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Towards a New Paradigm in Justifying Copyright: An Universalistic-Transcendental Approach

Christian G. Stallberg*

In the modern digital age, copyright as an institution can no longer be taken for granted. These days piracy of songs, movies, software and the like is hardly morally contested. Indeed, it is not far-fetched to argue that piracy has become socially acceptable. But efforts to sanction such behavior are bound to fail. Laws that a large majority views as untenable and refuses to comply with become normatively senseless. For the acceptance of, and the compliance with, legal norms ultimately rests upon extralegal foundations, namely on the belief that these norms on the whole are morally reasonable. Accordingly, only the development of a solid moral basis for copyright can strengthen its social acceptance, thereby warranting copyright's future existence. The arguments that have been offered do not provide such a basis. Above all, they lack of sufficiently argumentative structures and a systematic framework from which a sound moral justification can emanate. The result is an increasing gap between a diminishing moral basis of and a growing disagreement over copyright.

This Article attempts to provide a more systematic and rational basis for the moral justification of copyright. First, the article

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offers an analytical account of conceivable justification models. Rather than simply restating popular arguments, the author focuses on the implicit assumptions underlying these moral arguments. After elaborating two basic models of copyright justification, each of which can be subdivided into three subtypes, the article demonstrates that these models inevitably result in an irreconcilable divide between authors and society. Secondly, the article therefore develops an alternative justification model that avoids this conflict. This model stems from the idea that the one-dimensional ground upon which usual arguments stand can be left by returning to the transcendental condition of their possibility, that is, human language. Consequently, the article explains how intellectual works can be understood from the perspective of speech act theory. On this view, intellectual works can be conceived of as complex speech acts. The author elucidates how both a right of attribution of authorship as well as exploitation rights can be morally rooted in this finding. The article concludes by highlighting the ontological and moral paradigm shift that occurs when the moral justification of copyright is conceived of in terms of communicative actions and their implied rules.

I. INTRODUCTION

Copyright law, perhaps more than any other field of law, is subject to permanent struggle between opposing camps, each one arguing for and against legal reforms and changes in their own favor. Admittedly, it may well be that this situation is simply rooted in the economic importance of copyright law. Even marginal reforms of copyright law can affect producers, distributors, consumers, authors, and retailers in ways that significantly increase or decrease their expenses or revenues. If one takes these economic reasons into account, the struggle for copyright law is unremarkable. On the contrary, being a *homo oeconomicus* naturally necessitates a participation in that struggle. However, that is only half of the story and does not reveal a much more interesting feature worth highlighting. It can be found in certain flaws embedded in the moral discourse on copyright itself. That is to say, many of the justificatory arguments being offered in

order to defend as well as criticize copyright lack clarity and an argumentative structure. This is illustrated best by the popular strategy to employ personality and labor arguments in order to justify copyright.[1] Those arguments are fully content with using rhetorical phrases and metaphors that merely aim at self-evident plausibility.[2] That comes along with, and might be partly due to, an absence of coherent policy considerations held by the responsible legislative bodies. Hardly surprisingly, such an uncritical environment invites participants primarily to define their interests, and only secondarily to look for arguments deserving their name.

Hence, the intensity of the debate is not reflected in the quality of the arguments being made. Still worse, there is an obvious gap between the ease with which those unconvincing arguments are steadily repeated and the growing disagreement over copyright law. In the absence of defined structures and an argumentative framework, one cannot expect to find a solid normative basis for copyright. Such a basis is required in order to maintain the fundamental aspects of copyright law. For it is certain that copyright is not socially accepted in the same way other legal institutions are, e.g., private property in tangible goods.[3] On the contrary, these days piracy of songs, movies, software and the like is hardly morally contested. In the modern digital age, copyright as an institution can no longer be taken for granted.[4] Indeed, it is not far-fetched to argue that piracy has become a socially accepted

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[1] *See, e.g.,* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 285 (1970); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1230 (1996).

[2] This is also emphasized in Katie Sykes, *Towards a Public Justification of Copyright*, 61 U. TORONTO FAC. L. REV. 1, 13–14 (2003).

[3] *See* Jeanne M. Logsdon et al., *Software Piracy: Is It Related to Level of Moral Judgement?*, 13 J. BUS. ETHICS 849, 855 (1994), for an empirical study showing that the development described is not bound to a low stage of moral development in the sense of Kohlberg—"the implications of our study are serious, since even those who are capable of the *most principled moral reasoning* may engage in copying behavior." *Id.* (emphasis added).

[4] The view that natural rights inherently accompany "intellectual production," however, has long been held; for an early example see William E. Simonds, *Natural Right of Property in Intellectual Production,* 1 YALE L.J. 16, 16 (1891–1892).

activity, and efforts to sanction such behavior are doomed to fail. Laws that a large majority view as unacceptable and refuse to comply with ultimately become normatively senseless. The acceptance of, and the compliance with, legal norms ultimately rests upon extralegal foundations, namely the belief that a certain norm complex on the whole is morally reasonable. Obviously, this belief has been diminishing with regard to copyright law. But why? The answer lies ultimately in serious problems of the legitimacy of copyright. These legitimacy problems can be subdivided into two categories, ontological and technological.

Ontological problems stem from the ontology of intellectual works.[5] Since these objects are not tangible but solely exist as intellectual constructs, it is much easier to criticize their legal status. At least three such moral weaknesses of copyright attached to this ontology can be identified.[6] The first may be called the *problem of ubiquity*. Because of their intangible status, intellectual works can be used simultaneously in multiple ways. The content of a book, for example, can easily be read, told, copied, and so forth by an unlimited number of people. The question therefore arises as to why other people should be legally prevented from using a naturally unlimited good because of an artificial scarcity created by copyright law?[7] Relatedly, there is a *problem of greater restriction of individual liberty*.[8] Unlike property rights in

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[5] For further elucidation of the ontology of intellectual works see *infra* Part III.A.

[6] Contrary to what A. M. Honoré, *Social Justice*, 8 MCGILL L.J. 77, 88 (1962) says, there is therefore a *moral* difference between intangible and tangible objects. Also, it is equally misleading to suppose that the justification of copyright law is easier. *See, e.g.*, Ernest Bruncken, *The Philosophy of Copyright*, 1916 THE MUSICAL Q. 477, 479 (1916) (stating the mistaken view that "[i]f . . . a man is, by the very nature of justice, entitled to have dominion over the product of either his hand or his brain, we must certainly admit that artists should have their copyright."); *see also* Herbert Spencer, 2 THE PRINCIPLES OF ETHICS para. 305 (1893), *available at* http://oll.libertyfund.org/files/334/spencer_0155.02.pdf ("So that in fact a production of mental labor may be regarded as property *in a fuller sense* that may a product of bodily labor; since that which constitutes its value is exclusively created by the worker.") (emphasis added).

[7] *See, e.g.*, Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 34–35 (1989).

[8] *See, e.g.*, PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 211(Dartmouth 1996); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL

tangibles, copyright law restricts the individual liberty of people other than the copyright owner not only at a certain place, but also at every place. This is logically the other side of ubiquity: if intellectual works can be used everywhere, then the exclusive protection of those works restricts people everywhere. Finally, a problem concerning the *notion of authorship* arises. Today it is a common occurrence that intellectual works never originate exclusively from the person authorship is attributed to. Instead, every author is integrated into the manifold social and cultural contexts from which he steadily borrows. Thus, creating intellectual works always means the appropriation of preceding ideas. This point has been emphasized by the deconstructivism movement which focuses on deconstructing authorship and disclosing its ideological character.[9] A similar view can be also found in the argument of private language advanced by Wittgenstein.[10]

The legitimacy of copyright is also called into question by technological developments[11] which have increased the awareness of the aforementioned ontological problems. Indeed, the very historical reason for the emergence of copyright has begun turning against the institution. In the same way the need for copyright was due to the invention of printing, nowadays its legitimacy is called

PROPERTY IN THE INFORMATION AGE 43, 54–55, 76–79 (Adam Thierer & Wayne Crews eds., 2002).

9 *See, e.g.*, Michel Foucault, *What is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 113 (Donald F. Bouchard ed., 1977); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1418–19 (1992); Justin Hughes, "*Recoding*" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 929–32 (1999); *see generally* Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973 (1994) (providing an overview); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2002–2003) (analyzing of the legal concepts of authorship).

10 *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS para. 243–44 (G.E.M. Anscombe trans., Blackwell Pub. Ltd. 2d ed. 1958); *see also* Julian Friedland, *Ideation and Appropriation: Wittgenstein on Intellectual Property*, 12 LAW & CRITIQUE 185, 187 (2001).

11 *See also* Sykes, *supra* note 2, at 10–11 (discussing these problems—though with a different terminology).

into question by different inventions.[12] In particular, technological innovation has resulted in an increased quality and quantity in copying intellectual works. The greater quality of copies is an effect of progressing digitalization. In the digital world, every copy is not merely as perfect as the original; it even might be better.[13] Between 0 and 1 as the binary code of the digital world, there is no longer space for what Benjamin once called the aura of art works.[14] In the digital age, the concept of uniqueness no longer has any relevance. In addition, copying can be done in greater quantity than ever before. The main reason for this can be found in the emergence of the Internet which enables an incredible dissemination of intellectual works. For every copyright owner the Internet seems to be a nightmare—it is a place "where the ability to copy could not be better, and where the protection of law could not be worse."[15] This does not mean that copyright cannot be enforced on the Internet. Lessig has stressed that the Internet actually could be used in a manner allowing much more control over copyrights.[16] As long as this does not happen, however, the threat is still there.

Considering all of the above, the moral situation of copyright could hardly be worse. In what follows, I shall provide some steps towards solving this situation. I will generally attempt to reduce, or even partly eliminate, the lack of rationality in the discourse concerning the moral justification of copyright. This enterprise consists of two parts. First, I shall develop in Part II an argumentative and conceptual framework within which both proponents and opponents of copyright can articulate their moral arguments with more lucidity and precision. This framework builds upon a differentiation and ideal reconstruction of

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[12] *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 21–24 (2003).

[13] *See* NICHOLAS NEGROPONTE, BEING DIGITAL 17–18 (1995) ("[A]rtifacts can be removed from the digital signal using a few extra bits and increasingly sophisticated error-correction techniques that are applied to one form of noise or another, in one medium or another.").

[14] *See* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* 3–4 (1935), *available at* http://design.wishiewashie.com/HT5/WalterBenjaminTheWorkofArt.pdf.

[15] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 125 (1999).

[16] *See id.* at 123.

conceivable models for justifying copyright. Unlike in other articles,[17] the account given herein will not simply rest upon a casuistry of arguments. Instead, I will attempt to establish analytical distinctions between these arguments, through which logical relations and dependencies can be revealed. This program might be designated as a moral conceptualization of copyright from the viewpoint of analytic philosophy. Secondly, in Part III, I will outline an alternative model whereby the moral justification of copyright might be articulated in a different, more contemporary way. By utilizing linguistic philosophy, my model focuses on the communicative feature of intellectual works. This way overcomes problems and shortcomings of the other models.

II. DIFFERENT MODELS OF JUSTIFYING COPYRIGHT

In what follows I will develop or, more precisely, ideally reconstruct, different models for justifying copyright.[18] For this

[17] *See, e.g.*, DRAHOS, *supra* note 8; William W. Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 173 (Stephen R. Munzer ed., 2001); Peter S. Menell, *Intellectual Property: General Theories*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 129 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV 1661, 1695 (1988); Hettinger, *supra* note 7, at 31; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Viktor Mayer-Schönberger, *In Search of the Story: Narratives of Intellectual Property*, 10 VA. J. L. & TECH. 1 (2005); H.M. Spector, *An Outline of a Theory Justifying Intellectual and Industrial Property Rights*, 8 EIPR 270 (1989); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Samuel E. Trosow, *The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital*, 16 CAN. J. L. & JURIS. 217, 223 (2003); Lior Zemer, *On the Value of Copyright Theory*, I. P. Q., 2006, at 55.

[18] These models necessarily presuppose (i) a concept of moral justification and (ii) an idea of how copyright may be its subject. These issues cannot be addressed here in detail. For reasons I have stated elsewhere, *see* CHRISTIAN GERO STALLBERG, URHEBERRECHT UND MORALISCHE RECHTFERTIGUNG 34–46 (Duncker & Humblot 2006), the former necessitates copyright's positive correspondence to a moral norm; this correspondence might differ in level and scope. As to its level, it can either concern copyright as an institution or as a specific content. Its scope depends upon the deontic modus of the moral norm it corresponds to. Thus, copyright is morally possible if it corresponds to a norm allowing the legislator its introduction. In contrast, it is morally necessary if the norm requires the legislator to introduce it. From an adequate meta-ethical and methodological viewpoint, those aspects concern the legislative actions whose interpretative meaning is that norm or norm system establishing an exclusive legal relation between authors and certain intellectual works, i.e., what we term "copyright."

purpose, it is useful to separate two distinct levels of analysis. These analytical levels enable one to structure both current and prospective discourses on the moral justification of copyright. Those levels provide crucial distinctions with which possible arguments can be both constructed and related to each other. At a first level of analysis (Section A), it will be shown that all such models are based on a fundamental distinction, though they are often unaware of it. This distinction results from the way in which all conceivable models of justification are connected or separated. This difference is not only of heuristic value; it has substantial implications for the type of copyright system that can be justified.[19] Furthermore, this distinction has an additional impact that is of even more importance. By analyzing the distinct relations it separates, this distinction enables, at a second level of analysis, to develop a typology of justification models as to copyright. This typology comprises three justification models which I call individualistic (Section B) and three justification models which I refer to as collectivistic (Section C). Having sketched the basic ideas of those models, I will subsequently present the general difficulties all of those models face (Section D).

A. *The Difference Between Individualistic and Collectivistic Copyright Models*

How might arguments justifying copyright be systematically ordered? In the field of normative ethics, actions are usually evaluated in relation to two different aspects.[20] On the one hand, the action as such, i.e., the intentions, reasons and motives of a human action, are focused on. Accordingly, the intrinsic character of an action is involved in its ethical judgment. A classical example of this doctrine is the moral theory of Kant. His theory contends that the moral quality of an action depends solely upon the will of the agent.[21] On the other hand, an action might be also

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[19] These consequences are mentioned *infra* note 35.

[20] *See, e.g.,* WILLIAM K. FRANKENA, ETHICS 13 (1963); Hugh LaFolette, *Introduction*, *in* THE BLACKWELL GUIDE TO ETHICAL THEORY 1, 6–11 (Hugh LaFolette ed., 2000).

[21] For the classical statement, see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 18 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998)

morally evaluated by the social results it causes. Hence, the extrinsic character of an action becomes the basis for its moral assessment. This perspective is reflected in the doctrine of utilitarianism, according to which the morality of an action depends upon the overall happiness it produces.[22] This conceptual distinction shows up under different labels; it is, *inter alia*, referred to as deontological/teleological, non-consequentialism/ consequentialism or non-utilitarian/utilitarian. Not only does this distinction dominate moral philosophy; most of the moral justifications of copyright and intellectual property in general utilize it. But seldom is it expressed by its common labels.[23] Rather, there is a confusing diversity of names which cannot be seen as a progress, neither in subject, nor in terminology. It is expressed, for example, in notions like "The Author's Right" and "The Instrumental Argument,"[24] as well as "instrumental justification" and "desert justification."[25] An alternative terminology, which transports a mistaken conceptual view as well, distinguishes between economic and moral/natural law-arguments.[26] These arguments overlook that economy and morality do not mark an inevitable opposition, but, depending on

("It is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a *good will*.") (emphasis added).

[22] Classical formulations can be found in JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–16 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996); HENRY SIDGWICK, THE METHODS OF ETHICS 411–17 (7th ed. 1907) (1874).

[23] However, those common labels are used by Menell, *supra* note 17, at 129; Dale Nance, *Foreword: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 763 (1990); Spector, *supra* note 17, at 270.

[24] Lloyd Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1217, 1229 (1998).

[25] Sterk, *supra* note 17, at 1197.

[26] Such an approach can be found in Breyer, *supra* note 1, at 284; Jon Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1285 (2003); Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 517 (1990); *see also* Shelley Warwick, *Is Copyright Ethical? An Examination of the Theories, Laws and Practices Regarding the Private Ownership of Intellectual Work in the United States*, BOSTON COLL. INTELL. PROP. & TECH. F. 060505, 3 (1999); Daniel Stengel, *Intellectual Property in Philosophy*, 90 ARSP 20, 22 (2004).

the theoretical standpoint, can converge.[27] By the same token, natural law and morals are not necessarily identical; instead, as contemporary theories show, morality can have a basis quite different from classical natural law doctrine.[28]

To be sure, moral thinking in deontological and teleological categories is a simple and, at the same time, an intuitive method of evaluating human actions. For the present purposes, however, we need a more specific distinction, that is, a distinction able to capture the *ultimate* difference between opposing justification models for copyright.[29] Contrary to what the common distinction between deontological/teleological or consequentialistic/non-consequentialistic models might suggest, the difference between the arguments justifying copyright does not lie in an intrinsic or extrinsic value of copyright. Even though such considerations have their own right and are of some importance, they obscure the fact that, in the context of copyright, what matters is within which relation these considerations take place.[30] For copyright's intrinsic or extrinsic value ultimately hinges upon the particular relations from which it can be argumentatively derived. These relations center around the subject matter of copyright protection, namely, intellectual works. In other words, to whom do intellectual works

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[27] This position is often held by those adhering to the Economic Analysis of Law. *See, e.g.*, Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487 (1980); for a more pragmatic reasoning, see, e.g., RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 374 (1990); *see also* Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979).

[28] Recent examples are Hobbesian interest theories of justice, Habermasian discourse ethics and Rawlsian justice as fairness.

[29] That applies similarly for the conceptual distinction *proprietarianism/ instrumentalism*, introduced by DRAHOS, *supra* note 8, at 199. Admittedly, he puts aside pure considerations in intrinsical/extrinsical categories; by the same token, however, he does not give way for a pure thinking in relations. Instead, his distinction confines itself—since its rests upon contrasting Locke and utilitarianism—to separate natural law from legal privilege. Yet it is rather interesting *whose* natural law or legal privilege it is about.

[30] The same applies to the distinction between multilateral and bilateral public justification as utilized by Sykes, *supra* note 2, at 21. This distinction misses the specific point when used in copyright contexts because it conceals the reason why these justifications are reasonable, i.e., the moral relation that tacitly is presupposed.

morally relate? Thinking in relations replaces thinking in intrinsic/extrinsic values.

In order to illuminate this concept, it is necessary to introduce the concept of primary and secondary relations.[31] The primary relation refers to the moral relation which provides the arguments by means of which copyright is justified. The legal relation, that is copyright, which exists between an author and an intellectual work, is morally derived from the primary relation and therefore termed a secondary relation.[32] Both relations are logically independent from one another and, therefore, are not necessarily identical. From this it follows that copyright, in the legal sense, is not necessarily the author's right in the moral sense. In the light of this basic difference, it is crucial to determine from *which* moral relation (primary relation) arguments are derived in order to justify the legal relation between the author and his work (secondary relation). Such primary relation can be morally constructed either between the author and his work, or between society and the work.[33] As a result, copyright can be justified by arguments stemming from a moral relation between either author and work or society and work.[34] Insofar as the first relation is chosen, I shall refer to an *individualistic model* of moral justification. That is to say, the arguments by means of which copyright is justified are found and constructed within a primary author/work relation. If the second relation is chosen and the society/work relation serves

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[31] These two different relations are somewhat confused in Carys Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEENS'S L.J. 1, 6 (2002) (suggesting that the copyright interest must be understood as the consequence of the relationship between the public and the work).

[32] *See id.* at 1 (creating a distinction between the legal relation between author and work and a different moral relation whereby it is justified).

[33] Other relations, though equally conceivable, do not have any importance here. (i) The author/society relation cannot be integrated, since that relation only reflects the relation in which the duties and obligations exist, not their reasons. If the author has a moral right springing from his relation to his work, then he has such a right against society. (ii) By the same token, the work/world relation is of no argumentative significance. Since "world" in this context inevitably refers to the intellectual world, it is the equivalent of society because that is the place where meaning and communication is generated.

[34] This framework is also employed by Craig, *supra* note 31, at 3–5, though with other terminology ("author-work link"/"public-work link").

as the primary relation, I shall refer to a *collectivistic model* of moral justification.[35]

The distinction between individualistic and collectivistic approaches must be clarified in two ways in order to avoid any misunderstanding. First, the implied antagonism does not mean that collectivistic models ignore or underestimate the value of individuals. Quite the contrary; social structures are usually desired because of their benefits for every individual. This is the case, for instance, with claims that copyright is morally justified by the economic principle of efficiency. Such an argument is by no means individualistic. In moral terms, here the author only counts as an abstract individual, not as a specific being, namely an author. The author is integrated in a collectivistic justification just as any other member of society would be. So the difference between individualistic and collectivistic models cannot be found in the exclusion or inclusion of individuals; it can only be found in the way in *which* individuals are morally included, that is, solely as authors, or other parts of society as well.

A second aspect needs to be clarified. I am not claiming that any argument can be definitely recognized as individualistic or collectivistic. To be sure, in many cases it is hard to recognize whether a moral argument about copyright has an individualistic or collectivistic basis. This is so because such arguments often rely upon rhetorical phrases without being aware of their theoretical basis. The popular argument, for instance, that the author deserves his work as reward for his labor, is susceptible to either an individualistic or collectivistic interpretation. On the one hand, it

[35] The difference between individualistic and collectivistic models is not merely of heuristic importance, it concerns the justifiable content of copyright as well. An argument based upon an individualistic model cannot justify the post mortal subsistence of copyright. This can only be justified if a collectivistic model is employed. This thesis rests upon two convincing assumptions: (i) Any argument claiming that human beings have mental states after their death, namely interests, is not accepted as a starting point of a contemporary rational justification; and (ii) Any individualistic model, however, leads to a post mortal copyright only if (i) is presupposed. Unless leaving any rational discourse, therefore, one can only use a collectivistic model as rational foundation for post mortal copyright. Since law serves interests of human beings, without a subject to be protected, there is nothing left for legal protection. So if after the death of an author copyright is granted, it serves other interests than the author's. For an elaboration of this argument at full length, see STALLBERG, *supra* note 18, 50–52.

is conceivable that such a reward acknowledges an initial moral stake of the author in his work. In such a case, the moral justification stems from the author/work relation. On the other hand, that reward might be socially motivated by attempting to provide an incentive for creating works. Then, reasons are involved concerning the society/work relation. What kind of justification is being put forward—that is, which relation is the "primarily" primary relation—depends upon the *ultimate* reasoning behind it. That reasoning does not appear in the rhetorical form or its perception. Instead, the reasons upon which a justification of copyright ultimately is built show up in the case of conflict. Where an individualistic justification interferes with a collectivistic justification—e.g., if the protected works are socially invaluable—its user must make a decision. It is not before this decision that the priority of one of those perspectives and the moral reasoning of the argument is revealed.

B. Three Types of Individualistic Justification Models

Individualistic justification models represent arguments which claim a moral relation between author and work as a primary relation, by virtue of which a legal relation between author and work is justified as a secondary relation. It is possible to show that individualistic models exhaustively appear in three different forms. These forms and their structures can be made explicit by an analysis of the primary relation between the author and the work. The intellectual starting point for this analytical operation is as follows: every individualistic justification—that is because it is individualistic!—always focuses on a characteristic quality within the author/work relation in order to construct an argument in favor of the author. Consequently, there are exactly as many individualistic justifications as characteristic qualities within that primary relation. It needs to be analyzed, therefore, what and how many characteristic qualities the primary relation author/work embodies.

At the highest level of abstraction, the author/work relation embodies three characteristic qualities: (i) With regard to the author, it can be focused, first, on his properties, dependencies, intentions and so forth. Then, one draws upon internal or external

characteristics which hinge upon the author as person—hence, the characteristic quality to be focused on is a person. (ii) Second, it can be argued based on a mental or bodily activity of the author, for instance, when pointing toward his investment of labor in the work. As a result an action of the author is chosen as the characteristic quality. (iii) Regarding the work, third, the aspect of activity or action does not exist. Instead, only perceivable aspects of the work itself can be used as arguments. From an analytical point of view, therefore, three characteristic qualities to be argumentatively drawn upon exist within the author/work relation. These are the *action*, the *person* and the *work* of the author. Taking these preliminaries into account, three ways of justifying copyright can be distinguished, an Action-based, a Personality-based and a Work-based Justification. Each of those types and its theoretical forms will be briefly sketched.[36]

1. The Action-based Justification of Copyright

The Action-based justification generally claims that the action performed by an author while creating an intellectual work vests the author with a right in that work. This justification can be made in two distinct ways, differing in how the author's action involved is argumentatively used.[37] On the one hand, the action might be conceived of as having a right-transferring effect. In this case it operates as a kind of intermediary between a preceding right of the author and the right to be established in the created work. Such an impact stems from a derivative use of the creative action. As long as this route is taken, one has to contend that the author's action possesses a formal property which enables it to extend the preexisting right to the created work. On the other hand, the author's creative action might be interpreted and conceived of as right-constituting. Then it no longer extends a preceding right to the intellectual work but establishes such a right *ab initio*. This line of argument is an original use of the creative action; it

[36] For an analysis and discussion in detail see *id.* at 57–58.

[37] On this analysis see further Christian Gero Stallberg, *Ist das Urheberrecht das moralische Recht des Urhebers? Eine Kritik der populären Arbeits- und Persönlichkeitsrhetoriken als Rechtfertigungsbasis des Urheberrechts*, ARCHIV FÜR URHEBER- UND MEDIENRECHT, Jan. 2007, at 109–12.

presupposes that the author's action possesses a material quality of moral relevance. On an abstract level, therefore, two types of arguments can be distinguished with which an Action-based justification might operate, a derivative-formal and an original-material one. The former is by far the most popular line of argument in copyright discourse.[38] It is widely used and illustrated by referring to the so-called labor theory of property as developed by John Locke[39] with whose entire theory it is often mistakenly equated.[40] The latter approach is less frequently employed though it remains rhetorically a powerful one as well.[41] However, it requires an elaborated account of a desert theory of justice which is rarely provided.

2. The Personality-based Justification of Copyright

A Personality-based justification presupposes a relationship of dependence between the authors' personality and their intellectual works. This relationship is legally protected and recognized by copyright.[42] Depending on how and what kind of dependence is

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[38] For the Lockean approach—applied to copyright or intellectual property in general or to particular problems—see generally Craig, *supra* note 31; Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179 (2003); Steven J. Horowitz, *Rethinking Lockean Copyright and Fair Use*, 10 DEAKIN L. REV. 209 (2005); Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3 (2003); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65 (1997); Simonds, *supra* note 4; Spector, *supra* note 17; Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2005–2006).

[39] *See* JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT §§ 25–51 (Peter Laslett ed., Cambridge Univ. Press 1967) (1689).

[40] This is so because Locke's theory consists of four different arguments which concern, on the one hand, the justification of private property as such and, on the other hand, the modalities of its acquisition. The Lockean argument representing the derivative-formal type merely addresses one of those aspects, namely *how* private property can be acquired. Consequently, labeling this argument as Lockean justification is somewhat inaccurate. For only a small portion of Locke's theory is used whose normative subject matter is fairly extended.

[41] *See generally* Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993); Hughes, *supra* note 17, at 300.

[42] It has to be emphasized, therefore, that the metaphorical image of an imprint of the author's personality upon his work is argumentatively not a Personality-based, but an Action-based Justification. For in this popular account, the author's personality does play a role only insofar as it has been *integrated* into the work. By invoking the powerful idea

constructed, two types of Personality-based justifications have to be distinguished. The development-theoretical type assumes that copyright is necessary in order to warrant the author's development as a person. By considering personhood as a necessary condition of human autonomy, this type leads—given the premise of a moral right to freedom—to the conclusion that granting copyright to authors is morally necessary. In contrast, the identification-theoretical type starts with the assumption that creating a work results in a psychological relation between the author and the work. In other words, the intellectual work is part of the author's personality and should be considered an integral part of his own identity. In order to prevent harmful interferences with the author's identity or to avoid the creation of psychological pathologies, this relation needs to be protected by legal means, i.e., by copyright. Thus it can be seen that both types, though in different ways, are based on the same normative tenet, namely the freedom of individuals. Whereas the former strand of argument plainly relies upon a metaphysical conception of person, the latter is of more empirical character. The development-theoretical type is usually derived from and associated with Hegel's theory of property as developed in his *Philosophy of Right.*[43] The identification-theoretical type has no well-established theoretical background which may be the reason why it is rarely put forward.[44]

of a right-transferring activity, therefore, the derivative-formal mode of an Action-based justification is employed.

[43] *See* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT paras. 41–71 (T.M. Knox trans, Oxford Univ. Press 1952) (1821).

[44] Discussion of this model can be found solely in Becker, *supra* note 41, at 626–28 (classifying this idea, strangely, as labor-based justification by desert); *see also* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 49 (Routledge and Kegan Paul 1977). The mentioned psychological relation is loosely indicated in Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1539, 1541–42; Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 400–02 (1993); Sterk, *supra* note 17, 1239–44. As general justification of property the idea is suggested by Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982).

3. The Work-based Justification of Copyright

The Work-based justification also assumes a certain kind of dependency between authors and their intellectual works. Yet this relationship differs in two respects from the Personality-based justification. First, it no longer stems from a metaphysical or psychological ground but from the specific ontology of intellectual works, namely their immaterial nature. Secondly, the intellectual work depends upon the author, rather than the author being dependent on the work. So copyright is seen as a moral consequence of this dependency. This sort of dependency might be construed in at least two distinct ways. The communicative-theoretical type emphasizes the communicative aspect of intellectual works. It starts with the premise that authors communicate their thoughts to the public through intellectual works. It further supposes that the content of an intellectual work can only be communicated authentically if the attribution to its author remains intact. Put differently: the intellectual appropriation of a work is possible solely with hermeneutical recourse to its author. Therefore, a legal regulation is needed to protect this functional condition of communication and to avoid a violation of the authors' communicative freedom. The idea underlying this argumentation can be traced back to Kant's theory of authorship where it finds its most prominent manifestation.[45] The exclusive-theoretical type takes a different route by constructing a dependency based not on a condition but on a limit of intellectual appropriation. According to this view, an intellectual work is by its very nature exclusive: it necessarily precludes people other than the author from its entire appropriation. It is merely the author's mind which has access to the full intellectual meaning of the work, i.e., its specific form of thought. Copyright, then, is simply a normative recognition of what already exists, namely the exclusive relationship between the author and his work. Such a justification can be derived from

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[45] *Cf.* IMMANUEL KANT, *On the Wrongfulness of Unauthorized Publication of Books*, *in* PRACTICAL PHILOSOPHY 29, 29–35 (Mary J. Gregor trans., 1996) (1785); *see also* IMMANUEL KANT, THE METAPHYSICS OF MORALS 106 (Mary J. Gregor trans., Cambridge Univ. Press 1991) (1797).

thoughts developed by Fichte on the wrongfulness of book reprinting.[46]

C. Three Types of Collectivistic Justification Models

Unlike individualistic models, collectivistic models[47] do not claim a moral relation between author and work. Instead, these models construct a moral relation between society and work. This primary relation serves as a moral basis on which a legal relation between author and work is justified as a secondary relation. By utilizing collectivistic justifications, the separation of the legal right from its moral basis—suggested by introducing the distinction between primary/secondary relations—is not merely analytically but also argumentatively maintained. That is to say, the legal and moral congruency strongly emphasized by the individualistic justification models is rejected. Copyright as legal right of the author is no longer conceptualized as his moral right but as a means to accomplish social goals. Each collectivistic model refers to a social goal that is considered desirable, whose development, stabilization, or achievement is allegedly being promoted by copyright. As a result, collectivistic models normally show up in the form of consequentialism, i.e., they take into consideration the social consequences of copyright.[48] They differ only in what goal they regard as socially desirable. As a result, every collectivistic justification inevitably relies upon a certain normative conception of society. Since such conceptions are theoretically limitless, providing an analytical typology of collectivistic justifications is difficult. Nevertheless, their diversity can be put in order. All collectivistic models structurally differ in

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[46] *See* Johann Gottlieb Fichte, *Beweis der Unrechtmässigkeit des Büchernachdrucks*, *in* I GESAMTAUSGABE DER BAYERISCHEN AKADEMIE DER WISSENSCHAFTEN 409 (Rüdiger Lauth ed., 1964).

[47] In the literature, several distinct terms can be found describing the same doctrine. *See, e.g.*, Sykes, *supra* note 2, at 23 ("social policy arguments").

[48] For that reason, collectivistic justifications are often termed "utilitarian." In so doing, however, the concept of utilitarianism is by far exceeded. For it is used then to generally describe a program according to which the moral value of a regulation comes along with its social benefit. The specific idea of utilitarianism, though—greatest happiness of the greatest number—is thereby missed. It is reflected, more or less, solely in the Efficiency-based justification as it is sketched in *supra* Part II.C.2.

how weak or strong the normative premises are that their normative conception of society entails. This determines which social function intellectual works are associated with, i.e., what human needs and goals they are deemed to serve.[49]

I shall differentiate between three distinct ways in which a normative conception of society may define how its members ought to live.[50] What is important is whether those conceptions are merely negative, i.e., setting up minimum boundaries of satisfying needs, or whether they are positive, i.e., demand the maximum satisfaction of any need or the satisfaction of certain needs. (1) In an economic conception of society, it is up to the people to decide which needs to satisfy and which goals to pursue. This conception only posits that those factual needs and goals should be satisfied in a way leading to the maximum overall satisfaction of all society members. (2) In contrast to the previous conception, by at least partly deciding what needs and goals are to be pursued, a cultural conception of society values some needs and goals higher than others.[51] Such a conception consequently integrates not only factual, but also assumes normative, needs and goals. (3) Finally, a negative conception of society takes a position between integrating factual and/or normative needs. It abstains entirely from demanding either the maximum satisfaction of factually chosen needs and goals or the satisfaction of certain normative needs and goals. Instead, it posits that if any human needs or goals are being satisfied or pursued, some minimum constraints should be respected. Having introduced three normative conceptions of society, we can distinguish three types of collectivistic

[49] Probably the most well-known example for an existing collectivistic justification reflects the U.S. Contitution, which reads "Congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. This implies the opinion according to which copyright's moral basis can be found in its promotion of social goals; here, progress in science and useful arts.

[50] Such theories are commonly referred to as theories of the good (life), the term Aristotle used in *Nicomachean Ethics* and other works.

[51] This conception also comprises arguments attempting to guarantee merely the freedom of people, for such a conception normatively presupposes a need for liberty, whereas the economic conception theoretically can be utilized for a need for restriction of liberty. This is overlooked by RONALD DWORKIN, *Can a Liberal State Support Art?*, *in* A MATTER OF PRINCIPLE 221, 229–33 (Ronald Dworkin ed., 1985).

justifications as well, namely a Constraints-based model, an Efficiency-based model and a Culture-based model.[52] These justifications answer in a different manner why intellectual works are needed in society.

1. The Constraints-based Justification of Copyright

The Constraints-based justification stems from a negative conception of society. According to this approach, copyright is not justified because it positively promotes the achievement of a certain ideal of society. This model merely holds a neutral relation between society and intellectual works, without attributing any specific need to intellectual works. Rather, copyright is justified because its existence does not entail any negative consequences for society. From that, it follows that the moral foundation of copyright can be traced back to universal constraints of society; by not violating these constraints, its existence cannot be morally objectionable. Since copyright, it is argued, abides by these minimum constraints which govern human action, its legal implementation is permissible, i.e., morally possible.[53] In this view, copyright is not the result of a constituting, but of a constraining, principle which is inherent in any reasonable conception of society. Now, what kind of principle constraining human action might be generally agreed upon? At this point, it is quite common to utilize a part of Locke's property theory.[54] This theory contains the idea of an appropriation limit which can be found in the so-called sufficiency-proviso.[55] According to the proviso, an appropriation of things is permissible insofar as there is "enough, and as good left"[56] for others. This proviso, then, is employed to render copyright morally acceptable.[57] Needless to

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52 For a detailed discussion of these models, see STALLBERG, *supra* note 18, at 205.

53 This clearly shows that a Constraints-based Justification leads to a weak justification of copyright. For if its implementation is merely morally possible, one may just as well abstain from implementing it. The impact of such an approach confines itself to provide moral information whether copyright, when existing, is permissible or not.

54 LOCKE, *supra* note 39, §§ 25–51.

55 *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 175–182 (1974).

56 LOCKE, *supra* note 39, §§ 27, 33.

57 *See, e.g.*, ADAM D. MOORE, INTELLECTUAL PROPERTY & INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES 6–8, 71–119 (2001); Adam D.

say, the Lockean proviso is, more or less, only a particular example of the more general principle of *neminem laedere* (no-harm principle) that can already be found in Roman law.[58]

2. The Efficiency-based Justification of Copyright

The Efficiency-based justification is arguably the most popular variant of a collectivistic justification of copyright.[59] Notwithstanding differences in detail, one may well summarize this model in the idea that copyright "can be explained as a means for *promoting efficient allocation of resources*."[60] Consequently, copyright is conceived of as a means to achieve an economically efficient production and use of the intellectual works it protects.[61] To be sure, this thesis needs to be supplemented in order to become a justification of copyright. Besides demonstrating the economic rationality of copyright, this finding must also have a moral dimension. The starting point of this model is the basic problem of economics. Given scarce resources and infinite human

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Moore, *Toward a Lockean Theory of Intellectual Property*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 81–103 (Adam D. Moore ed., 1997); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 77–108 (1997).

[58] *See* JUSTINIAN'S INSTITUTES 1.1, at 36–37 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987).

[59] The number of articles dealing with this approach is permanently increasing; for examples, see the bibliography in Wendy J. Gordon & Robert G. Bone, *Copyright*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS, CIVIL LAW AND ECONOMICS 189, 204–15 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). In addition to numerous articles, there are also some books devoted to this program; see in particular WENDY J. GORDON & RICHARD WATT, THE ECONOMICS OF COPYRIGHT: DEVELOPMENTS IN RESEARCH AND ANALYSIS (2003); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY (2003); RUTH TOWSE, CREATIVITY, INCENTIVE AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE (2001); RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? (2000).

[60] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyight Law*, 18 J. LEGAL STUD. 325, 325 (1989) (emphasis added).

[61] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 308 (1996), separates these aspects. Depending on whether the production or the use of intellectual works is the focus, Netanel distinguishes an incentive approach and a neoclassicist approach. *See id.* In this Article, however, both aspects are equally referred to as Efficiency-based Justification. *See id.*

needs, distribution conflicts inevitably arise. In order to reduce those conflicts, resources have to be used in a way that achieves a maximum of satisfaction (allocation efficiency).[62] This is theoretically ensured by the market mechanism. With regard to copyright, however, a market failure is assumed. That is to say, despite the demand for intellectual works, the market does not provide their sufficient production and distribution. The reason is the free-riding problem of public goods. Since access to intellectual works is difficult to control, people might hope to use them free of charge. As a result, consumer demand does not reflect the real value of intellectual works. Guided by incorrect market signals, intellectual works are underproduced and/or under-distributed. Given this situation, the market mechanism misallocates resources. Copyright, it is argued, rectifies this market failure. By creating an artificial scarcity through an exclusive legal right, intellectual works become commodified products. For this reason, a monetary incentive encouraging the sufficient production and distribution of intellectual works is necessary. Moreover, it is assumed that copyright is the most efficient means able to rectify this market failure.

3. The Culture-based Justification of Copyright

A Culture-based justification is based on a specific cultural conception of society. Here, intellectual works are endowed with a special meaning for human well-being; they are considered indispensable for a culturally valuable society. If this culture is desirable, then the need for intellectual works is also desirable. Given that copyright is required as an incentive for the production of intellectual works, copyright becomes a necessary condition of that culture. In this way, the moral basis for copyright shifts to stronger normative premises. It no longer stems from a conception of society that requires the most efficient satisfaction of contingent needs. Similarly, minimum constraints of human striving are irrelevant. Rather, certain needs considered valuable are invoked

[62] *See, e.g.*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 249 (14th ed. 1992).

for the justification of copyright. There are a number of ways[63] in which it may be asserted that a lack of intellectual works results in a "state of cultural stasis."[64] The most popular contemporary way is the recourse to political culture, namely to democracy. In its rudimentary form, this approach is indicated in the idea of copyright as "engine of free expression."[65] Its systematical elaboration can be found in articles written by Neil Netanel, who attempts to justify copyright by supposing a necessary connection between democracy and copyright.[66] This does not mean, as one might be tempted to think, that copyright is considered the necessary outcome of a democratic process. Instead, Netanel argues that copyright is a necessary condition of democracy. Thus, copyright is not conceptualized as a restriction of free expression[67] but as its enabling constituent.[68] In other words, democracy depends upon certain flows of communication generated by copyright in the first place. By connecting this idea with the need for a democratic society, a moral justification is put forward distinct of an efficiency perspective.

D. The Problem of Irreconcilability

Now that I have given an account of those justification models which are widely used, albeit not in the structured and ideal form presented here, I will turn to their critique. Since I cannot specifically address here the internal and external flaws of each of these models,[69] I will confine myself to a discussion of the general

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63 *See, e.g.*, Fisher, *Theories of Intellectual Property, supra* note 17, at 192 (explaining that the potential possibilities are endless).

64 Barbara Friedman, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L.J. 157, 158 (1994).

65 *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

66 *See* Netanel, *supra* note 61; Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000). For a critique on Netanel's views on copyright and democracy, see Christopher Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933 (2000).

67 *See, e.g.*, Donald Diefenbach, *The Constitutional and Moral Justifications for Copyright*, 8 PUB. AFF. Q. 225, 230–34 (1994).

68 Netanel, *supra* note 44, at 226 n.27.

69 Such a critique can be found in STALLBERG, *supra* note 18, at 200, 296.

problem they all face. This problem is a serious and crucial one, though often overlooked. It is implicitly embodied in the basic distinction between individualistic and collectivistic models I developed above. Those people who argue in favor of copyright find themselves in a situation we may call the *problem of irreconcilability*. That is to say, the different moral perspectives on copyright expressed by the distinction between individualistic and collectivistic models cannot be reconciled in case of conflict.[70] On the contrary, they ultimately make a decision between the author and society inevitable. To be sure, in such a situation it is quite popular to seek relief by simply compromising or balancing the interests involved. However, such an attempt is bound to fail as long as the models are taken seriously, that is, as long as they are consistently treated as models of moral justification. This point will become clear after elucidating different propositions that a moral justification of copyright might state.

The proposition made by a moral justification of copyright can vary in two different aspects, namely in its level and its scope. Its level determines whether a normative proposition applies to either copyright as an institution or copyright as a content.[71] The institutional level concerns whether the copyright system is generally justified, independent of its substantive implications. The content level depends logically upon affirming the prior institutional level. It deals with the question of how the copyright system ought to be shaped: under what circumstances what particular rights are to be granted. Either level can show up with a different scope of justification, depending upon the *deontic modus* the normative standard they correspond to has. The weakest kind of justification is one according to which copyright ("C") corresponds to a moral norm, allowing the legislator to legally introduce it. Then C is merely morally possible. In contrast, the strongest justification is where the norm commands the legislative

[70] To be sure, as far as there is no conflict between certain individualistic and collectivistic models, the problem of irreconcilability does not appear. However, this is very rarely the case.

[71] In this context, speaking of copyright as an institution merely refers to its abstract being as a norm complex, whereas speaking of copyright as a content refers to its concrete implementation.

bodies to legally introduce the copyright system. In this case C is morally necessary. Regarding the institutional justification level, one of those *deontic modi* must be given if C is to be justified. The situation changes when considering the content level. For example, it is possible that particular rules are forbidden. Thus, it is conceivable that a moral norm commands the legislator to institutionally introduce C, and at the same time forbids the particular content C_1. In this case, C is either morally possible or necessary, but its implementation C_1 is morally impossible. Depending on the modus of the norm, the legislator has to, or is allowed to, set up copyright. However, he is not allowed to choose C_1 but has to choose different implementations like C_2–C_n.

Depending on whether the institution or content of copyright is allowed, prohibited or even required, one can distinguish between the *moral possibility*, *moral impossibility* and *moral necessity* of copyright. In most cases,[72] justification models do not merely claim the moral possibility but even the moral necessity of copyright. This is explicitly or implicitly presupposed or expressed by the justification of a concrete copyright system. The distinctions drawn here enable us to consider in what respect compromising or balancing of interests is inadequate. If, for example, according to an asserted moral norm (N_1), an unlimited subsistence of copyright is morally necessary (C_1), whereas, according to another asserted moral norm (N_2), copyright's expiration with the death of the author is morally necessary (C_2), then there is an insolvable conflict. For that conflict cannot be settled by way of compromising, e.g., by determining expiration of copyright 70 years after the death of the author. On the contrary, such an outcome would be morally impossible according to N_1 and N_2. Cleary then, C_1 and C_2 by no means can be compromised. A more fundamental objection supports this view: there is no need for any balancing of N_1 and N_2 because there is no normative conflict at all. This can be seen when thinking of conflicting norms in general. Is it necessary or possible in such a situation to balance norms against one another? No, for it is absolutely

[72] The only exception is the model, which I refer to as Constraints-based model.

impossible that some valid norms contradict each other.[73] Such a norm contradiction would not be compatible with the very concept of normative validity; this concept implies that contradicting norms cannot be valid at the same time. Thus, in such cases we do not face a contradiction of norms, but of norm *formulations*.[74] In other words, we are talking of a semantic, not of a normative contradiction of N_1 and N_2. On this semantic level it must be already clarified which norm formulation prevails and which norm is therefore taken as being valid.[75]

III. AN ALTERNATIVE MODEL: THE UNIVERSALISTIC-TRANSCENDENTAL APPROACH

In this section, I will present an alternative argument whereby the shortcomings of both individualistic and collectivistic models of justifying copyright are partly reduced, if not eliminated. The suggested argument relies on the insight that the intangible being of intellectual works is not only their ontological but also their moral particularity. The ubiquity of intellectual works, in other words, must not be classified and interpreted as moral weakness—as is commonly believed[76]—but, if anything, as their moral strength, i.e., the reason for the legitimacy of copyright. This thesis is drawn from the fact that justification models which originally apply to tangible objects cannot successfully attempt to justify what is, compared with these objects, morally questionable. The moral flaws copyright is usually confronted with cannot be removed by simply ignoring these differences. If copyright ought to exist at all, the intangible character of intellectual works has to

[73] This view is pointed out very well by HANS KELSEN, PURE THEORY OF LAW 74–81, 206 (Max Knight trans., 2d ed. Univ. of Cal. Press 1978) (1960).

[74] On the distinction between *norm* and *norm formulation* see GEORG HENRIK VON WRIGHT, NORM AND ACTION: A LOGICAL ENQUIRY 93 (Routledge & Kegan Paul 1963).

[75] This does not apply to value judgments: they need to be balanced against and compromised with other conflicting values since they do not inform us about their relation to other values. Obligation judgments, however, do not represent normative statements to be balanced against others, but are already the *result* of compromised values.

[76] *See supra* Part I.

be recognized and acknowledged as the *key* to its moral justification.

Every moral justification of copyright needs to take both the rationality of individualistic and collectivistic models into account. A simple combination of those models, however, hardly achieves that objective. If that were the case then the question of which primary moral relation prevails in the case of conflict with the other would be left unanswered. This clearly shows that every attempt to reconcile those models by a balancing of interest inevitably fails. If an individualistic model holds it as morally necessary to implement a right of life long duration in favor of the author and a collectivistic model considers it morally impossible, obviously this contradiction cannot be logically resolved. On the contrary, those models have to be kept separate in order to disclose the crucial difference one must decide upon; that is, namely whether to favor the author or society. What we need is a more fundamental approach whereby both perspectives are, as it were, deconstructed and freed from their fierce opposition. I will subsequently refer to this approach as a *universalistic-transcendental justification*. This term means that the proposed model is neither individualistic nor collectivistic; rather, it can be conceived as a condition of the possibility of either relation.[77] Now the ultimate precondition enabling these relations, i.e., the prerequisite of the difference they imply, can be found in the human language.

Thus, the alternative model that will be sketched in this Article finds its roots in linguistic philosophy. That is to say, conventional linguistic rules are used to demonstrate the moral plausibility of copyright. Roughly speaking, this alternative model is built upon two theoretical ideas. The first idea consists of the assumption that the performance of human language is a rule-orientated action.

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[77] *See generally* C. D. BROAD, KANT. AN INTRODUCTION 13–15 (C. Lewy ed., 1978) (explaining Kant's concept of transcendental arguments); SEBASTIAN GARDNER, KANT AND THE CRITIQUE OF PURE REASON 188–96. (Tim Crane & Jonathan Wolff eds., Routledge 1999).

Stemming from the late Wittgenstein,[78] this idea has been elaborated systematically by the speech act theory as developed by Austin[79] and Searle.[80] The second idea refers to the assumption that those linguistic rules have moral implications as well. Though more or less already included in the theory of speech acts, that conclusion was drawn first by the theory of discourse ethics as developed by Apel,[81] Habermas,[82] and Alexy.[83] Hence, the following discussion might be conceived of as an attempt to morally reconstruct copyright by means of speech act theory. Subsequently, I shall term this program the linguistically moral reconstruction of copyright. Clearly, the complete elaboration of it would be an undertaking needing a separate monograph. Therefore, this Article is restricted in two ways, both in its theoretical scope and its subject matter. As to its theoretical scope, only the speech act theory originally developed by Searle is employed, notwithstanding different versions, alterations or even criticisms of that theory. Moreover, this theory will be applied only to a small extract of what can be seen as intellectual works. The purpose of this paper is not to provide a complete account but to outline an alternative argument that lies beyond the conflict between individualistic and collectivistic justifications of copyright.

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78 *See, e.g.*, WITTGENSTEIN, *supra* note 10, para. 23 ("Here the term 'language-*game*' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.").

79 *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., Harvard Univ. Press 2d ed. 1981) (1962).

80 *See generally* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (2d. ed. Press Syndicate of the Univ. of Cambridge 1984) (1969) [hereinafter SEARLE, SPEECH ACTS].

81 *See* KARL-OTTO APEL, *The A Priori of the Communication Community and the Foundations of Ethics: The Problem of a Rational Foundation of Ethics in the Scientific Age*, *in* TOWARDS A TRANSFORMATION OF PHILOSOPHY ch. 7, 225 (Glynn Adey & David Frisly trans., Routledge & Kegan Paul Ltd. 1980) (1972).

82 Its fullest exposition can be found in JÜRGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 43–115 (Christian Lenhardt & Shierry Weber Nicholson trans., MIT Press 1990).

83 *See* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 177–208 (Ruth Adler & Neil MacCormick trans., Oxford Univ. Press 1989).

My argument will proceed in three parts. In part one, I shall analyze and explain why and how intellectual works can be conceived of as complex speech acts. In part two, the results of that analysis are used to morally reconstruct two aspects of copyright. On the one hand, the right of attribution of authorship will be justified by the pattern of incorrect speech act. On the other hand, the moral justification of exploitation rights is derived from the nature of language as such. The final part will evaluate the alternative argument sketched.

A. *Intellectual Works as Complex Speech Acts*

I contend that intellectual works need to be conceived of as complex speech acts. For this purpose I will explain three different theses by which the claim above and its content can be further developed and completed. The first thesis (a) concerns the qualification of intellectual works as speech acts in general. I will show in what respect intellectual works are to be qualified as institutional facts. Both the second (b) and the third (c) theses rest on the premise that the speech act designated as an intellectual work is a complex illocutionary act in the form ($F_1(p_1)$ & $F_2(p_2)$). The first speech act $F_1(p_1)$ I will refer to as *attributing act*, the second $F_2(p_2)$ I will refer to as *attributed act*.[84] This distinction must be clarified in two ways. First, this distinction is merely analytical so that in fact either act mutually affects and depends upon the other. Second, the attributed act, as it might be misunderstood, does not necessarily comprise a single action. In fact, the act usually consists of several actions so that it is likely to be a complex illocutionary act. Methodologically, these three theses rest on the outcome of an ordinary language phenomenology; I will attempt to reconstruct exactly those rules with which a speech act corresponds where it produces a symbol seen as an intellectual work.

[84] That act might be termed as *attributing object* in order to retain the common object ontology. But then it is overlooked that linguistically not an object—here the sign—but ultimately a human action behind that sign plays the decisive role.

1. Intellectual Works as Institutional Facts

I will use the speech act theory to reconstruct the action which produces the speech act that is being designated and conceived of as an intellectual work. In so doing the linguistic rules which allow intellectual works to serve as speech acts can be isolated and defined. This kind of interpretation presupposes, however, that intellectual works are to be conceived of as speech acts. This can be demonstrated by introducing the distinction between brute and institutional facts as developed and elaborated by Searle.[85] While brute facts describe physically existing entities, institutional facts comprise those things which exist solely in and by human language. Intellectual works are a good example of the latter. This can be illustrated by considering the physical aspect of a painting or book.[86] Such tangible goods do not differ from other man-made objects such as chairs or screwdrivers. In both cases we are concerned with physically existing entities that can be labeled as brute facts. Unless they are destroyed these entities would endure even if human beings ceased to exist. Of course that does not mean that brute facts are entirely independent from human language.[87] A chair, for instance, is designated a "chair" merely because the word "chair" symbolizes that entity. The symbolized entity itself, however, is *not* a linguistic phenomenon. Its physical characteristics exist independently from being symbolized by a sign.[88] Similarly, a painting or a book would not lose its physical characteristics in a world without language; canvas and oil paint or ink and sheets of paper would continue to exist.

If a painting or book is qualified as an "intellectual work," it is plain that physical characteristics are not being referred to. The term "intellectual work" does not simply symbolize oil on canvas

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85 The distinction between institutional and brute facts can be found in SEARLE, SPEECH ACTS, *supra* note 80, at 50–53; JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 27–29 (The Free Press 1995) [hereinafter SEARLE, SOCIAL REALITY].

86 Of course, the following argumentation does not merely apply to paintings or books but applies also to all objects that may theoretically be interpreted as intellectual works (e.g., films, music, sculptures, dances, etc.).

87 SEARLE, SOCIAL REALITY, *supra* note 85, at 2 ("Of course, in order to *state* a brute fact we require the institution of language, but the *fact stated* needs to be distinguished from the *statement* of it.") (emphasis in original).

88 *See, e.g.*, *id.* at 27.

or sheets of paper with ink in the way that the terms "painting" and "book" do. But what, then, is symbolized by an "intellectual work"? There is only one answer: If a painting or a book is designated as an intellectual work then it has to be something beyond itself. Thus, the notion of "intellectual work" does not represent physical characteristics, e.g., of paintings or books, but part of the meaning they symbolize. Such an interpretation, however, hinges upon a rule attributing to certain physical entities a certain meaning. Every symbol is based on constitutive rules[89] determining under what circumstances something is seen as something different.[90] Consequently, there must be rules according to which a certain physical sign under certain circumstances is designated as an intellectual work. Since such rules can merely exist linguistically[91] the possibility of intellectual works as such depends upon human language.[92]

2. Intellectual Works as Attributing Acts

My second thesis deals with the first part of the complex illocutionary act, designated as intellectual work, namely $F_1(p_1)$. It says that "intellectual works" are evoked and generated exclusively by those speech acts, explicitly or implicitly entailing the *assertion of authorship*. To put it another way: only those artificial symbols or signs which point to a human being as their author, i.e., containing an attribution, are designated as intellectual works. That means that the illocutionary role of F_1 is an assertion whose propositional content p_1 states that the speech act $F_2(p_2)$ has one or several authors. This part of the complex illocutionary act

[89] *See id.* at 27–29 (discussing the concept of a constitutive rule and its difference to the regulative rule).
[90] *See id.* at 43–46.
[91] *See id.* at 59–66.
[92] Since copyright refers to an institutional fact, Niel MacCormick, *On the Very Idea of Intellectual Property: An Essay According to the Institutional Theory of Law*, 3 INTELL. PROP. Q. 227, 234 (2002), has argued that the protection of copyright applies solely to itself. In other words, copyright protects an artificial object that is created by copyright. Yet that would be true only if the constitutive rules intellectual works rest upon were generated by copyright alone. That can be doubted: books, paintings etc. would remain intellectual works if they were not protected as intellectual works. On the mutual interdependency between copyright and art see, e.g., Eberhard Ortland & Reinold Schmücker, *Copyright & Art*, 6 GERMAN L.J. 1762, 1768–69 (2005).

"intellectual work" I label as an attributing act. Can we find a rationale for claiming that the speech act "intellectual work" necessarily entails such an attributing act?

Stating the contrary would contradict our linguistic conventions. For propositions like "that is an intellectual work without an author" or "there are intellectual works without authors" strike us in the same way as the proposition "that is an effect without cause" or "there are effects without causes" does.[93] The reason for that can be found in a conceptual contradiction: since the concepts of "author" and "work" as well as the concepts of "cause" and "effect" mutually affect and presuppose each other, neither of them can be affirmed or negated without the other. They represent two related sides of what one is able to conceive of within the subsisting speech community only as a unity.[94] Intellectual works, as a matter of fact, always imply the question: who is the author? At the same time, therefore, they imply the theoretical possibility of answering that question.[95] If that question is negated with regard to a subject "intellectual work" then it is equally denied that that subject is an intellectual work.

It is highly important to stress that the thesis above is a pragmatic one. That is to say, my thesis refers to dispositive linguistic conventions. It merely claims that the attribution of authorship is a linguistically necessary part of performing the speech act "intellectual work." It does *not* claim that this institutional fact constituted by the speech community is reasonable or makes any sense. For this reason, any critique

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[93] To be sure, this does not apply if these assertions are taken to negate merely the present, not the theoretical existence of an author. Such an interpretation intuitively removes the otherwise existing conceptual contradiction. Again, it clearly confirms the conceptual contradiction involved.

[94] With regard to the notion of cause/effect it is even possible to claim that it not only expresses a dispositive convention of speech community—like DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 400 (L.A. Selby-Bigge ed., 2d. ed. 1975) (1740) did—but represents an a priori necessary concept. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON 218 (Norman Kemp Smith trans., Routledge and Keagan Paul 1963).

[95] It seems to me that this aspect is also indicated by MARTIN HEIDEGGER, *The Origin of the Work of Art*, *in* BASIC WRITINGS FROM BEING AND TIME (1927) TO THE TASK OF THINKING (1964) 149 (David Farrell Krell ed., 1977) ("The artist is the origin of the work. The work is the origin of the artist. Neither is without the other.").

calling into question the rationality of such an attribution does not affect my thesis.[96] In addition, the attributing act is necessary but not sufficient to perform an intellectual work. Someone can perform an attributing act without evoking an intellectual work, e.g., by putting his name onto an accidentally found root of a tree. In order for a speech act to imply the attributing act, the attributed act itself must fulfill certain requirements. Whether the attributing act fulfills its purpose, that is, whether it successfully performs the speech act "intellectual work," depends after all on the speech act it attributes. This aspect, however, concerns the second part of the complex speech act "intellectual work" which will be explained next.

3. Intellectual Works as Attributed Acts

My third thesis deals with the part of the speech act "intellectual work" to which I refer to as the attributed act $F_2(p_2)$. This act provides the meaningful context within which the act of attributing can be performed in the first place. In short: $F_2(p_2)$ is the condition of its success. It is complicated, however, to reconstruct the elements of that attributed act $F_2(p_2)$: how must the speech act be shaped to automatically imply authorship and therefore create an intellectual work? Every answer needs, first, the existence of a congruent linguistic convention, and second, it must be possible to discover that linguistic practice. It may well be that—as is the case concerning the concept of art—no consistent linguistic rule deciding upon when a speech act is an intellectual work exists. Even if such a convention existed, however, it would probably not be possible to discover. A solution of this problem is impossible; but it is also not necessary. This Article can restrict its reconstruction to elements which represent the core of intellectual works and can be linguistically explained.

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[96] *See generally* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1999 DUKE L.J. 455 (1991) (presenting a typical critique by the poststructuralist movement).

a) Utterance Act and Propositional Content

An analysis of the premises upon which the attributed act $F_2(p_2)$ is built, should begin with analyzing its propositional content p_2. Both the utterance act and the propositional act performed by that speech act need to be examined. The utterance act is that act generating a sound, sign or symbol. On the other hand, the propositional act is the expression of a proposition, i.e., the composition of a meaningful sign.[97] Whether a speech act represents an intellectual work surely depends upon these two factors. Three examples help to illustrate this point of view: (i) A speaker asserts, "it will rain tomorrow"; (ii) a speaker makes that claim in form of poetry or music; and (iii) a speaker says, "ba be bi," meaning that it will rain tomorrow. All examples are based upon the possibility of being able to perform the same propositional act by different utterance acts. Still, the question as to in what case the speech act performed can be considered an intellectual work might be answered differently. Case (i) is likely to never be seen as an intellectual work. In contrast, case (ii) may be interpreted as an intellectual work. Case (iii) might not even be interpreted as a speech act. The question arises as to why only case (ii) might be thought of as an intellectual work that implicitly causes the attributing act.

My response to that question stems from the following assumption: as soon as the propositional act of the speaker partly transcends what generally had been or how it specifically had been previously symbolized, it is interpreted as "intellectual work." The concept of intellectual work includes those acts partly eluding the previous rules of the speech community and, at the same time, complying with those rules insofar as necessary to retain the possibility of being designated and interpreted as a speech act. So the connectivity to the new linguistic rule is maintained implicitly open by the speaker's explicit rule breach. This feature may be termed as the *rule-constituting rule breach*. That assumption helps to explain why there are certain speech acts whose comprehension needs a particular concept and that operate as contextual

[97] This linguistic distinction is equivalent to the distinction between idea and expression in copyright.

background of the attributing act. If by partially transcending the linguistically possible, a speech act does not accord with linguistic convention, then the intended proposition or utterance cannot be linguistically reproduced other than by connecting it with its communicator. In the same way, the concept of intellectual work helps to comprehend what cannot yet adequately be reproduced linguistically.[98]

The thesis that intellectual works are—linguistically speaking—rule-constituting rule breaches also explains the examples above. In case (i) no rule breach can be recognized, while case (iii) is a rule breach but without any resemblance of rule. Only, in case (ii) there is a breach of rules that is able to generate new rules, partly because of its accordance with previous rules. This thesis can easily be integrated with considerations commonly held in art theory. It corresponds to a popular view by Kant, which contends that art is existentially bound to genius. According to Kant, genius is "a *talent* for producing something for which no determinate rule can be given."[99] This is what Kant calls originality. This does not mean that the genius lives and creates beyond *any* rule. There is also original nonsense[100]—which can be defined as a rule-less rule breach. The genuine or meaningful originality—which will always be capable of meaningful interpretation—must refer to the rules that enable it to be original in the first place. For "directing the work to a purpose requires determinate rules that one is not permitted to renounce."[101] A work that is at once rule breaching and rule constituting has, according to Kant's terminology, spirit. It consists of expressing "what is ineffable in the mental state accompanying a certain presentation and to make it universally communicable—whether the expression consists in language or painting or plastic art."[102] This requires uniting the ineffable "in a concept that can be

[98] If the thesis of the rule-constituting rule breach was true, it could explain why the length of copyright is restricted. For after a certain time it is possible to integrate the speech act of intellectual works linguistically.

[99] IMMANUEL KANT, CRITIQUE OF JUDGMENT 175 (Werner S. Pluhar trans., Hackett Publ'g. Co. 1987) (1790).

[100] *Cf. id.* at 175 (stating that "nonsense too can be original").

[101] *Id.* at 178.

[102] *Id.* at 186.

communicated without the constraint of rules (a concept that on that very account is original, while at the same time it reveals a new rule that could not have been inferred from any earlier principles or examples)."[103] This sort of interpretation supports the paradigm of a rule-constituting rule breach according to which originality must not be conceived of as monological but dialogical.[104]

b) The Illocutionary Act

Compared with the preceding analysis, the determination of the illocutionary force F_2 which the attributed act must meet in order to be designated as intellectual work is quite simple. While this act cannot be restricted, as in the case of the attributing act, to a certain illocutionary force, its force can be systematized by means of a taxonomy of speech acts, as developed by Searle. Searle differentiates five kinds of illocutionary acts, namely assertives, directives, commissives, expressives and declarations.[105] Assertives are those illocutionary acts expressing that some state is the case, such as assertions, claims, descriptions, confirmations, informing, etc.[106] In other words, a proposition is purported to be true. Directives aim at attempting to make someone take a certain action, such as pledging, commanding, requesting, recommending, etc.[107] In the case of commissives the speaker commits himself to a certain behavior. Good examples are a promise, a threat, a guarantee, an agreement, etc.[108] Expressives are those speech acts with which a speaker tries to express a psychological state which points towards a propositional content. To this apologizing, thanking, mourning, appreciating, etc. belong.[109] Finally,

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[103] *Id.*

[104] The advantage of a dialogical interpretation of originality is also emphasized by Friedman, *supra* note 64, at 179.

[105] *See* Searle, *A Taxonomy of Illocutionary Acts, in* EXPRESSION AND MEANING. STUDIES IN THE THEORY OF SPEECH ACTS 1, 12–20 (Cambridge Univ. Press 1979); JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 52 (Cambridge Univ. Press 1985).

[106] *See, e.g.*, SEARLE & VANDERVEKEN, *supra* note 105, at 182–92.

[107] *See, e.g.*, *id.* at 198–205.

[108] *See, e.g., id.* at 192–98.

[109] *See, e.g.*, *id.* at 211–16.

declarations represent those cases where the illocutionary act brings about a correspondence of reality with a propositional content, such as cursing, nominating, baptizing, etc.[110]

All those categories can be derived from the possible relations between language and the world. Every speech act necessarily relates its propositional content in a certain way to the world. The way this relation occurs depends upon the direction of fit between the propositional content and the world. There are four possible directions:[111] First, it is possible that the propositional content aims at matching a status of the world (word-to-world-direction). This direction is employed by the assertives. Secondly, the converse is possible, that is, the world is supposed to match the propositional content (world-to-word-direction). That occurs in the case of directives and commissives. Thirdly, both directions can be combined; then the world is supposed to match the propositional content by presenting it as having changed simultaneously (double-direction). This happens in the case of declarations. Fourthly, there is the possibility of no direction at all, when a direction is presupposed by an utterance (empty-direction). These are the expressives.

Thus, the illocutionary force, F_2 (being necessary for the occurrence of an intellectual work), depends upon the direction of fit between its propositional content and the world. Like the reconstruction of the propositional content itself, however, it is not possible to fully determine which direction is linguistically presupposed concerning intellectual works. At this point, it is therefore assumed that speech acts at least are considered intellectual works if their direction matches those of assertives and directives.[112] This assumption not only rests upon the fact that it is quite common in the field of art theory to comprehend art as a description of reality—like the Platonic or Aristotelian view of mimesis—or as changing the world. It rests equally upon the fact that the direction of commissives, expressives and declarations can

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[110] *See, e.g.*, *id.* at 205–11.
[111] *See id.* at 52–53.
[112] That does not mean, to be sure, that a complex speech act seen as an intellectual work cannot perform other directions of fit as well. Yet it does mean that this aspect is not constitutive for its being an intellectual work.

hardly be asserted as typical for intellectual works. Rarely will someone believe that a speech act is an intellectual work *because* its speaker tries to commit himself to an action. The same applies to declarations: a speech act is never deemed to be an intellectual work because it performs a baptism, etc. Regarding expressives, the situation seems to be less plain. Isn't it a characteristic of intellectual works that they express approval or regret? However, such a view is only plausible if those expressions are connected with a critical attitude. In order to maintain the theoretical difference to directives, those expressions can only represent the uncritical utterance of regret or approval. Anything else would lead to a world-to-word-direction which resulted in directives.

B. The Linguistically Moral Reconstruction of Copyright

So far I have outlined how intellectual works can be analyzed and defined by utilizing the speech act theory. I have attempted to show how the institutional fact "intellectual work" can be grasped by means of ordinary language phenomenology. I will now demonstrate how a different institutional fact, namely the copyright system, is morally justified. First, the preceding linguistic analysis must be embedded into a moral argument with which the legal right concerning those speech acts can be made plausible. In order to accomplish this, I shall employ two different strategies by which that objective can be pursued.[113] On the one hand, it is generally possible to examine whether actions usually seen as infringements of copyright offend linguistic conventions. Such offences, then, can be proven morally wrong by applying the argumentative figure of defective speech act, normatively underpinned by Kantian universalism. On the other hand, it is equally possible to focus not on the defects the speech act performed by a copyright infringer entails but on the linguistic necessity of those speech acts designated as "intellectual works."

[113] These strategies are not the only ones conceivable. The fact, for example, that intellectual works are to be qualified as speech acts already entails moral implications,.for it enables us without difficulty to explain why animals or natural phenomena could never produce intellectual works. A speech act is by its very concept an action performed by a member of our speech community according to its rules. Those members are solely human beings.

By assuming an inherent telos of language promoted by intellectual works, copyright can be morally justified as long as it is considered a necessary condition for the creation and dissemination of those works. The first strategy (a) will be demonstrated with regard to the right of attribution of authorship and bears centrally on the defects the act of plagiarism has according to speech act theory. The second strategy (b) will be demonstrated with regard to exploitation rights. Starting from a certain nature of language—reproduction and alteration of the world—it will be shown that this nature relies upon the existence of intellectual works.

1. Justifying a Right of Attribution of Authorship: The Act of Plagiarism

The following justification of the right of attribution of authorship consists of two argumentative parts. In the first part (aa), the act of plagiarism will be linguistically reconstructed to illustrate the speech act performed by somebody who plagiarizes an intellectual work. In the course of this analysis, it will be seen that the attributing act performed by a plagiarist must be qualified as a defective speech act in two ways. In a second part (bb), an argument is given which lends moral weight to these linguistic defects. At this point, I will employ a certain interpretation of the categorical imperative as developed by Kant.

a) The Linguistic Defectiveness of Plagiarism

In order to demonstrate the value of my approach and illustrate the idea of a defective speech act, I will examine the act of plagiarism. Usually a plagiarist is someone who intentionally portrays himself as the author of an intellectual work which he has not created. Such behavior is widely considered unethical. From the perspective of speech act theory, however, plagiarism is prima facie very similar to the speech act analyzed as an intellectual work.[114] By claiming authorship of the speech act in question, plagiarism equally comprises two speech acts: the attributing and the attributed act. How, then, can it be argued linguistically that it

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[114] *See supra* Part III.I.A.(a).

is rational to consider the plagiarist as an immoral agent? The answer can only be found by a subtle analysis of what the plagiarist's claim of authorship must imply and express pragmatically in order to succeed. What we need is a reconstruction of the act of plagiarism in terms of speech act theory. In doing so it will become apparent that the attributing act $F_1(p_1)$ is subject to certain conditions offended by the plagiarist.

First, the performance of $F_1(p_1)$ is subject to *preparatory conditions* originating in the propositional content p_1 and the act of assertion F_1. The claim that the plagiarist is an author works if, and only if, there is a linguistic rule according to which someone can be deemed to be an author at all. In other words, at the outset it is to be presupposed that authorship as an institutional fact does exist. Without authorship there cannot be plagiarism and vice versa. For that reason p_1 is internally connected with the premise of authorship. Hence, by claiming his authorship the plagiarist implicitly asserts that he who is the author is to be treated as author.[115] But if $F_1(p_1)$ always contrafactually presupposes that the author must be acknowledged, the plagiarist faces a serious dilemma. On the one hand, his attributing act makes sense only when presupposing that the author obtains recognition as an author. On the other hand, the plagiarist cannot hold that premise since he wants recognition as the true author even though he is not. Ultimately, this would result in the absurd claim "I am the author of that intellectual work but I deny the existence of authorship." Not only is this speech act defective; it also is not successful. A plagiarist thus will want to avoid that consequence by concealing the fact of his non-authorship. As a result, he is bound to perform the assumptions of $F_1(p_1)$ in a contrafactual rather than in a factual way. In that case, it is true, that the speech act of plagiarist is defective but at least successful. According to Austin we are merely confronted with an insincerity rendering a speech act "unhappy."[116]

In addition, there is still a second defect that can be found in such a case. For the performance of $F_1(p_1)$ is subject to certain

[115] Authorship cannot mean recognizing someone who pretends to be author. For the plagiarist implicitly claims to be recognized as author and not as plagiarist.

[116] AUSTIN, *supra* note 79, at 39.

conditions of sincerity. These conditions are not morally based but simply spring from the illocutionary force of the assertion F_1. Every assertion necessarily expresses the speaker's belief in the truth of the proposition he wants to assert.[117] For it is plainly impossible to simultaneously perform an assertion and deny its truth, because the contradiction this entails would prevent such utterances from being understood and interpreted as an assertion at all. Thus, if the speech act of assertion is to be performed successfully, the psychological state of sincerity inevitably must be expressed. In the case of plagiarism, however, the plagiarist does not believe in the truth of his assertion. Otherwise he would not be a plagiarist but at the most someone who performs unconsciously a defective attributing act. In order to avoid the failure of his assertion, every plagiarist is bound to conceal that belief. By performing $F_1(p_1)$ instead, he will express a contrafactually psychological state he does not factually have. As a result, his speech act certainly remains defective but at the same time is successful.

b) The Moral Implications of Defective Speech Acts

The speech act performed by a plagiarist is successful but defective for two reasons. First, the speech act offends a preparatory condition by implying something which the plagiarist, by definition, cannot presuppose. Second, the plagiarist breaches a condition of sincerity as he expresses a psychological state he cannot have as a plagiarist. In order to use these aspects to claim that plagiarism is to be prohibited and a right of attribution is morally necessary, the moral relevance of those defects must be demonstrated. But how is that possible? One might be inclined to consult the figure of performative contradiction as it has become popular in discourse ethics.[118] The label "performative

[117] *See* SEARLE, SPEECH ACTS, *supra* note 80, at 64.

[118] *See* Robert Alexy, *Discourse Theory and Human Rights*, 9 RATIO JURIS 209, 214 (1996) (using that figure); HABERMAS, *supra* note 82, at 80–81, 89–109. Using that figure, though, has been massively criticized. *See, e.g.,* ARMIN ENGLÄNDER, DISKURS ALS RECHTSQUELLE? ZUR KRITIK DER DISKURSTHEORIE DES RECHTS 42–47 (Mohr Siebeck 2002); PETER VON GRIL, DIE MÖGLICHKEIT PRAKTISCHER ERKENNTNIS AUS SICHT DER DISKURSTHEORIE. EINE UNTERSUCHUNG ZUR JÜRGEN HABERMAS UND ROBERT ALEXY 53–56 (Duncker & Humbolt 1998). However, the critique does only apply to its tautological

contradiction" refers to a contradiction between the content of an act and the necessary presuppositions of its performance. The speech act, for example, "I claim authorship but I do not believe in my assertion" clearly is a pragmatic contradiction that leads to its failure. For every assertion needs to express belief in its truth in order to be understood by others as an assertion.[119] However, this argument does not take us very far. First, the moral relevance of its reasoning can be questioned: if the contradiction itself already results in the speech act being not only defective but fails as well, it is absurd to prohibit its success. Second, the speech act of plagiarism does not represent a performative contradiction, that is, a contradiction in performing an action. Since that speech act perfectly implies and expresses its necessary conditions it is externally consistent and therefore successful.

Thus, the contradiction entailed by plagiarism points at a different dimension, at the dimension of will. By performing the speech act of plagiarism the plagiarist shows that he accepts the preparatory conditions and conditions of sincerity upon which his practice linguistically relies.[120] This is exactly the reason why he fakes their existence. So he clearly knows that the performance of his speech act necessitates two things. First, it necessitates the existence of the institution of authorship without which the asserted propositional content p_1 would not make any sense. Second, it necessitates the belief in the sincerity of the content without which the assertion F_1 would not be possible. To guarantee the success of his speech act, therefore, the plagiarist must will both the institution of authorship, as well as the belief in its sincerity, to exist. Yet the plagiarist cannot intend for his speech act to become a common practice because he would no longer be able to perform it. The impossibility of wanting the action as a general rule without causing its impossibility represents the inherent contradiction of plagiarism. This contradiction

use as a means of justifying rules on whose basis a performative contradiction rests. It does not apply insofar as those rules are already given. In such a case, even critics admit that a performative contradiction is a compelling argument. *See, e.g.*, ERNST TUGENDHAT, VORLESUNGEN ÜBER ETHIK 166–68 (Surhkamp 1993).

[119] *See* SEARLE, SPEECH ACTS, *supra* note 80, at 64–65.

[120] *Id.* at 62 (analyzing argumentation of insincere promises).

consequently leads to the accusation of a necessary inconsistency that is implied by his conduct and makes it morally wrong.

The stated argument, ultimately, is a Kantian one. It illustrates that version of the categorical imperative according to which one ought to act on a maxim which one can at the same time will that it should become a universal law.[121] Hence, my argument rests on a compelling principle, namely the principle of universalization or impartiality respectively. That principle is a minimum requirement on all moral judgments.[122] Every action will be generally agreed upon only if that action can also be generally realized. So the proposed argument also proves that the categorical imperative is not a completely meaningless principle as critics often claim.[123] Its weakness merely lies in the fact that it only works *as long as* linguistic rules exist enabling both the institution of authorship and the speech act of assertion. For "a contradiction," as Hegel argued, "must be a contradiction of something, i.e., of some content presupposed from the start as a fixed principle."[124] Admittedly, the argument I present is not able to provide grounds for such a fixed principle. More precisely, it is not able to establish those linguistic rules which the act of plagiarism contradicts. As a result, the possibility of its application relies upon contingently linguistic rules whose subsistence it cannot ensure. Still, this does not point to any defect with my rationale. For in any event, the speech act of plagiarism cannot be performed successfully unless those linguistic rules allowing meeting its necessary conditions do already exist. Once again, without authorship there is no plagiarism. Hence, inasmuch as that speech act can come into existence, it can also be discredited as being immoral. From that it follows that the right of attribution of authorship is morally necessary.[125]

[121] *See* KANT, *supra* note 21, 31–32. On this formula, see Christine M. Korsgaard, *Kant's Formula of Universal Law, in* CREATING THE KINGDOM OF ENDS 77 (Cambridge Univ. Press 1996).
[122] J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 83 (Pelican Books 1977) ("This principle, in some sense, is beyond dispute.").
[123] See HEGEL, *supra* note 43, para. 135, for a classical critique.
[124] *Id.*
[125] That applies only insofar as the institution of authorship does exist. Otherwise, the question for rights of the author could not be put forward.

2. Justifying Exploitation Rights: The Telos of Language

Justifying exploitation rights by means of speech act theory is much more complicated. Since the exploitation of an intellectual work does not affect its attributing and attributed act, such a justification cannot be undertaken by simply proving it linguistically defective. For this reason, I shall suggest a different argument. I will attempt to explain that those speech acts designated as intellectual works are linguistically necessary. Assuming also that exploitation rights are required for facilitating the factual performance of those speech acts, these rights are therefore morally necessary. In what follows this argument will be further elaborated. As a first step in section (a), the idea behind it will be given a shape in a four-stage argument. Subsequently in section (b), two problems with that argument will be discussed.

a) The Structure of a Teleological Argument

How can it linguistically be shown that exploitation rights are morally reasonable? My answer consists of a four-stage argument: (i) The first stage focuses on the attributed act and the characteristics of its propositional content. As discussed previously intellectual works can be conceived of as rule-constituting rule breaches. They form speech acts that enhance and expand the possibility of what can be linguistically expressed. Intellectual works consequently result in an increase of linguistic possibilities. (ii) The second stage has two aspects, both of which emphasize the necessity of such an increase. First, a certain nature or telos of language is presupposed. That is to say, human language aims at reproducing or altering the concept of world. Second, the concept of world is not static but dynamic. As the world permanently changes, new perspectives and interpretations (both of descriptive and normative kind) emerge. In order to integrate them linguistically, language must differentiate further. (iii) At the third stage two premises are asserted. First, the performance of those speech acts designated as intellectual works does not result from nature but, rather, requires incentives. Second, these incentives can only be given by exploitation rights. (iv) The fourth stage consists of the conclusion that exploitation rights are morally necessary.

b) Defending its Assumptions

Since the first stage of the argument has been developed in the course of section III.A. I will focus on stages (B) and (C). The second stage introduces the thesis that the nature or telos of language involves reproducing and altering the world. Does that thesis make any sense? The assertion that there is an inherent telos in language is not new. In fact, it is found in the work of Habermas, though in a somewhat different way. He holds language as a place of rationality; according to him language embodies the telos of understanding.[126] Such a normative thesis can easily be criticized, e.g., by observing that language is also used to produce dissent.[127] In this Article the notion of "telos" shall mean something different. It does not deal with the objective language ought to pursue but with the objective language is necessarily directed towards. This interpretation is supported by Searle's argument regarding the world-direction of language. Language can be directed at the world or the world can be directed at language.[128] The former refers to reproducing the world, the latter points at an alteration of the world. Thus, it is reasonable to assume that at least one purpose language has can be found in its effects. It can be said, then, that the telos of language also comprises the reproduction and alteration of the world. Due to the permanent alteration of the world, however, its linguistic interpretation and description must alter as well.

Difficulties with my argument can be found at its third stage. They are identical to those problems arising from the so-called incentive function of copyright. Particularly, the argument

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[126] *See, e.g.,* JÜRGEN HABERMAS, *The Theory of Communicative Action*, 1 REASON AND THE RATIONALIZATION OF SOCIETY 287 (Thomas McCarthy trans., Beacon Press 1984) (1981) ("Reaching understanding is the inherent telos of human speech."); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 4 (William Rehg trans., MIT Press 1996).

[127] For a critique, see Niklas Luhmann, *Was ist Kommunikation?, in* AUFSÄTZE UND REDEN 103 (Oliver Jahraus ed., 2001) ("One can also communicate in order to mark a dissent, and there is no compelling ground upon which the search for consent should be considered more rational than the search for dissent.") (author's translation).

[128] To be sure, both directions can be combined. Since the analysis of the speech act intellectual works perform examined only these directions, I confine myself to discuss only these.

assumes that those linguistically expanding and enhancing speech acts called intellectual works do need an incentive in the first place; in terms of the efficiency-based model, that premise is identical to assuming a market failure concerning intellectual works. In addition, the required incentive can only be obtained by creating exploitation rights concerning those works. Thus, these rights are merely servants of a linguistic necessity. Of course, the plausibility of my argument does depend on the empirical validity of the incentive function thesis, which in any event cannot be proven empirically. But is the given argument, then, equally defective? Not at all. Unlike the Efficiency-based and Culture-based justification my argument does not argue collectivistically by referring to social needs but it does relocate those problems at the place intellectual works emanate from, i.e., human language.

C. Evaluation of the Alternative Model

Several objections to the linguistic reasoning for a right of attribution of authorship and for exploitation rights are conceivable. It is possible, for example, that the normative basis of the alternative model sketched might be criticized. For it is true that the claim that from linguistic defects and necessities normative rules can be inferred, cannot itself be justified by linguistic rules. Thus, the model ultimately infers norms from facts, at least psychologically. Yet that defect is inherent in any normative argument and therefore is shared by the other justification models. All justification models must begin with an unproven premise upon which their argument rests. So that objection is not specific to my argument but concerns the ability to justify moral norms in general. Since the justifiability of moral norms must be assumed in order to be able to discuss the morality of copyright at all, that objection has a fatal connotation. In discourses about the moral justification of copyright, the explicit negation of the truth ability of normative statements results in a performative contradiction. This is so because this negation explicitly denies what the assertion "copyright is justified or not justified" implicitly presupposes. This Article would face the same problem if it denied the truth ability of normative statements but, at the same time, discussed arguments for and against the justification of copyright. So the

language game or practice with which participants engage when addressing the morality of copyright inevitably assumes that moral norms are theoretically justifiable.[129]

However, the aforementioned objection makes us think about another possible criticism: What is the advantage of the alternative model if it has the same (theoretical) weaknesses as the others? The universalistic-transcendental model sketched in this Article represents a progress in two respects. First, it avoids a normative deficiency embodied in the other models, and second, it is more specific than those models. A normative deficiency is sorted out by overcoming the fierce conflict between individualistic and collectivistic models. In contrast, the alternative model goes back to the initial link between either position, namely their coexistence in the speech community. So a right of attribution of authorship is no longer justified by claiming a moral relation either between author/work or society/work; it is justified because in either relation the speech act of plagiarism is equally defective according to conventional linguistic rules. Similarly, exploitation rights are necessary due to the function of language which is in either relation necessarily identical.[130] Moreover, my model is more specific as it takes into account the ontology of intellectual works in a more appropriate way. Not only does it argumentatively integrate the ontology of intellectual works like Work-based and Culture-based models, it also considers human language as *the* central argument for a moral justification of copyright at all.

[129] It needs to be emphasized, however, that this is the only function of that assumption; in particular, it does not mean that moral norms are objectively justifiable.

[130] One might ask whether there is any difference to the collectivistic justification. For it could seem that, by referring to human language, my approach is ultimately subject to societal interests. In other words: Does not language itself always concern the interest of any society? Yet this "interest" differs significantly from those interests underlying collectivistic justifications. First, language is the means by which we—authors and society —give expression to our interests. Thus, it is the prior condition for our ability to express the interests forming the basis for collectivistic justifications. Secondly, the function of language lies not at our disposal but is rather the evolutionary product of unintended events.

IV. CONCLUSION

Why is copyright morally justified? This question is normally answered in two opposing ways. In the European-Continental context it is mostly held that a specific relation between authors and their intellectual works exists giving copyright as a legal institution moral relevance. In this way, copyright is based upon a moral right of the author which bestows upon him an entitlement to his intellectual works. This kind of justification which can be designated as individualistic is opposed by a perspective dominating the Anglo-American area. It holds that the moral justification of copyright results from a specific relation between society and intellectual works. Thus, copyright is morally grounded in a way which can be referred to as collectivistic. The crucial difference between these standpoints can be put in another way: According to the individualistic perspective, the author's legal right—that is the copyright—is also his moral right. Hence the moral and legal relations coincide. By contrast, the collectivistic perspective takes copyright solely as the author's legal, not as his moral right. So the moral and legal relation part company with one another. To be sure, the difference as formulated above does not overlook that intellectual works concern interests of both society and authors. It decides, however, upon the *ultimate* moral justification of copyright, i.e., which relation prevails in case of conflict. In such a situation, any attempt to settle the issue by balancing or compromising the interests involved is bound to fail. Because of what I have called the problem of irreconcilability, in the light of those models a decision between author and society is inevitable.

One possible solution is the alternative model which I have sketched in this Article. This approach can be conceived of as an universalistic-transcendental justification. It is universalistic because it is neither individualistic nor collectivistic but originates from a level prior to that difference. It is transcendental because that prior level is found in the ultimate precondition enabling those relations, i.e., the condition of the possibility of either relation. This condition is the human language. Starting with this premise, it is possible to demonstrate that intellectual works are to be construed as speech acts. This finding, in turn, can be used to

morally reconstruct certain features of copyright. On the one hand, the right of attribution of authorship can be justified by elucidating the linguistic defects attached to the act of plagiarism. On the other hand, the moral justification of economic rights derives from the nature of language as such, for this nature relies upon the existence of intellectual works. The outlined argument advances common perspectives on copyright law in two ways. Ontologically, the traditional way in copyright law of thinking of intangible objects is abandoned in favor of thinking of communicative actions. Intellectual works should no longer be seen as objects but as the meaning of speech acts performed by authors. Morally, the argument overcomes the thinking of individualistic and collectivistic relations in favor of thinking of linguistic conventions. Thus, copyright should not be derived from moral rights of authors or of society but from human language as their common form of being. If the proposed ontological and moral paradigm shift were encouraged by this Article, if the traditional thinking were abandoned in favor of thinking of communicative actions and its rules, much would be achieved.