideal of political 'maturity' towards which all persons (children and women included) may aspire and from which no one, therefore, is in principle barred.[59]

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[52] Kant, "Toward Perpetual Peace" pp.328-9 (8:357-8). This right "belongs to all human beings by virtue of the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely" (ibid p.329 (8:358)). The meaning of hospitality is however heavily contested: some for example link it to the rights of refugees (see Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004)); others to rights to engage in international trade (see e.g. B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), pp.205-11); others stress Kant's insistence that cosmopolitan right '*shall be limited* to conditions of hospitality' for the visitor, and does not amount to a right to settle, thereby positioning colonial occupation outside its scope (see Peter Niesen, "Colonialism and Hospitality" *Politics and Ethics Review*, 3(1) (2007), pp. 90–108).

[53] Kant, "Toward Perpetual Peace" p.322 (8:349n).

[54] Ibid. p.491 (6:354).

[55] On this dimension of Kant's political thought, see Elisabeth Ellis, *Kant's Politics: Provisional Theory for an Uncertain World* (New Haven: Yale University Press, 2005), esp. Ch. 3.

[56] Kant, "Theory and Practice" p.294 (8:294).

[57] Ibid. p.295 (8:295).

[58] Ibid.

[59] See further on the theme of independence in Kant's political thought, Howard Williams, "Liberty, Equality and Independence: Core Concepts in Kant's Political Philosophy" in G. Bird (ed.) *A Companion to Kant* (Oxford: Blackwell, 2006), pp.364-382.

Further interpretive difficulties arise when one considers the form of political participation that Kant envisages for the citizenry. He frequently asserts that a rightful condition only exists where a legal order, together with its constitutional structure, actualizes the idea of the "general (united) will"[60] of the whole 'people.'[61] He also suggests that this idea requires that the people considered as a collective entity (i.e. the citizenry) author the laws binding the people considered severally as a sovereign's subjects. Yet on closer inspection it becomes clear that these are not arguments for popular sovereignty in any conventional sense. For Kant, constitutional founding is not to be understood as an actual assertion, at some point in history, of popular 'constituent power'; and he denies that Right requires the actual consent of all empirical legal subjects to the laws promulgated by a constituted sovereign. The idea of the general united will is only an 'idea of reason,' binding the sovereign "to give his laws in such a way that they *could have* arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, *as if* he has joined in voting for such a will."[62] Moreover, only the sovereign, not the subject, can be the judge of whether its laws meet this standard. Faced with laws that in the subject's view a unified public will could not possibly have endorsed, the subject must nonetheless obey.[63] To do otherwise would be to precipitate a return to the state of nature in which no unique law-making authority in fact exists and everyone makes, applies and enforces his own unilateral judgements.[64]

What then becomes of the idea of the citizen as co-legislator? It is at this point that the relevance of publicity to Kant's analysis of both citizenship and justice (or Right) becomes clear. In a nutshell, Kant's message is this: *subjects* must obey the laws in force, but as *citizens* they should also argue publicly about their rightness. Subjects – while acting 'externally' in obedience to laws – may nonetheless harbour conscientious objections to them 'internally'. These doubts testify to the freedom of subjects, while constrained in what they can *do* vis-à-vis the laws in force, nonetheless to *think* about their rightness. Such independent opinion-formation is perfectly legitimate, even in a civil condition, since "every human being still has his inalienable rights, which he can never give up even if he wanted to and about which he is authorized to judge for himself…;"[65] and each is therefore entitled to judge the laws in force wanting as failing to respect these rights. However it is "freedom of the pen" – the freedom to publicly *articulate* these opinions – that is "the sole palladium of the people's rights,"[66] the only guarantee that laws and institutions will in fact be brought into conformity with Right. It is through the free public criticism of unjust

[60] Kant, "Theory and Practice" p.295 (8:295).
[61] In "Theory and Practice" Kant refers to the 'original contract' by which a multitude establishes a civil constitution (p.296 (8:297)), a constitution being defined in the *Rechtslehre* as 'a rightful condition under a will uniting them' (Kant, *The Metaphysics of Morals* p.455 (6:311)). So a civil constitution is an arrangement under which the multitude is united into a people, and the people, considered now severally as legal subjects, are governed through a system of laws under the ultimate authority of a sovereign.
[62] Kant, "Theory and Practice" pp.296-7 (8:297) (emphasis added).
[63] Ibid. pp.297-8 (8:297-8).
[64] Kant thus rules out revolutionary action as incompatible with citizenship. Although the idea that laws ought to reflect the general united will remains always as a standard against which to evaluate the justice of the sovereign's laws, it cannot without contradiction be invoked as the basis of a right to revolution against a sovereign which appears to betray this idea.
[65] Kant, "Theory and Practice" p.302 (8:304).
[66] Ibid.

laws that citizens become co-legislators – by collectively constructing the standards of reason that can guide law-making towards realisation of the general united will. As explained further in Section 2 below, these standards are not mere aggregations of individual opinions, or victors in the clash of opinions, but may claim universal validity because forged in a specifically public process of argument through which reason itself emerges as the victor. It is this conviction that underlies Kant's claim (in "Toward Perpetual Peace") that there is an *a priori* (and not just an empirical) connection between public justifiability (publicity) and justice or Right. That is, publicity is not only appropriate on prudential grounds (because fallible empirical sovereigns are liable to promulgate laws that contradict the rightful condition demanded by reason, and public argument enables these errors to be foreseen or corrected), but is a transcendentally necessary condition for just laws. Further, Kant seems to argue here that publicity can be the mechanism of progress towards a global system of Right.[67] In the absence of (or until)[68] the creation of a world republic with supreme coercive power to make, enforce and apply global laws, the united public opinion of world citizens can substitute for such laws, constituting universal standards by reference to which abuses of political power everywhere can be judged.[69]

At both the domestic and the global levels, then, open public debate is for Kant *the* mediator between principles of justice and the practice of politics. It is the crucial mechanism by which civic independence is exercised and through which it is enhanced; and it therefore underlies the development of an increasingly mature citizenry and progress towards a just polity.[70] But as the next Section will show, the public use of reason has an even wider significance within Kant's philosophical system, for he sees it as indispensable to the advance of Enlightenment in every dimension.

2 Freedom as Communicative Autonomy: Kant on Public Reason

The most obvious clues to the true meaning and import of the public use of reason for Kant emerge from some of his shorter journalistic essays, writings that were aimed at

[67] Ibid. p.347-51 (8:381-6).

[68] It remains a matter of dispute amongst Kant scholars whether Kant wanted to make a case for a world republic: see e.g. Georg Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press 1999) (arguing against this interpretation) and Otfried Höffe, *Kant's Cosmopolitan Theory of Law and Peace*, (Cambridge: Cambridge University Press, 2006) (arguing in favour).

[69] On this, see James Bohmann, "The Public Spheres of the World Citizen" in J. Bohmann and M. Lutz-Bachmann (eds.) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, MA: MIT Press, 1997), pp.179-200. Bohmann argues that this interpretation of the global significance of publicity for Kant can be gleaned from Kant's remark in "Toward Perpetual Peace" that "the … community of the nations of the earth has now gone so far that a violation of right on *one* place of the earth is felt in *all*…" ("Toward Perpetual Peace" p.330 (8:360)). If universal outrage is indeed so felt, Bohmann argues, it is because world citizens publicly expose and criticize such violations, and thereby publicly acknowledge as universal the rights that have been violated. This criticism can in turn only occur because the right to hospitality guaranteed by cosmopolitan law accords to world citizens the freedom to communicate within the public spheres of foreign states, and thus "a cosmopolitan public sphere forms within each republic, with transnational relations to many other such spheres" (Bohmann, "The Public Spheres of the World Citizen" p.186).

[70] Larry Krasnoff, "The Fact of Politics: History and Teleology in Kant" *European Journal of Philosophy* 2(1) (1994) pp. 22-40; Ellis, *Kant's Politics* esp. Ch.1 (emphasizing Kant's foregrounding of publicity "as a motor of progress towards an ideal state" (ibid p.12)).

a wider audience than that addressed by his more technical philosophical works.[71] In one of these essays, published in 1784 – "An Answer to the Question: 'What is Enlightenment?'" – Kant characterizes enlightenment as the attainment of maturity through the use of reason: thinking and deciding for oneself rather than deferring to established authority or tradition. In principle, Kant argues here, maturity is possible for all persons, because all are equipped with the capacity for independence. Yet through laziness, cowardice or irresolution, individuals are apt to remain in thrall to 'guardians' – Kant instances priests and doctors – and so in a state of self-incurred minority.

As Katerina Deligiorgi has noted,[72] there is a parallel between the account presented in Kant's practical philosophy of 'pathologically determined' *action* – action determined by sensuous inclinations – and the account he offers here of allowing one's *thinking* to be dictated by forces external to oneself: while Kant acknowledges the prevalence of heteronomous thought, no less than heteronomous action, he insists that what essentially characterizes the human subject is the capacity for the free (i.e. autonomous) use of reason. What Kant urges in general, then, is the emancipation of our reason from everything that undermines its authority for us. Yet whereas his practical philosophy yields a method or principle – the Categorical Imperative – that, if followed, will (he claims) enable one to act autonomously, here Kant suggests that free thought depends only on public communication: "[f]or … enlightenment, however, nothing is required but … freedom to make *public use* of one's reason in all matters."[73] It is not immediately obvious why this should be so – at least, it is not clear why the freedom to express something in public should be any guarantee of the speaker's progress towards intellectual independence (since the views expressed might simply be hackneyed or formulaic, or the speaker a puppet of some 'guardian'). Embedded in Kant's idea of a public use of reason, then, must be a normative criterion of publicity: some principle that could guide thought, as the Categorical Imperative guides action. Yet none is spelled out in this essay. The only definition Kant offers of a public use of reason is this: "that use which anyone may make of [reason] *as a scholar* before the entire public of the *world of readers*."[74]

In the context of the essay, the immediate significance of the italicized terms is that they serve to distinguish a public from a 'private' use of reason. However Kant's conception of a private use of reason is somewhat peculiar.[75] It is not a use of reason that is merely personal to the reasoner and undisclosed to anyone else. Rather, it is "that [use] which someone makes of [reason] in a certain *civil* post or office"[76] and the examples Kant invokes in "What is Enlightenment?" to illustrate his meaning here all refer to utterances directed at an audience: a priest's sermon, an army officer's orders, a tax official's demands, and so forth. It would seem that when these representatives of ecclesiastical or state authorities interpret the latter's dictates and address their interpretations to these authorities' subjects, or when they speak in the

[71] The key essays in this connection are: "An Answer to the Question: 'What is Enlightenment?'" (1784); "Idea of a Universal History from a Cosmopolitan Point of View" (1784); "What Is Orientation in Thinking?" (1786); "Theory and Practice" (1793); "Toward Perpetual Peace" (1795) and "The Conflict of the Faculties" (1798).
[72] Katerina Deligiorgi, *Kant and the Culture of Enlightenment* (Albany, NY: SUNY Press, 2005), p.60.
[73] Kant "What is Enlightenment?" p.18 (8:36).
[74] Ibid. p.18 (8:37).
[75] Deligiorgi, *Kant and the Culture of Enlightenment* p.63.
[76] Kant, "'What is Enlightenment?'" p.18 (8:37).

exercise of an authority delegated to them from above, they engage in private uses of reason in Kant's sense. They reason publicly, on the other hand, when they speak their own minds on issues within the jurisdiction of these authorities. Thus although the priest – in his private capacity of officer of the church – is obliged to preach religious orthodoxy to his flock from the pulpit "for he [is] employed by [the church] on that condition",[77] as a scholar (i.e. as an intellectual) "he has complete freedom and is even called upon to communicate to the public all his carefully examined and well-intentioned thoughts about what is erroneous in that creed and his suggestions for a better arrangement of the religious and ecclesiastical body."[78] The normative force of this freedom and calling is conveyed by Kant's insistence that it would be a "crime against human nature"[79] for members of the clergy to bind themselves never to doubt an established religious creed in public: this would be an instance of renouncing enlightenment altogether, which in turn would "violate the sacred right of humanity."[80] Yet once again Kant does not explain in so many words where the normative force of this 'public doubting' emanates from: how exactly it contributes to enlightenment.

"What is Orientation in Thinking?," published in 1786, is one of a number of texts in which Kant finally reveals what might be called the 'supreme principle of rational thinking', the analogue of the Categorical Imperative that was suggested by, but missing from, "What is Enlightenment?". It is contained in the following proposition:

> To think for oneself means to look within oneself (i.e. in one's own reason) for the supreme touchstone of truth; and the maxim of thinking for oneself at all times is enlightenment…. To employ one's own reason means simply to ask oneself, whenever one is urged to accept something, whether one finds it possible to transform the reason for accepting it, or the rule which follows from what is accepted, into a universal principle governing the use of one's reason.[81]

In form this is very similar to the Categorical Imperative, which is itself a principle requiring the moral reasoner to assess whether her subjective rules of action could, without contradiction, be universalizable. And like the Categorical Imperative, which orients moral action not via a substantive moral code but by means of a procedure that operates only negatively, this principle does not tell us *what* to think. Instead it urges us to examine the criteria underlying our acceptance or rejection of propositions with a view to identifying whether these are mere prejudices, arising from the passivity of our mental faculties, or criteria that could be valid for anyone: only in the latter case are the propositions they support worthy of acceptance. Now if thinking for oneself is solely a matter of reflecting on one's thought processes by the light of this universalizability test, it is difficult to see what the connection is between enlightenment and public debate. Yet Kant here reaffirms his earlier emphasis on the inextricable link between individual freedom of thought and the freedom to think "in community with others to whom we communicate our thoughts and who

[77] Ibid p.19 (8:38).
[78] Ibid.
[79] Ibid p.20 (8:39).
[80] Ibid.
[81] Kant, "What is Orientation in Thinking", in H. Reiss (ed.) *Kant: Political Writings*, pp.237-49, p.249. (All references to "What is Orientation in Thinking" are to this translation.)

communicate their thoughts to us."[82] So close is the connection here forged between public debate and autonomous thinking, indeed, that Kant goes so far as to state that "the same external constraint which deprives people of the freedom to communicate their thoughts in public also *removes* their freedom of thought."[83] Yet there is at least a tension between the principle that before accepting a proposition I must ask myself whether *I* can judge it to be universally valid (which seems at most to involve an ideal conversation with an imagined community of reasoners), and the principle that I must first test whether it meets with general assent following an actual process of open public debate.

This brings us closer to where the normative significance of Kantian publicity resides. The key point is that the public use of reason (implying *both* the universalizability of a proposition *and* its availability for open public debate) is indispensable to the task of securing the authority of reason – in politics, knowledge and human affairs generally – and displacing the authority of unquestioned tradition or power. This dimension of Kant's thought has been explored with particular rigour by Onora O'Neill.[84] For O'Neill, "What is Enlightenment?" is best read as characterizing 'private' uses of reason by reference to two related features that render them "deprived (privatus) [and] incomplete"[85] by comparison with what Kant calls public uses of reason. The first is the partial reliance of private reason's authority on the power that attends the reasoner's superior status *vis-à-vis* her audience: "[i]n all such communication there is a tacit, uncriticized and unjustified premise of submission to the 'authority' that power of office establishes,"[86] which in turn means that "[a]t some points in debates about such communications argument must stop and authority be invoked."[87] The second is that the audience for such utterances is necessarily restricted to those who accept the speaker's ability to invoke his or her superior status as an argument-stopper in this way. A public use of reason, by contrast, is one that presupposes no authority other than reason, and is thereby in principle available for debate by 'the entire public.'

O'Neill herself characterizes utterances of this kind as 'publicizable', and notes that Kant clearly prioritizes publicizability (in this sense of worthiness to be publicly debated) over publicity (actual public debate). Yet she also stresses that whether a proposition is publicizable cannot for Kant depend simply on whether the proponent believes it to be so, or on whether it is stated to conform to transcendent standards of rationality that have been established in advance of its communication. Even propositions that are believed in good faith to invoke no authority other than reason might be informed by hidden prejudices of which their proponents are unaware; and this danger cannot be circumvented by invoking a higher authority as the guarantor of reason without regressing to a state of tutelage. Of necessity, then, authoritative criteria of rationality have to be *constructed*, and this requires a process of trial, error, correction and retrial – an ongoing *collective* task, guided only by the idea that the

[82] Ibid. p. 247. In "Theory and Practice", too, Kant remarks that "it is a natural calling of humanity to communicate with one another, especially in what concerns people generally" (ibid. p.303 (8:305)).
[83] Kant, "What is Orientation in Thinking", p.247 (emphasis added).
[84] O'Neill, *Constructions of Reason*, esp. Ch. 1 and 2.
[85] Ibid. p.17.
[86] Ibid.
[87] Ibid. p.34.

authority striven for must be that to which all can agree.[88] This in turn means that each person should reason in a way that recognises – in oneself and in everyone else – the freedom to think for oneself, while at the same time acknowledging the necessity to think in community with others. It is only through sustained practices of free, critical and universal debate that the task of constructing reason's authority – and progress towards a fully Enlightened world – stands any chance of accomplishment.

What then are the principles by reference to which reason's authority can be collectively constituted through the process of open debate? Kant offers no particular specification in any of his writings on the public use of reason, but here again O'Neill's interpretation is helpful. The most basic of these principles can, she argues, be extrapolated from Kant's moral theory, in particular the prohibitions on using coercion and lying in one's communications with others. She finds other principles elsewhere in Kant's *oeuvre* – especially in the *Critique of Judgment*[89] and in *Anthropology from a Pragmatic Point of View*,[90] where general guidance is offered on how to think in community with a plurality of others who cannot be guaranteed in advance to agree.[91] Briefly, this guidance reduces to three maxims: 'think for oneself'; 'think from the standpoint of everyone else'; and 'think consistently'. The first of these maxims requires active and unprejudiced, rather than passive, thinking: otherwise no genuine plurality of perspectives can emerge.[92] The second requires reflection on one's initial judgments from the perspective of all so that any partiality conditioning them can be corrected.[93] Far from being a matter of ascending to a neutral Archimedean point above the conflict of opinions, this process should be oriented toward comparing one's independently formed judgments with the actual viewpoints of others,[94] and taking any discrepancies as signalling that one's reasoning may be erroneous. Since the results of this reflective movement will constantly be in flux, contradictions in one's thinking can be expected to emerge. Hence the third maxim implies a preparedness to work through these contradictions in an unceasing effort to integrate all of one's considered judgments into a whole which is unified under common criteria.[95]

To think and communicate in accordance with these principles is to think and communicate autonomously. It should be clear that this intellectual/communicative autonomy is irreducible to freedom of expression in the standard liberal sense of freedom to choose what to say and whether to say it.[96] This is not to suggest that expression can be arbitrarily prohibited or interfered with, but individual expressive liberty is only a *condition*, not *constitutive*, of what Kant actually has in mind as the

[88] Ibid. p.18-20.
[89] Immanuel Kant, *Critique of Judgment* (trans. W. S. Pluhar) (Indianapolis: Hackett, 1997) pp.160-2 (5:294-6). (All references to the *Critique of Judgment* are to this translation.)
[90] Immanuel Kant, *Anthropology from a Pragmatic Point of View* [hereinafter *Anthropology*] trans. Mary J. Gregor (Nijhoff: The Hague, 1974), pp.72 (7:200) and 96-7 (7:228-9). (All references to *Anthropology* are to this translation.)
[91] O'Neill, *Constructions of Reason* pp.24-27, 46-50.
[92] Kant, *Critique of Judgment* p.161 (5:295); O'Neill, *Constructions of Reason* p.46.
[93] Kant, *Critique of Judgment* p. 161 (5:295).
[94] O'Neill, *Constructions of Reason* p.46-7.
[95] Kant, *Critique of Judgment* p. 161-2 (5:295).
[96] "In contrast to contemporary liberal defences of free speech, Kant proceeds on the basis of what he considers to be the essential requirements for rational autonomy, and not from a notion of basic individual rights" (Deligiorgi, *Kant and the Culture of Enlightenment* p.85).

practice of public reason. Onora O'Neill invokes the idea of toleration to mark the distinction, and I adopt it in what follows. Toleration here on the one hand signifies a responsiveness towards the communications of others ("[w]e do not tolerate others' communications if we are merely passive and noninterfering"),[97] and on the other hand the act of communicating itself in so far as that act is oriented towards conformity with the principles and maxims identified above. On O'Neill's interpretation, an utterance which is, for example, purely egoistic,[98] or dictated by an external authority, or trivial, or unintelligible, could *only* be an expression, which is to say a *failed* communication (since expression is parasitic on communication) that fails because it is 'intolerant' of its audience;[99] while a communication which is greeted with indifference, even if not interfered with, is treated as if it were a mere expression and so not 'tolerated' as a communication. In general, then, the public use of reason – where 'use' signifies processes involving both communication and reception – presupposes toleration.

It was noted in Section 2 above that Kant saw the public use of reason as the motor of progress towards a just political order. It should now be clear why he saw it as the key to the advance of Enlightenment generally. The process of Enlightenment – and with it, progress towards a free or 'mature' culture characterised by the mutual recognition of the intellectual autonomy of all – depends on social practices of tolerant communicative interaction which are both public and fully inclusive. Although oriented towards the horizon of universal consensus, these practices are essentially constituted of *disagreements* with, and *contestations* of, perspectives that happen to be generally accepted – albeit within the limits set by the presupposition of all critical intellectual activity, which is toleration. If afforded space in which to flourish, principled communicative practices can fuel an emancipatory process that is not personal to each individual so much as it moves humanity as a whole towards a situation in which 'everything submits' to criticism.[100] And since reason for Kant owes its authority to nothing other than criticism,[101] reason would in that situation rule supreme in human affairs.

3 The Legal Structure of Communicative Freedom

[97] O'Neill, *Constructions of Reason* p.31. Simply put, the distinction is between allowing someone to speak and engaging with what they have to say.

[98] Egoistic uses of reason disregard the necessity of testing one's judgments against the judgments of others (Kant, *Anthropology*, p.10 (7:128)).

[99] O'Neill, *Constructions of Reason* p.31.

[100] Kant makes the connection between Enlightenment and criticism/the free public use of reason explicit in a footnote appearing in the Preface to the first edition of the *Critique of Pure Reason*: "Our age is the true age of criticism, to which everything must submit. Religion through its holiness, and legislation through its majesty commonly seek to exempt themselves from it. But in this way they heap justified suspicion upon themselves, and cannot claim the genuine respect that reason grants only to what has been able to stand the test of free and public examination" (Immanuel Kant, *Critique of Pure Reason*, trans. P. Guyer and A. Wood (Cambridge: Cambridge University Press, 1998) [hereinafter CPR] pp.100-101 (A xi)). (All references to the *Critique of Pure Reason* are to this translation.)

[101] Kant insists that reason itself is subject to "searching review and inspection:" its "very existence" depends on freedom of critique and its claim to authority is based on nothing more than "the agreement of free citizens" (CPR p.643 (A738-9/B766-7)). For consideration of the relation between reason and criticism in Kant's writings, see Deligiorgi, *Kant and the Culture of Enlightenment*, pp.85-92.

The question that must now be addressed is whether Kant envisages any particular legal arrangements as necessary for the flourishing of tolerant communicative interactions in the sense outlined in the previous Section. The dominant view is that the answer is 'no': the public use of reason is not in fact conceived of by Kant as amenable to being organised in terms of claims that can be redeemed through rights – even a right to free speech – at all. Rather, it is sustained by social practices and orientations; and Kant establishes the legitimacy of these practices and orientations by reference to his conception of reason, not Right.[102]

It is undeniable that Kant's case for the free use of reason in public is advanced in terms that appear to suggest that it is a 'right' of human reason, not an individual (subjective) right properly so called:

> To this freedom … belongs the freedom to exhibit the thoughts and doubts which one cannot resolve oneself for public judgment without thereupon being decried as a malcontent and dangerous citizen. This lies already in the original right of human reason, which recognizes no other judge than universal human reason itself, in which everyone has a voice; and since all improvement of which our condition is capable must come from this, such a right is holy and must not be curtailed.[103]

If anything, it would seem to follow that the counterpart to this 'right' is a *duty* – but a duty that each human being owes to humanity, not to other individuals. Nonetheless, it could be argued that the freedom to engage in a public use of reason is required by that aspect of Kant's Universal Principle of Right that, in Pogge's words, "demands … the thriving of reason, and the promotion of its development both in the species and in each particular person."[104] Otherwise put, Kant can be construed as arguing that justice demands not only a legal order guaranteeing equal spheres of external freedom for all, but a set of legal arrangements conducive to Enlightenment in the broadest sense. And since free public criticism is, for Kant, absolutely central to Enlightenment, it is at least arguable that Kant sees law as having a role to play in facilitating it.

What then is the juridical structure of free communication as Kant sees it? It is first necessary to recall that for Kant, a system of rights is a set of pure rational concepts that define the morally necessary form of interaction between persons prior to any positive laws which would give effect to these concepts. Pending the institutionalisation of these concepts in positive law, persons can only be said to have morally valid rights *claims* against others: in Kant's words, "(moral) capacities for putting others under obligations."[105] Moreover, a claim to right is intrinsically coercive: it is indeed simply a claim that others ought to be constrained to treat the claimant in certain ways. Kant himself clearly takes the view that there is a right (in the specific sense just outlined) not to be prevented from saying what one chooses: he states in the *Rechtslehre* that in so far as speech does not infringe on the rights of others, the freedom to utter one's thoughts to others is protected by the innate right to

[102] Ibid. See also Allen W. Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999) ("Kant asserts no individual right of free speech or expression" (ibid. p.306)).
[103] Ibid. p. 650 (A752/B780).
[104] Pogge, "Kant's Theory of Justice" p.413, 421.
[105] Kant, *The Metaphysics of Morals* p. 393 (6: 237); Byrd and Hruschka, *Kant's Doctrine of Right*, p.3

freedom.[106] Even lies and deceitful promises are within the sphere of freedom to which each is entitled simply by virtue of being a person: though immoral, these utterances can be regarded as rightful in so far as they do not infringe the addressee's sphere of external freedom by diminishing that to which the addressee is entitled.[107] It is also clear that the right to say what one chooses is a necessary condition of publicity's operating as a mechanism for securing progress towards a just state and, more generally, that it is a necessary condition of the public use of reason in any discursive domain at all. It is necessary, because freedom of speech is the *sine qua non* of the possibility of communicative freedom in the sense outlined in Section 2 above, and so also of rational discourse, including in particular discourse about injustice:

> Certainly one may say, "Freedom to speak or write can be taken from us by a superior power, but never the freedom to think." But how much, and how correctly, would we think if we did not think as it were in common with others, with whom we mutually communicate! Thus one can well say that the external power which wrests from man the freedom publicly to communicate his thoughts also takes away the freedom to think – the sole jewel that remains to us under all civil repression and through which alone counsel against all the evils of that state can be taken.[108]

The argument in the passage just quoted is that without the possibility of individual expression, communication with others is impossible, and without communication with others, rational thought is impossible: in other words, the right to free speech is here justified, not by reference to the innate right to freedom, but by reference to the demands of reason and the possibility of Enlightenment. More precisely, Kant claims that since speech is the indispensable means of testing one's individual opinions against the opinions of others, the right to expressive freedom is justified by the maxim of broad-minded thinking (thinking from the standpoint of everyone else, and thereby transcending the partiality of one's own opinions) which was referred to in Section 2 above as one of his three maxims of thinking:

> The logical egoist considers it unnecessary to test his judgment by the understanding of others … as if he had no need at all for this touchstone (*criterium veritatis externum*). But we cannot dispense with this means for assuring the truth of our judgments; this is so certain that it may be the main reason why educated people clamour so urgently for freedom of the press. For if we are denied this freedom, we are deprived at the same time of an important means for testing the correctness of our own judgments and left open to error."[109]

However, though necessary, freedom of speech is not a sufficient condition for the public use of reason, precisely because freedom of speech is also grounded in the innate right to freedom. As such, it includes the right to use one's power of expression to manipulate one's interlocutors; and it implies no duty to listen and so no duty to engage with or respond to them. It follows that there can be no right in anyone to

[106] Kant, *The Metaphysics of Morals* p. 387 (6: 231).
[107] Ibid. p.394 (6:238). Hence fraudulent claims and lies that damage another's reputation are wrongful.
[108] Kant, "What is Orientation in Thinking" p.247.
[109] Kant, *Anthropology* p. 10 (7:128-9).

force anyone else to engage in tolerant communicative interactions. To say that I have a morally valid claim to force others to permit me to engage in the free public use of my reason is either tautological or incoherent: my claim to freedom to engage in the public use of my reason adds nothing to my claim to be free to say what I choose other than the contradictory (in Kant's terms) notion that others can be compelled to participate with me in processes of public reasoning oriented towards our collective emancipation. In short, for Kant, each person has a right to speak, but no (strictly juridical) duty to speak 'maturely' and no (strictly juridical) right that anyone else do so.

But granted that the public use of reason is unenforceable, it does not follow that Kant saw law as having no role to play in fostering conditions conducive to its advance and counteracting manipulative, egoistic or generally intolerant (in the sense outlined in Section 2 above) speech. My claim here is that Kant does indeed conceive of a systematic legal structure for the protection of communicative freedom, but that he sees this structure as constituted by the rights of authors, publishers and the reading public in relation to authorial communications. An important clue to the significance Kant ascribes to authorship is to be found in the two passages quoted above, where freedom to speak is explicitly linked with freedom to 'write' and freedom of the 'press'. These linkages reveal how in practice the sphere of public reasoning, the cosmopolitan *Lesewelt*, was in Kant's view to be realized: through the production, distribution and consumption by 'educated people' of cultural artefacts, namely books. As Kant clearly recognized, to 'speak' in this setting is in fact to communicate one's words in writing to the 'reading public'; and since communicating to the 'entire' reading public is of the essence of a public use of reason, writing for that public necessarily involves the mass production of one's texts as books, and the distribution of these to a public with the practical capabilities to read them. Hence freedom of speech must involve the freedom to communicate one's words in writing to the 'reading public'; and freedom of the press must involve the freedoms to mass produce one's texts as books, to distribute these to the public, to facilitate public communication by printing and publishing the books of others, and to acquire and read printed material. Indeed, authorial communication by means of printed texts cannot have been regarded by Kant as merely subsidiary to speech: it is in fact more conducive than oral communication to the public use of reason, in that it orients the author towards an unknown readership and so promotes an awareness of the necessity of communicating in terms that could be accepted by all. The only conclusion one can draw from reading Kant's remarks on publicity in relation to those on publishing, I believe, is that Kant elaborated his views on the rights of authors, publishers and readers with a view to showing how commercial publishing should be legally structured if the public sphere – the institutional space for the public use of reason – was to be nurtured. In the remainder of this Section I reveal the lineaments of this structure as set out in the 1785 Essay: the author's innate right to say (only) what s/he chooses to say, the publisher's private right to appropriate profits from publishing the author's words, the reading public's right to an undistorted communicative relation with the author and – underpinning all of these rights – the universal calling to engage in tolerant communicative interactions through the medium of print. I argue that Kant must be read as conceiving of all of this as forming an integrated legal regime oriented towards advancing – albeit indirectly – the public use of reason.

Ostensibly, the 1785 Essay is simply concerned with showing how the private rights (in the sense elaborated in the *Rechtslehre*) of *publishers* are engaged by the unauthorized publication of an author's book. Kant commences his consideration of the wrongfulness of unauthorized publication by establishing that this act wrongs the authorized publisher. The authorized publisher, he reasons, is one who has received a mandate from the author to communicate the author's discourse to the public. A mandate is the focus of a contract, the purpose of which is to empower one person to be another's agent by "carrying on another's affairs in his place and in his name,"[110] so the publishing contract enables a publisher, through the author's writing, to discourse publicly in the author's name.[111] Kant insists that such empowerments must be exclusive, since otherwise rival publishers would be competing to sell the same book and none could profit from doing so.[112] Moreover, unless the author has reserved the right to object to the transfer of the empowerment to another publisher, it is itself alienable by the publisher.[113] Absent such a transfer, the unauthorized re-printer usurps the empowerment and steals the legitimate publisher's profits. Hence "it is not the author but the publisher empowered by him who is wronged"[114] by the re-printer's activities. Thus far, the rights of the author seem marginal to Kant's analysis. However as explained above, Kant also explicitly argues that publishing an author's writing without his consent is tantamount to forcing him to speak against his will, which wrongs the author because the right to be one's own master in respect of one's speech is an aspect of the innate right to freedom: "[t]he right of the author is … an innate right in his own person, namely, to prevent another from having him speak to the public without his consent…".[115] One's innate right to freedom is the right to determine how one's innate physical and intellectual capacities shall be exercised and to what ends; otherwise put, it is the right that no one else shall interfere with or usurp those capacities. Thus the authorized publisher's *acquired* right to the use of the author's innate power to speak to the reading public depends on the author's consent to what would otherwise be a violation of his or her *innate* right.[116]

The innate right of the author is not a right of property, and it is inalienable. These conclusions follow from Kant's conception of authorial speech as 'an action belonging to the author's person': an author's intellectual creation is an exercise of the author's innate capacities which, as such, cannot be owned (for that would be to presuppose that a person is also a thing, which is contradictory) but to which, as such, only that person could have a right.[117] Now it was noted in Section 1 above that for Kant, the freedom/calling to publicly voice criticisms of existing political

[110] Kant, *The Metaphysics of Morals* p. 433 (6: 285).
[111] Ibid. p.437 (6:289).
[112] Ibid. p.31 (8:81).
[113] Ibid. p.31 (8:82).
[114] Kant, "On the Wrongfulness of Unauthorized Publication of Books" p.31 (8:82).
[115] Ibid. p.35 (footnote to text at 8:86).
[116] "[T]he right to publish cannot be included in the rights that depend upon ownership of a copy; it can become rightful only by a separate contract with the author" (ibid).
[117] On this, see further Ripstein, *Force and Freedom* pp.14-15 and Ch. 2. For an account of how a Kantian idea of innate self-mastery has informed rules restricting the alienability of authors' entitlements in civil law jurisdictions, see Neil W. Netanel, "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law" *Cardozo Arts and Entertainment Law Journal* 12 (1994) 1. Cf. Charles R. Beitz "The Moral Rights of Creators of Artistic and Literary Works" *Journal of Political Philosophy* 13(3) (2005) pp.330-358, 351 n56 ("Kant himself offers nothing that could be construed as an argument for the inalienability of the right against unauthorized, inaccurate or unattributed copying [*sic*]").

arrangements resides in all *citizens*, and citizens are persons who can live by selling what is theirs. Kant admits that it can be difficult to distinguish such persons from those who live by selling their services, but the key is whether a man produces some *thing* (*opus*) which is his to alienate.[118] Prima facie, professional authors seem to have no property to sell, and so appear to lack this key requisite of citizenship. However in the 1785 Essay, Kant establishes that authors are indeed their own masters on the basis that an author produces an "*opus*"[119] (a copy of his text in the form of a manuscript) which is his to alienate. An author, he implies, can sell his 'copies' (i.e. the handwritten or printed copies of his text that he himself has made) direct to the public, or he can hand this trade over to an intermediary by selling his manuscript to a publisher and making a further contract with the publisher empowering the latter to make copies and sell these to the public. The publisher's authorization to *publish* the manuscript – the focus of this further contract – derives, as we have seen, from the author's (inalienable) right not to be compelled to speak. But that right makes practicable the right to sell the *opus* which is the manuscript, and so also the capacities characteristic of the citizen, for in the absence of a right to control unauthorized publication, no publisher would purchase a manuscript from an author in the first place. It is arguably for this reason that Kant's major concern in the 1785 Essay is in fact to legitimize the book trade, the publishing agreements that underpin it, and the profits that may be realized from it: he aims not to denigrate publishers and the publishing trade, but to show how the trade can be rightfully organized, because in its absence professional authors could not be regarded as having the qualities requisite for citizenship.

Already, then, it can be seen that authorship has a crucial, and interrelated, set of implications for Kant.[120] As *inscription* – i.e. as the production of a physical manuscript – it attracts a property right in the manuscript that both founds a legitimate trade in copies (an economic pursuit which the author cannot undermine by authorizing competing publishers) and at the same time positions the professional author to exercise civic independence. As *expression* – i.e. as an activity for which the manuscript is the vehicle – it attracts a right that is 'innate in the author's own person': a right (which is not a property right) to exert a continuing control over his or her speech. However, it is as *communication* – i.e. as an address to the reading public – that authorship is also *culturally* significant. The central right adumbrated in the 1785 Essay – the inalienable right "that no one may deliver the same speech to the public other than in … the author's name"[121] – clearly has implications not only for the individual author but also for the advance of an emancipated culture. To re-circulate an author's text unaltered without the latter's consent is not only to deny the author's innate right but to show no independence of thought in one's communications with the reading public: no sign that the re-publisher has obeyed the injunction to 'think for oneself.' Correspondingly, where a reader, by re-writing an

[118] Thus a barber provides services, but a wigmaker is a trader, "even if I have given him the hair for the wig…" (Kant, "Theory and Practice", footnote to text at p.295 (8:295)).
[119] "The copy that the publisher has had printed is a *work* of the author (opus) and belongs entirely to the publisher, once he has negotiated for the manuscript or a printed copy …" (Kant, "On the Wrongfulness of Unauthorized Publication of Books" p.33 (8:84)).
[120] "If the publisher is at the same time the author as well, the two affairs are still distinct, and he publishes in his capacity as a merchant what he has written in his capacity as a scholar" (ibid p.33 (footnote to text at 8:84)).
[121] Ibid. p.35 (8:86). It is central because from this right follows the right to prevent unauthorized publication of the same speech, and the attribution to the author of a fundamentally altered speech.

author's text with modifications, *has* shown evidence of an ability (however embryonic) to think for him- or herself, the rights of the first author in respect of the delivery to the public of the original text must give way to the rights of the modifier in respect of the public communication of the modified text. The reciprocal rights of author and reader here serve the wider cultural goal of facilitating that critical reflection on which reason's authority depends. The same applies to the author's right to object to the delivery of the modified text in his or her name and the modifier's right to claim authorship of that text: these rights too are conducive to the development of a mature culture, because such a culture is one in which persons speak for themselves and take responsibility for their utterances as named individuals. Finally, the author's right to object to the delivery of an altered speech in his or her name also preserves the integrity of the communication between that author and his or her readers. Not only the author, but also the audience, has a right that this communication be undistorted. Throughout the Essay, Kant reiterates that the author's communication is with the public, and that the publisher and the book trade should only facilitate this communication. That the public has a *right* against the commercial intermediary to receive the author's communication in the form the author intended emerges very clearly from the following passage:

> Were the author to die after he has given his manuscript to the publisher for printing and the latter has bound himself to print it, the publisher is not at liberty to hold the manuscript back as his property; instead, if the author has no heirs, the public has a right to compel him either to publish or to turn the manuscript over to someone else who offers to do so. For it was once an affair that the author wanted to carry on with the public through him and for which he offered himself as the agent. It is not necessary for the public to know of the author's promise or to accept it; it obtains this right against the publisher (to perform something) by law alone. It is not a right of the public to the manuscript but to an affair with the author that is the basis for this. If, after the author's death, the publisher were to put out his work in an abridged or falsified form, or in an edition smaller than the demand for it, the public would be authorized to compel him to correct or enlarge the edition or, failing this, to provide for someone else to do so. All this could not happen unless the publisher's right were derived from an affair that he carries on between the author and the public in the author's name.[122]

Taken together, then, it seems clear that the rights set out in the 1785 Essay are conceived of by Kant as tending to yield the conditions in which authors would advance their own reason (by speaking for themselves) and at the same time advance public reason by communicating their thoughts, undistorted by commercial imperatives, to a critical mass public which is free to read and respond. The final section below will briefly sketch some of the possible implications of viewing contemporary copyright law through Kant's lens.

4 Copyright Law, Communicative Freedom and the Global Public Sphere

[122] Ibid. p.33-4 (8:85).

An appropriate starting point here is Abraham Drassinower's claim that the normative heart of copyright law resides, not in the right to control unauthorized copying as such, but in what he calls the right of public presentation: an author's exclusive right to address the public, in his or her own words, in the form of a work.[123] Copyright law, Drassinower argues, necessarily takes authorial activity to be an instance of speech. All of its central categories – including in particular the exclusive rights of the author and the major defences available to users of copyright material – should, he argues, be (re-) interpreted in relation to a conceptualization of works of authorship as communications to the public.[124] This would limit the current scope of copyright protection, because when re-interpreted in this way, not every act of copying can properly be regarded as infringing. Only reproductions of the work *qua* communicative act – or reproductions which are "in the service of public presentation"[125] – are normatively relevant; copies which are reproductions only "in the physical sense"[126] are not. Copies made for personal use would fall into the second category, as would copies technically incidental to the reception of the work, such as cache copies or digital copies made while browsing online. Moreover, to reproduce another's work *as a work* (i.e. to repeat the communicative act represented by the work) is – properly construed – not simply to re-communicate another's work, but to "wrongfully place [one]self in another's position as an author."[127] What Drassinower has in mind here, evidently, is any adoption of another's communicative act as one's own, and in a way which also involves its public presentation. There is no such adoption where A independently creates and communicates a work that coincidentally bears a similarity to a pre-existing work authored by B: the similarity, rightly in Drassinower's view, does not constitute a basis for finding A liable to B. There should equally be no liability, in his view, if A's use of the earlier work, though deliberate, is reasonably necessary for his or her own exercise of authorship,[128] for in such a case A is addressing the public on his or her own account. (It is this interpretation of the wrong involved in copyright infringement that grounds Drassinower's arguments, noted in the Introduction above, about the legal position of transformative re-users of copyright material.)

Aspects of copyright law, Drassinower argues, already recognize this fundamental reciprocity between actual and potential future authors. One example is the so-called idea/expression dichotomy: the principle that where one author has not copied another author's expression but has instead expressed the latter's idea anew, s/he has shown independent authorship and cannot be impugned for trespassing on another's authorship.[129] Another example is the defence available for using a work as part of an exercise in criticism or review of that work. However other aspects of the current law – including many of those yielded by its recent expansionary tendencies – fail to acknowledge the equal authorial freedom of addressees. To remedy this, Drassinower suggests that at least some defences and exceptions to copyright protection – the vast majority of which currently give rise to nothing more than user 'privileges' and as such are vulnerable to being overridden by digital rights management systems and the

[123] Drassinower, "Authorship as Public Address."
[124] Ibid. p.223.
[125] Ibid. p.224.
[126] Ibid. p.225.
[127] Ibid.
[128] Ibid. p.224-5.
[129] Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law," p.9-10.

contractual ordering of user privileges that these enable – should be placed on a firmer legal foundation by being characterised as user 'rights.'[130] The fundamental user right, he suggests, is the right to engage with (as opposed to merely repeating), and respond publicly to, works of authorship in ways that reasonably require the use of those works. This is as integral to copyright law as the authorial right of public presentation, because it too protects authorial freedom. "Equality, then, is the category that would make intelligible the connection between author rights and user rights as aspects of the copyright system."[131] The domain protected by copyright and the public domain (i.e. the reservoir of intellectual materials that may be freely drawn upon in authorial activity) must thus be seen as two moments of a single integrated structure oriented towards guaranteeing equal authorial freedom for all.

These conclusions – which dovetail with recent proposals to 'constitutionalize' the private relations between copyright owners and users of copyright material[132] – are undeniably consistent with the logic of the 1785 Essay. However, what I want to argue here is that from the perspective of Kant's philosophy as a whole, the structure of rights Drassinower envisages is in turn only intelligible as conducing to social emancipation by fostering the conditions under which free public criticism could be possible. It is his neglect of this dimension of Kant's thought that accounts for Drassinower's tendency to conflate communication with expression, and autonomy with agency, when theorizing the nature of the 'speaking' that is bound up with authorship and protected by authors' rights. While he frequently asserts that copyright law's point is to protect 'communication' – a copyright work, he insists, just "*is* an invitation to engage in dialogue"[133] – Drassinower's arguments only in fact sustain the claim that copyright law protects original expression: expression that originates in the mind of an individual.[134] What he shows is that responses to the authorial acts of others ought to be legally guaranteed, not particularly as elements within a social process of communicative interaction, but as individual expressive acts in their own right. This begs the question of why individual expressivity merits copyright law's protection in the first place. On the utilitarian account, that protection is merely a means to an end: by incentivizing expression, copyrights serve aggregate welfare. Drassinower wants to invoke the idea of moral autonomy that underpins Kant's ethical theory to argue for an opposed understanding of authors' rights as ends in themselves, "inseparable from and embedded in any affirmation of the dignity of authorship itself."[135] Yet what his analysis actually suggests is that authors' rights are grounded, not in an idea of autonomy (whether Kantian or Millian) but in a quite

[130] On this, see in particular Drassinower, "Taking User Rights Seriously", where it is also suggested that existing defences to copyright "are not exhaustive but rather illustrative of a higher principle of authorship equally applicable to both parties" (ibid. p.471) to a copyright infringement action, and hence that further defences not currently given statutory recognition may be warranted.

[131] Drassinower, "Authorship as Public Address" p.213.

[132] For comparative analysis of the constitutionalisation of private law generally in Germany, the Netherlands and the UK, see Olha O. Cherednychenko, "Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?" *Utrecht Law Review* 3(2) (2007) pp.1-25. On the constitutionalisation of copyright law, see e.g. Lucie M.C.R. Guibault, *Copyright Limitations and Contracts* (The Hague/London/Boston: Kluwer, 2002), and Christophe Geiger, "'Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union" IIC 37 (2006) 371-406.

[133] Drassinower, "Authorship as Public Address" p.230 (emphasis in original).

[134] On this see also Abraham Drassinower, "Capturing Ideas: Copyright and the Law of First Possession" *Cleveland State Law Review* 54 (2006) p.191.

[135] Drassinower, "Taking User Rights Seriously" p.479.

different idea of negative liberty: freedom as individual capacity to do (or in this case, to say) what one chooses, without interference from others but within limits defined by the equivalent liberties of others. Unfortunately, this presupposes an individualistic and empiricist understanding of the rationality of choice that is perfectly compatible with the very utilitarianism from which Drassinower seeks to distance himself.

Kant's own answer to the question of why individual expressivity merits protection is, as we have seen, rather more complex. At no point does he argue that individual rights to freedom of expression, much less authors' rights, are directly deducible from the idea of moral autonomy. Individual expressive freedom is an aspect of a person's agency, and Right requires that others not be permitted to interfere with or usurp it except under a universal law guaranteeing equal spheres of freedom for all. However there is much more at stake in the protection of expressive freedom than individual agency, because freedom of expression is also a condition for the possibility of *intellectual* autonomy in Kant's very demanding sense: the determination of thought by reason alone. Intellectual autonomy in turn presupposes communicative freedom: the freedom to articulate one's thoughts in public, subject to principles entailed by the internal logic of communication itself as a mode of interaction between a plurality of (at least potentially) rational persons. It is this *principled* freedom of thought and communication that alone serves humanity's collective project of advancing towards a mature, and therefore fully emancipated, culture.

What additional implications for copyright law – beyond those rightly identified by Drassinower – can be gleaned from Kant's reflections on authors' rights, set against this picture of communicative freedom? One point must be made unequivocally. It follows from Kant's own understanding of Right that law cannot prohibit 'immature' forms of expression: individual liberty to say what one chooses is, as we have seen, a condition of communicative freedom in the richer sense outlined in section 2 above. There can therefore be no question of, for example, reorganizing the copyright system so as to favour intellectual production that shows a particularly high degree of authorial independence – as if such a standard could be knowable in advance of the very interactions that enable its emergence. Kant's thinking must be construed as tending in a different direction, and as yielding two general but nonetheless powerful insights. First, the 1785 Essay on unauthorized reprinting reflects Kant's recognition that communication between speakers in modern conditions is inevitably *channelled* – by technologies and media of communication (print and books in Kant's day; software and networks in ours), by commercial intermediaries (Prussian publishers in Kant's context; global information and entertainment corporations in ours), and by institutional structures (book markets then; information markets generally now) – in ways that may shape the form and content of communication and so the nature of the communication community itself. The Essay can therefore be understood as thematizing these mediations and their propensity to enhance, but also perhaps to compromise, extant possibilities for mature communicative interactions; and as reflecting upon the legal framework that ought to regulate these mediations so as to realise their capacity to support such interactions and forestall their capacity to distort them.[136] The second insight speaks directly to that aspect of the legal framework that

[136] The free software movement can be understood in this light. It is primarily concerned with ensuring that the technical infrastructures with which today's public spheres are intertwined – the protocols, standards, applications and software constituting digital networks: what might be called the material, as distinct from the transcendental, conditions for the possibility of public communication – are

protects the rights of authors. It poses a challenge to the premise of the standard liberal perspective on the relationship between authors' rights and a free culture: that marketable property rights in authors' works, by protecting individual expression, serve as motors of progress towards a fully competitive marketplace of ideas. For Kant, by contrast, progress towards an enlightened culture can *only* be achieved through the critical intellectual activity that communication – the free use of reason in public – demands. This position affords a perspective from which to evaluate the expressive diversity that passes for freedom on the standard liberal account: for Kant, there simply is no freedom without the principled communicative interactions that the public use of reason presupposes. Expressive freedom is certainly a condition of this 'higher' form of freedom, but in so far as the workings of the copyright system impede the social practices and orientations conducive to intellectual/communicative autonomy, copyright law must be regarded as constituting an obstacle to cultural progress, rather than its engine.

Constraints of space preclude a comprehensive exploration of the ways in which the current organization of the copyright industries and copyright law might be vulnerable to the kind of rethinking that these insights demand. However one conclusion at least seems inescapable: fully exchangeable property rights in works of authorship are in no way required by Kant's theory of authors' rights. IP scholars who claim Kant as an influence have been remarkably reluctant to acknowledge this,[137] perhaps because of a

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themselves subject to public debate and re-making. As the movement's advocacy of 'copyleft' licensing shows, this critical project in turn implicates copyright law's regulation of these infrastructures. For an unorthodox but interesting argument along these lines, see Christopher Kelty, *Two Bits: The Cultural Significance of Free Software* (Durham and London: Duke University Press, 2008).

[137] Drassinower is ambivalent. Whereas he insists that works of authorship be regarded for copyright purposes as activities of speech rather than as intellectual 'objects' – reified results of these activities – he falls short of denying that a copyright is or ought to be a property right (see e.g. Drassinower, "Authorship as Public Address" p.221). Robert Merges, meanwhile, has called on Kant's support for his own project of *justifying* intellectual property (see note 28 above). This move is problematic for a number of reasons. As shown already, it is impossible to read the 1785 Essay as explaining the rights of authors in terms of a concept of literary property, and Merges's own attempt to do so rests on an implausible interpretation of a throwaway remark Kant makes at the beginning of the Essay, coupled with an unconvincing dismissal of the rest of the Essay (Merges, *Justifying Intellectual Property*, p.78 and n.40, pp.341-2). Merges's invocation of Kant's theory of property to ground intellectual property rights *tout court*, on the other hand, depends on a reconstruction of the theory that bears scant resemblance to anything in the *Rechtslehre*, where Kant's theory of property is set out. Kant, Merges asserts, "believed that any object [including intellectual objects] onto which a person projects his or her will may come to be owned" (ibid. p.72). He adds that "Kant understands ownership to be crucial to the development of a person's full potential" (ibid. p.304), and that "[f]or Kant, property is all about respect for autonomy" (ibid. p.307). Consequently, he says, Kant's vision of property implies "a radically individualistic … view of humans" (ibid. p.76). Creative individuals imprint their autonomous wills on the intellectual artefacts they produce in the process of realizing their unique mental conceptions (ibid. pp.72-77). Hence the respect due to the dignity of these individuals makes the legal protection of IPRs rationally necessary (ibid. p.94-6). It is difficult to discern the logic of Merges's thinking here, but it is certainly not Kant's. The 'autonomy' to which he refers is clearly the personal autonomy around which contemporary liberal individualism is organized, yet the notion that property is the central platform for the realization of this autonomy seems to add an infusion of Hegel (drained of the latter's metaphysics of Spirit) to the mix. For Kant, by contrast, property is necessary to agency, *not* personal autonomy. One exercises one's agency in relation to a thing by publicly taking control of it, not by realizing one's plans for it once control has been assumed (Kant, *The Metaphysics of Morals* p.411 (6:258); p.417 (6:265)). It is absolutely clear that, for Kant, only corporeal things may be objects of property rights (as distinct from contract or domestic rights): see ibid. p.402 (6:247); p.412 (6:259); p.421 (6:270); p.437-8 (6:2:290)). Further, Kant's conception of the *legitimacy* of a claim to property in

concern that without such rights authors would lack the means to support themselves from the fruits of their intellectual activity alone. Yet breaking the link between authors' rights and property rights in no way entails leaving authors with only their inalienable 'moral' rights – their authorial 'dignity' and nothing else. As we have seen, Kant's Essay was centrally oriented towards establishing the right of authors to earn a living from their works, thereby fostering the emergence of a class of professional intellectuals released from dependence on courtly and ecclesiastical patronage. In contemporary conditions, however, exchangeable intellectual property rights more often than not result in a new kind of authorial 'tutelage' in relation to the investors that acquire these rights.[138] Reading Kant quite literally, there is no (rationally) necessary connection between protecting the material interests of authors and recognizing them as holders of property rights in their works, and it follows that other systems of subsidy might serve equally well to protect these interests while also more effectively guaranteeing authorial independence.[139] As Kant himself pointed out, "the author *speaks* to his reader; and the one who has printed the book *speaks*, by his copy, not for himself but simply and solely in the author's name. He presents the author as speaking publicly, and only mediates delivery of his speech to the public."[140] Ideally, then, commercial intermediaries between authors and audiences provide only "the mute instruments for delivering the author's speech to the public;"[141] they cannot assume the capacity to dictate or distort this speech.

This dimension of Kant's thought might fruitfully be read in relation to Jürgen Habermas's much-discussed account of the 'structural transformation' of the public sphere.[142] Habermas here picked out the rise of the culture industry in the nineteenth century as the key element in this transformation (and, in his view, decline). He

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a thing has nothing to do with placing one's "unique stamp" (Merges, *Justifying Intellectual Property*, p.305) on the thing: indeed Kant dismisses as "absurd" (ibid. p.413 (6:260) this "tacit prevalent deception of personifying things" (ibid. p.420 (6:269)). Instead, the legitimacy of a proprietary claim depends on the possibility of reconciling one's claim with the equal claim of everyone else to exercise his or her agency in relation to the same thing (ibid. p.410 (6:257); p.413 (6:261)). For Kant, this is deeply problematic given the finitude of possible objects of property on a 'spherical' planet. It is for this reason that he holds that property rights can only be provisional pending the achievement of a global system of Right: a process of global public (i.e. fully inclusive) legislation through which the freedoms of all in respect of the Earth's finite resources could be reconciled (ibid. p.491 (6:355)). (On this see Flikschuh, *Kant and Modern Political Philosophy*, Ch. 4 and 5). In short, nothing in Kant's own theory of property serves as a foundation for a theory of intellectual property, and his theory of property in tangibles cannot plausibly be described as 'radically individualistic'.

[138] Raymond Williams has charted the historical shift from patronal to market social relations around cultural production. In *Culture*, he identified the latest phase of market relations at the time of writing (1981) as the 'corporate professional', characterized by highly capitalized corporate structures and the direct commissioning of saleable products from employed writers. (Raymond Williams, *Culture* (London: Fontana, 1981), Ch.2). David Hesmondhalgh has since revisited and updated Williams' analysis (re-naming the 'corporate professional' as the 'complex professional' era of cultural production): see David Hesmondhalgh, *The Cultural Industries* 2nd ed. (London: Sage, 2007), Ch.2.

[139] The UN's Committee on Economic, Social and Cultural Rights has taken this view of the requirements of Art. 15(1)(c) of the Covenant on Economic, Social and Cultural Rights, recognizing "the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author" (see CESCR, *General Comment No. 17* U.N. Doc. E/C.12/GC/17 (Nov. 21, 2005)).

[140] Kant, "On the Wrongfulness of Unauthorized Publication of Books" p.30 (8:80).

[141] Ibid. p.30 (8:81). The mute instruments Kant had in mind here were printed books, but today of course include the full panoply of cultural commodities.

[142] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1962) (Cambridge: Polity, 1989) p.102 ff.

argued that commodified mass culture turned active readers into passive, privatized consumers of leisure and entertainment, fragmenting them into distinct taste communities and distancing them from cultural producers; while groups of experts emerged to take over the critical functions of the earlier public sphere. "The sounding board of an educated stratum tutored in the public use of reason … shattered; the public … split apart into minorities of specialists who put their reason to use nonpublicly and the great mass of consumers whose receptiveness [was] public but uncritical."[143] As a result, the eighteenth century public sphere – having initially emerged in opposition to the 'representative' public organised around the figure of the feudal monarch's court – became 're-feudalised'. Habermas never considered how copyright law figured in this transformation, although an echo of his concerns arguably reverberates within contemporary debates about the 'information feudalism' associated with over-broad copyrights wielded in today's context of cultural industry concentration.[144] Reading Habermas in the light of Kant's 1785 Essay, it seems clear that an analysis of the role that authors' rights – as distinct from copyrights – might play in the reinvigoration of the public sphere (the sphere of principled public criticism) is long overdue.

Such a project, however, would inevitably also involve reading Kant in the light of Habermas and other contemporary critics of information capitalism, and thus move beyond Kant's own writings on authorship, rights and communicative freedom even if remaining broadly 'Kantian' in orientation. The justification for such a move would simply be this: in allowing one's thinking about matters of contemporary concern to be guided by Kant's texts, it is unwise to look in these texts for prescriptions that must be followed to the letter, for that would be to treat Kant himself as a 'guardian' whose doctrines ought to supplant our own intellectual autonomy in these matters. As is particularly apparent from his account of citizenship, Kant could not transcend his own – far from fully enlightened – cultural environment. It is for this reason that Habermas has read Kant's remarks on publicity as presupposing the educated bourgeoisie *as* the critically debating public that was uniquely entitled and obliged to engage in a free use of its reason. And although Katerina Deligiorgi may be correct to claim that Kant's exclusion of women from the status of citizenship did not translate into a denial of women's participation in the cosmopolitan realm of public debate,[145] this concession arguably only reflects the division of the political from the (feminized) literary public sphere that was a feature of eighteenth century bourgeois life.[146] Recall that Kant defines the public use of reason as "that use which anyone may make of [reason] *as a scholar* before the entire public of the *world of readers*."[147] The words 'anyone' and 'entire' here suggest that this practice of reasoned communication is in principle available to all, regardless of social status. Yet the words 'scholar' and 'readers' make clear that it was from the ranks of the learned that Kant expected the rational debating public to emerge.[148]

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[143] Ibid. p.175.
[144] Peter Drahos with John Braithwaite, *Information Feudalism* (London: Earthscan, 2002).
[145] Deligiorgi, *Kant and the Culture of Enlightenment*, p.73.
[146] See e.g. Dena Goodman, *The Republic of Letters: A Cultural History of the French Enlightenment* (Ithaca: Cornell University Press, 1994).
[147] Kant, "'What is Enlightenment?'" p.18 (8:37)
[148] Deligiorgi suggests that this expectation can be interpreted as inclusive rather than exclusive because it signifies that none of the traditional barriers of rank, wealth or occupation should apply (Deligiorgi, *Kant and the Culture of Enlightenment*, p.72). However, John Christian Laursen has shown that Kant aimed his remarks very deliberately at a particular social class: the educated general public

If indeed Kant conflated the educated bourgeoisie with humanity as such, and saw the opinions generated by the debating bourgeois public as reflecting the light of reason as such, are we to assume that the authors whose rights Kant theorizes in his reflections on books and publishing are likewise *bourgeois* authors – if not 'scholars' then persons whose class position made it inevitable that they could write as if they were scholars? If so, Kant's writings on both publicity and publishing would be hopelessly compromised by his own particular prejudices. Yet Habermas's reading of Kantian publicity suggests that it need not be dismissed as a mere ideological cloak for bourgeois privilege: that the ideal of fully participatory public criticism between equals is still worth pursuing. The *spirit* of Kant's understanding of this ideal – whereby 'anyone' may address the 'entire public' – requires that all persons be free, substantively as well as formally, to participate. Because of this, Kant's argument for the continued advance of Enlightenment can be read as calling for the overcoming of every kind of obstacle to its realization – an unceasing interrogation of *all* the economic, technological, political, social and legal impediments that now stand in the way of universal, equal and effective access to the means and media of communication – and this on a global scale, if Kant is understood as positing a 'cosmopolitan' society of free communicative interactions, a global public sphere. Copyright law is not the only such impediment – nor only an impediment, for as suggested here, authors' rights deserve a place in the legal infrastructure underpinning both global and domestic public spheres – but in its current form it is an important one.

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addressed by the essays on the public use of reason was in fact the eighteenth century German bourgeoisie (John Christian Laursen, "The Subversive Kant: The Vocabulary of 'Public' and 'Publicity'" in J. Schmidt (ed.) *What is Enlightenment? 18th Century Answers and 20th Century Questions* (UC Berkeley Press: 1996) pp.253-269). The occupants of civil positions referred to in "'What is Enlightenment?'", Laursen suggests, are not only state and church officials narrowly conceived, but members of the bourgeois class in general, all of whom – in the Prussia of Kant's day – would have depended (directly or indirectly) on the monarch for their livelihoods. The category would have included merchants, professors like Kant himself and members of the clergy, to whose situation most of the discussion in the essay is directed. Indeed Laursen has argued that Kant's project in this essay was to make a case for the freedom of this constituency to express their considered opinions openly, notwithstanding their status as functionaries of the establishment.

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