Daniel Stengel, Berlin

Intellectual Property in Philosophy

ABSTRACT: The article deals with the concept of intellectual property and its basis in different philosophical theories. First, the author gives a short historical overview of the development of intellectual property, locating its roots already in pre-historical society. It is followed by an examination of today's features of intellectual property, in contrast to 'regular' property. In the second part, the article analyses the theories of Locke, Kant, Hegel, Servan and Foucault to explain intellectual property, followed by a discussion which of their theories' features are reflected by today's intellectual property law.

A. Introduction

'Intellectual property' is a 20th century term. As understood today, it comprises four law areas: trademark, patent, copyright, and trade secrets law.[1] The concept of intellectual property, however, is well known in history. Protection of intellectual products can be traced far back in history, but only since the 16th and 17th century do we encounter written intellectual property laws and privileges, first in England (copyright) and Venice (patents). These laws and privileges were not introduced to secure the property rights of inventors, publishers, or authors, but rather as a tool to control the particular intellectual good and the printing industry. However, a theory of intellectual property was due to be developed. This essay concentrates on the works of Locke, Kant, Servan, Hegel and Foucault in order to examine which of the theories' features are reflected by today's intellectual property law.

I. Intellectual property – a part of human history

A historical overview shows how intellectual property has formed an integral part of society since the early formations of communities. Before the introduction of patents, copyright, trademarks, and signs were protected by moral rules and religious doctrines. A sign is a mark with the basic function of distinction as well as a function of identification. Probably, the first protected signs were tribal signs, signalling the tribe to which someone belonged. They could not be adapted by another tribe without losing their specific functions and therefore their defining characteristics. The signs and their functions enabled the bearers to establish a specific relationship with one another in a social context.[2] Some tribal signs became the work of artists or priests, and for reasons of power, of financial or religious interest someone may have claimed to be the only one to be allowed to reproduce a sign or painting. Even without knowing the meaning of a sign, at least one can conclude it is something unknown. There are different examples that show ancient cultures being familiar with the concept of pro-

1 All areas are quite distinct from each other. In particular the protection of trade secrets usually is not included in property theories.

2 Jeremy Rifkin, *The Age of Access*, 2000, 77. He is mainly concerned with trademarks.

tection of intellectual goods based on religious or structural interests.[3] For example, in Ghana, the monarch was custodian of copyright for every new design of fabrics.[4]

Trademarks are the commercial successor of signs. Already during the Roman Empire, trademarks were counterfeited.[5] It is worth emphasizing that signs do not only work in an economic context, but in any context where distinction and identification are of interest. For example, the cross and the half moon as religious marks are comparable to trademarks of a specific religion. Both functions of identification and distinction are essential to religious signs. Today, trademarks of any kind are protected as long as they fulfil specific formal requirements.[6]

The history of copyright is slightly different from the history of trademarks. Some authors agree on religious secrets, e.g. chants and rituals, as the first intellectual property good.[7] Although these secrets belonged to and were identified with a specific group, they were not made public due to the very nature of secrets. The typical feature of intellectual property is that the information itself is shared with the public, while the owner does not lose his claim to the information. Intellectual property finds its roots in the instant, when someone else becomes aware of information, but does not use it, because someone else's rights in the information are recognised. In this sense of recognition, protection for artistic goods like dramas can be found as early as in ancient Greek society. Even if no written laws prevented plagiarism, it was ostracised by the ethical norms of the society. The development of copyright in music can be traced back to the 14th century.[8] An important step was the introduction of written laws defining and governing intellectual goods. Of crucial importance to copyright was the invention of print-making. After the invention of the printing press, the cost of copying decreased and made the introduction and enforcement of copyright laws increasingly more necessary than before. In the late 18th century, the introduction of copyright as known today was fostered.

II. Characteristics of intellectual property

Before analysing the philosophical origins of intellectual property, we have to examine and illustrate the current characteristics of intellectual property as understood today. The essential characteristics we find are the elements we have to look for in the philosophical discourses. In addition, the following points show that a general property theory, which does not distinguish between regular and intellectual property, may easily fail to explain the existence of the latter.

3 For further reference, see Bruce H. Ziff and Pratima V. Rao, *Borrowed Power: Essays on Cultural Appropiation*, 1997.

4 Ida Madieha Azmi, Spyros Maniatis and Bankole Sodipo, Distinctive Signs and Early Markets: Europe, Africa and Islam, in: *The Prehistory and Development of Intellectual Property Systems*, ed. by Alison Firth, 1997, 149

5 Loc. cit., 134

6 Today, a trademark is not just something like a crest any more. It can be a scent, a colour, a whole sentence; even sound designs are trademarks. Anything that helps to identify something with a specific source seems to be evaluated as a possible trademark. For early, distinctive signs see loc. cit. 125 ff.

7 Richard Wincor, *From Ritual to Royalties: An Anatomy of Literary Property*, 1962, 27 f. He talks about the chants and rituals of druids in particular.

8 Hansjörg Pohlmann, *Die Frühgeschichte des musikalischen Urheberrechts, ca. 1400-1800; Neue Materialien zur Entwicklung des Urheberrechtsbewusstseins der Komponisten*, 1962, 36

1. Economic aspects

The utilitarian argumentation for intellectual property is based on different effects of ownership in intellectual goods. The importance of literary property for the progress of science and literature was observed in the 18th century.[9] The notion that neither technical progress nor a working economy is possible without intellectual property was first formulated by Schumpeter.[10] A macro economic aspect of intellectual property is that the trust in the validity of trademarks is identified as a crucial factor for a strong economy.[11]

Intellectual property also has different financial aspects rooted in utilitarism. The financial aspect of intellectual property is seen first as an incentive to write or develop something that is beneficial to society.[12] Secondly, the author or inventor should also be rewarded for his engagement. While an incentive has an effect before the process of a creation, a reward is given after the creation, because the inventor added something of value to society. The third financial function of intellectual property law is to compensate the inventor or author. He receives compensation not just for his investment of time and money, but primarily for the publication of his work. The society compensates the creator when he shares his idea with the public. Without these financial payments based on patents or copyrights, innovators would turn to alternative systems like trade secrets. The society would lose if these alternative systems were applied.[13]

2. Ethical dimensions

Besides the financial and economic aspects, there are several ethical aspects related to intellectual property. Strong intellectual property rights may increase the interest of companies and individuals to invest into research and development, but they would limit the spread and use of information. Intellectual property has never been undisputed; already in the 18th century, it was named 'a most odious monopoly'.[14] The power of copyright can be seen in modern cultural life. Culture seems to take place increasingly through mass media, watched and controlled by the right owners or their representatives.[15] Access to knowledge may become a privilege of the wealthy. Copyright owners may even determine cultural developments.

Thus, we can formulate an argument by stating that intellectual property itself may threaten the development of society. We would have to say that all intellectual property is unethical, given the assumption that speech, drama and music have been crucial

9 Francis Hargrave, *An Argument in Defence of Literary Property*, 1774; reprint in: Stephen Parks, *John Dunton and the English Book Trade: A Study of His Career with a Checklist of His Publications*, 1976.

10 William Kingston, *Innovation, Creativity, and Law*, 1990, 10

11 Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, 1995

12 Of course, the incentives an author faces are too complex to claim that without money nothing would be created.

13 Megan Richardson, J. Gans, F. Hanks and P. Williams, *The Benefits and Costs of Copyright: An Economic Perspective – Discussion Paper Prepared for the Centre for Copyright Studies Ltd*, 2000, 9

14 According to Hargrave, (note 9), 3. At this time, the monopoly in a written text or in a mechanical device was renamed to 'copyright' or 'patent.'

15 Rifkin (note 2), 139

elements of human experience at all times.[16] Consequently, all human beings should share these elements (which belong to all), and should not be allowed to keep it to themselves. A similar argument can be stated for patents.

The ethical dimension of intellectual property becomes clearer by highlighting that patents are monopolies. Those who started using the word 'property' in connection with inventions seem to have had a very definite purpose in mind. They wanted to substitute a word with a respectable connotation, 'property', for a word that had an unpleasant connotation, 'privilege' or 'monopoly'.[17] When we examine the origins of intellectual property, we have to look behind these wording problems and have to concentrate on the balance between the positive and negative effects of monopolies in a cultural context.

However, today the most difficult ethical questions refer to the area of human and animal genome patents and copyrights. Nowadays, we discuss patents in the genetic map of animals; for instance, patented rats for laboratories are a booming business due to patent rights. We should be aware that this is only the beginning of ethical challenges. One day a scientist may even claim a copyright in the genetic map of a human. These last questions are not within reach of a mere intellectual property theory.

3. Differences between property and intellectual property

"Information is different."[18] In the examination of the philosophical origins of intellectual property the fundamental difference between regular property and intellectual property is another aspect. In order to address how 'mental things' ought to be made the objects of ownership and law it is necessary to focus on its fundamental nature. In the case of a general property theory, these aspects have to be taken into account. If a property theory cannot be applied due to ontological differences, the theory will fail to explain intellectual property.

Firstly, intellectual property deals with abstract objects, while regular property usually consists of tangible objects. One may object that in fact, all rights are abstract objects, which is true to some extent. For example, a debt is purely fictional, even a property right is a fiction of a relation. Yet the object it relates to is another object. The object of intellectual property is always abstract; it is not the concrete text, but its content. In contrast, a house is a very solid object. Although a loan is a legal fiction, it is related to something 'real'. We protect the debt or a loan because it stands for something we could exchange materially. The abstract object in the world of intellectual property is not related to anything real; it exists for itself because it is self-referential. It is the information only which is protected, and we cannot substitute it with anything of the 'real' world.

Something tangible, for example a concrete object, may emerge at the very end of intellectual production, when in the eyes of the inventor or author completion of all the relevant information and ideas allows the embodiment. This may be the embodiment of a patent idea, or the idea for an artwork that will be painted.[19] Intellectual property

16 Loc. cit. 140
17 Tom G. Palmer, Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects, *Harvard Journal of Law and Public Policy* 13 (1990) 821
18 Lawrence Lessig, *Code and Other Laws of Cyberspace*, 1999, 131
19 See Kingston, (note 10), 23

does not have to come into the world as hardware. A musical piece can be played without the score ever being written down.

Secondly, intellectual property objects do not have well-defined boundaries. The boundaries of a house or a car are instantly clear. The content of a book has invisible boundaries, which can be resolved precisely in court only. In daily life, it is difficult to determine whether one has crossed a boundary. On the one hand, it is a known fact that it is not allowed to copy a book as a whole. On the other hand, one knows that it is within legal boundaries to copy just one sentence of a text. Somewhere in between we will find the limit of protection of an intellectual product.

Boundaries are changing and are therefore subject to revision. While a century ago a translation was seen as a work of the translator, today the 'unauthorised' translation is considered a breach of the copyright of the original author. Similarly in patents, the doctrine of equivalents was introduced. Before, one could re-build the patented invention with minor changes, as long as one did not re-build the invention as such. The doctrine of equivalents prevents such evasive action to be taken, but a decision about what is an equivalent and what is not has to be made case by case.[20]

Another boundary concerns the idea-expression dichotomy of intellectual property. On the one hand, it is possible to have an idea without owning it. The same applies to information or data: a census taker can collect data, but he does not receive a copyright because this data is not seen as sufficiently original. Some data seems to be placed firmly and irrevocably in the public domain.[21] On the other hand, one can own an intellectual product/idea just by the expression or utterance thereof; the expression seems to be worthy of protection. Pure information cannot be appropriated, but if the information is produced, assembled, expressed or presented in a particular way, an appropriation of the information becomes possible and is therefore subject to intellectual property law.

An intellectual property theory has to focus on the step which bridges the gap between a free idea and its protected expression and which has not been clarified reasonably by any general property theory, so far. It is a topical issue, since the span of ideas which can be protected has been rapidly expanded over the last decades.[22] Several reasons caused this development. One factor is a rising awareness for intellectual goods. There are many examples for the expansion of the realm of intellectual property law: a Mexican restaurant chain sued another company, claiming it had copied its décor, a distinct combination of non-functional features like colour schemes.[23] Legal scholars have argued for patents in athletic manoeuvres.[24] Surgical procedures have become subject to patent law as well.[25] The "Big Brother" TV format was licensed to several TV stations worldwide; otherwise they would have been liable for compensation payments.

20 William W. Fisher, Geistiges Eigentum – ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten, in: *Eigentum im internationalen Vergleich: 18.-20. Jahrhundert*, ed. by Hannes Siegrist, et al., 1999, 273

21 Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, 1994, 39

22 Fisher (note 20), 266

23 *Two Pesos, Inc. V. Taco Cabana, Inc*, 505 U.S. 763 (1992).

24 Robert M. Kunstadt, Scott F. Kieff and Robert G. Kramer, A New Hook for IP Practice – Intellectual Property Protection for Sports Moves, *National Law Journal* (1996) C1

25 An ethical dimension of copyright becomes immediately visible, since only wealthy people might be able to afford certain procedures. The U.S. Congress curtailed the use of such patents by exempting physicians and health care entities from liability for infringing them. See 35 U.S. § 287(c).

Thirdly, the existence of intellectual property has a time limit.[26] The legislature grants ownership of a work or a patent only for a certain period of time, after which the rights expire. From a legal point of view, regular property can exist almost eternally. The state does not set a time limit to own a cat or a house. One may relate the time limit of regular property to the limited rights in intellectual property by stating that both forms end with the impossibility of usage; the death of a cow or the final breakdown of a car may be equal to the termination of a patent. Actually, the limited existence of a patent may be nothing else than a simulation of the limited life span of regular property. However, it is precisely this fact that reveals the nature of the difference between both property forms. While property in 'real' life will find its natural end, intellectual property rights die an artificial death. While regular property continues to be a personal right, intellectual property becomes part of the public domain.[27] It is difficult to find a justification for this. An economic theory stating the necessity to lift the right in a monopoly due to the very nature of a sole right to promote and distribute a good may not be sufficient. Thus, a philosophical approach to intellectual property may be able to explain this difference.

There are other aspects pertaining to intellectual property, which go beyond any property rights. In most legal systems, intellectual property is a kind of 'hermaphrodite', because it combines aspects of financial interest with aspects of personal interests. No other property or even right possesses this feature. Moral rights, which protect the personal interests authors have in their work rather than in their financial interests, are also part of intellectual property law. Moral rights therefore combine features of personality and property, a concept unknown to regular property law.[28]

Prevention of use by others is a dominant factor of intellectual property law.[29] Obviously, this is also an aspect of regular property, but it is crucial for the contemporary understanding of intellectual property. Other forms of property list prevention of use as one aspect among many.[30] Furthermore, the quantity of intellectual property cannot be lessened, regardless of how many times it is consumed. It is non-rivalrous. Ideas can be shared indefinitely, with no reduction to the owner.[31] They are inexhaustible and cannot be destroyed. Once the idea has been brought into the world, it is notoriously difficult to control or to extinguish, unlike regular property.[32] Likewise, one cannot deprive somebody of an idea.

Another aspect of intellectual property derives from the notion that property is partly associated with identity. One can define identity as consisting – among other elements – of several relations to the outer world. Property, as an extension of identi-

26 Of course, the time limit is applied by the law, as well as an unlimited existence would be rooted in the law. However, all intellectual property regimes seem to recognise the importance of a limitation in the existence of intellectual property. See U.S Const Art. I, Sec 8, 8.

27 "This *is* Communism, at the core of our Constitution's protection of intellectual property". Lessig (note 18), 134.

28 'Features of personality': this term designates all interests in the own personality and its appearance, for example, reputation.

29 Peter Drahos, *A Philosophy of Intellectual Property*, 1996, 134

30 Describing this aspect as "prevention of use" is much more adequate than describing it as "exclusion from use". This is perhaps the key factor that has lead to the Copyleft movement.

31 L. Lessig (note 18), 132

32 Of course, it is possible to keep an idea secret. Additionally, one may use technical devices to ensure that an idea stays within a certain area. It is very hard to avoid people within a community sharing and (therefore) spreading an idea. However, it would not change the nonrivalrous status.

ty, can be seen as a link between a personality and the world. Intellectual property as something created within the interior realms of the human mind can be seen as something even more personal. As soon as the state regulates property rights, it influences the being of individuals with their outer world. Moral rights, that is, the right of an author to protect not only his financial but also his personal interest in a work, pay tribute to this aspect. They protect the personal integrity as well as the reputation of the author.[33] In philosophical theories of intellectual property a different approach to copyright or patents affects the understanding of identity, and vice versa.

B. Intellectual property in philosophy

Despite the differences between intellectual and regular property and its importance to our world today, authors agree that there is no general intellectual property theory.[34] The various principal arguments that normally reinforce each other in support of strong property rights diverge when applied to the concept of intellectual property.[35] The governing (intellectual property) rules have been developed largely through courts in an *ad hoc* manner. They are not based on any specific conception, but represent mainly an empirical development based on an economic perspective.[36]

However, we can find some paragraphs dealing with intellectual property within the works of Kant, Hegel, Fichte, Herder, or Foucault. Additionally, Locke and Marx attempted to develop a complete theory of property including intellectual property. With such a holistic approach a specific theory for intellectual property may not be necessary – but only as long as the general property theories can explain the existence of intellectual property satisfactorily. Interestingly, relatively marginal authors like Servan advanced the most interesting arguments in support of intellectual property. In other cases, it remained to the interpreters of prevailing philosophers to adapt the more influential theories of property to intellectual property.[37]

I. John Locke

Locke introduces his natural rights property theory in Chapter V, Book II of the *Two Treatises on Government*. The work of the philosopher provided a solution to the problem of how natural law, which proclaimed the existence of a commons, could lead to a state of private ownership. The 'common' refers to everything that either belongs to all members of a particular community or, instead, belongs to the state.

Locke's property theory may help to illustrate how human beings achieve property rights in intellectual goods. Several articles on Locke have been written in this context.[38] His theory has played a prominent role in developing the present intellectual

33 See Richardson, Gans, Hanks and Williams (note 13), 3
34 Drahos (note 29), preface
35 Tom G. Palmer (note 17), 817
36 Royce Frederick Whale, *Comment on Copyright*, 1969, 11
37 Tom G. Palmer (note 17), 818
38 Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 287 Iss. 77 (1988) 296; James W. Child, The Moral Foundations of Intangible Property, *The Monist* (1990) 578; Lawrence C. Becker, Deserving to Own Intellectual Property, *Chicago-Kent Law Review* 68 (1993) 609; Donald Diefenbach, The Constitutional and Moral Justifications for Copyright, *Public Affairs*

property law. In two pioneering 18th century cases on copyright – *Millar v. Taylor* (1769) and *Donaldson v. Becket* (1774) – the representation of the author as proprietor depended on Locke's notion of the origins of property.[39]

Locke, a philosopher with a strong religious background, attempted to combine the creativity of God and the creativity of human beings. In Locke's opinion, God has given the world to 'Men' in common.[40] According to Locke, God did this not only to give human beings a chance for self-preservation; they also had an obligation to make use of the world to their own advancement and convenience. For Locke, no one has a private dominion, except one's very own body.[41] This is the key to Locke's property theory and leads him to the assumption that whatever a person creates with his own hands must therefore belong to this person.

> "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his."[42]

For Locke, individuals can take things out of the state of nature; mixed with labour it becomes property.[43] The labour adds value to the (then) refined natural objects:

> "For 'tis Labour indeed that puts the difference of value on every thing. [...] in most of them 99/100 are wholly to be put on the account of labour."[44]

This theory works well when applied to the example of the farmer, his farms and the fruits of his farms. Without his work, there would be no grain on the land. Thanks to his efforts, he can harvest the grain. Hence, the harvested grain and the soil ought to be his property.

Locke adds two provisos. Firstly, he limits the power of labour to originate property: only if 'enough and as good' products are left in the common for the other commoners, for example members of the particular community, can a person apply labour to produce own property. Secondly, it is forbidden to spoil or destroy the things. Both provisos are significantly diminished in a monetary economy, although they do not become invalid or superfluous.

1. Intellectual property

The outlined theory of property can work in the context of intellectual goods. To claim ownership in intellectual products, labour must be invested. The question is whether intellectual products require labour to develop them. Having the choice between mental and physical work, people would prefer the mental work as the easier part. From an outside perspective, thinking does not have to look like work. In fact, some people enjoy thinking. Locke imagines work as something so unpleasant that people do it

Quarterly 8 Iss. 3 (1994) 225; Horacio M. Spector, An Outline of a Theory for Justifying Intellectual and Industrial Property Rights, *European Intellectual Property Review* 8 (1989) 270; Edwin C. Hettinger, Justifying Intellectual Property, *Philosophy and Public Affairs* (1989) 31

39 Mark Rose, *Authors and Owners : The Invention of Copyright*, 1993, 5

40 John Locke, *Two Treatises of Government* (ed. by Peter Laslett), 1960, II V § 25

41 Loc. cit. II V § 27. Interestingly, it has been true for the ancient Egyptian culture (the Egyptian word "d.t" means "body" and "personal property" at the same time).

42 Loc. cit. II V § 27

43 Loc. cit.

44 Loc. cit. § 40

only in expectation of benefits.[45] One may read Locke in a way that would prevent someone finding pleasure in work from being rewarded. An interpretation following this kind of reasoning would lead to strange results when applied to Locke's property theory. He would have to deny a farmer the fruit of his work, in case he enjoys ploughing the acre. However, a result like this does not seem to be in accordance with other aspects of Locke's theory. If Locke refers to labour as 'pains', one should not take it too literally.[46] Therefore, 'labour' has to be interpreted in a more liberal sense. If at least some efforts are invested into one's work, the criterion of labour is sufficiently fulfilled. For a simple idea, however, this is not necessarily the case. The idea of a 'man-meets-woman'-story does not require any physical effort. However, a more sophisticated expression of this idea involves much more than just the mental idea; it requires labour to bring it to paper. As soon as the body starts to express an idea, labour in the Lockean sense is involved.

One may reduce the conflict of the idea-expression dichotomy to the question whether or not sufficient efforts are being made to fulfil the definition of labour. If too little pain or mental work are involved to accomplish a task, one would not be entitled to speak of labour. Therefore, the result of the mental work cannot be protected. If an idea pops into one's mind, it must be expressed, which involves some kind of labouring process.

However, even if this aspect of labour is given, it may not be sufficient to appropriate an intellectual good. According to Locke, the labour process also has to add value (to an object or an idea). 'Value' is defined as being 'useful to the Life of Man'.[47] Thus, something that is already in the world cannot be appropriated without adding value. In the context of intellectual property it indicates that an existing invention cannot be claimed as property by another person ten years later. But this is not the only effect value has on intellectual property.

It is difficult to determine whether a new intellectual good adds value to 'the Life of Man'. Not every intellectual product enhances the life of human beings, be it a useless invention or an awful story. A new intellectual product may even turn out to be a net loss for someone who invested years of his life to work on texts, which are valueless from an objective point of view. According to Locke, value is independent from the beliefs of the individual. The creator cannot claim the value, since for Locke, the value of a good/product can only be measured on an objective basis and not by the 'biased' creator himself. In addition, the value of a good must be determined independently from any point of time. Something that first seems to be valueless may turn out to be of great value after a certain period of time or in another social context.

Characteristically, prevention of use becomes an issue as soon as a valuable good is involved. Obviously, various interests compete with each other as soon as a conflict arises. In court, no one would defend something that is completely useless or valueless. Furthermore, even if he tried, he could not due to the legal system. The various interests involved prove that something of value is at stake. Although useless inventions are subject to the law as well, it will be applied only in cases where people see a value in their intellectual product.

The value-added aspect is the reason why new inventions must meet a standard of "usefulness" to receive protection under today's law. A written text or an artistic

45 Hughes (note 38), 302
46 Locke (note 40), II V § 30
47 Loc. cit. § 40

work only meets the criteria of copyright if it is of a certain value. However, these criteria are set at a very low level and therefore easy to overcome, as demonstrated by American copyright law, where registration seems to be the only thing needed to gain protection.

The addition of value works best if one does not only measure work itself, but also the overall effect. This rule-utilitarian argument does not include the necessity that any single protected intellectual good has a particular value. As long as the ruling system produces a net increase in social value compared to the conditions without the system, it is justified, according to utilitarism. When the labourer produces something of value to others, then he deserves to benefit from it. He will be rewarded with property rights. This is also the normative aspect of Locke's theory, whereas the labour-avoidance aspect presented above (that society rewards labour with property on grounds that we must provide rewards to get labour) is the instrumental. Both aspects can be applied without excluding each other. The instrumental interpretation has very close ties to the law of unfair competition. If the outcome of labour has no prospective value, no one would care if it were stolen. Thus, if the intellectual product has some value, it would be unfair to deprive the creator thereof. This aspect of value is also very closely linked to the utilitarian defence of intellectual property and to today's justification for intellectual property law. The legal history of intellectual property contains many allusions to the value-added theory.

The 'enough and as good' proviso also has to be taken into account. According to Locke, enough has to be left in the common for the other members of the community. Locke's 'common' contains enough goods of similar quality so that one person's extraction from it would not prevent the next individual from taking something of the same quality and quantity.[48] The common does not need to be infinite; it is sufficient if it is practically inexhaustible. With ideas, the condition of inexhaustibility is easy to meet, since one idea can be used as often as possible without depleting the common in any sense.

The problem of the 'enough and as good' proviso of Locke may lie in the distribution. The creator of a work may exclude others from using it. However, with ideas this is only possible, if the creator keeps them to himself, because thoughts cannot be controlled. One may control the expression, but this is different from the idea. The complete exclusion is impossible. Additionally, anyone is free to have the same idea again. Therefore, the common cannot be exhausted.

According to Hughes, some ideas are too important to be taken out of the common, such as simple everyday ideas like telling a ghost story as well as extraordinary ideas like the discovery of a physical law.[49] However, Hughes' interpretation of Locke does not convince. An everyday story cannot be appropriated, since it is already in the world. Before it can be appropriated, an everyday story would have to be modified and labour would have to be applied. After the modification, its characteristics will have shifted so that it will not be an everyday idea any more. Something similar happens to extraordinary ideas in the natural sciences. A limit to appropriation is provided by the fact that 'God gave the world to Men in common'. He gave it to Adam in the state it existed to that particular time. Everything that was in the world became part of

48 Hughes (note 38), 316
49 Loc. cit.

the common. A discovery is just a description of what is already part of the world. In contrast, an invention adds something to the world; it is something that did not exist when humanity received the world.

The 'enough and as good' proviso does have an important role in the area of law. If a particular argument would be the property of someone, the owner may prevent others from using it. The same applies to standardised contract clauses. Everyone has to be free to use and to copy them, since otherwise the ability of the contractors to limit the liability would depend on the wilfulness of the copyright owner. Maybe Locke would argue that these rules were already in the world before men entered it; therefore, the rules cannot be appropriated. Accordingly, one has to be critical of the tendency registering standard contracts under the copyright.

The non-waste condition is another important element of Locke's theory. Locke presents the non-waste condition in the context of food spoilage – nothing should be wasted. According to Locke, it does not matter whether all have enough food to meet their needs, since this would violate the task given to men by God. The spoiling of things prevents another person from making use of them, as well as the owner himself is deprived of future potential use.

However, can intellectual property be spoiled? If someone has invented a technical device, but destroys it before anyone else can see it it, the new device and its potential benefit to society are wasted. This is the bottom line. However, intellectual property lives from the ambivalence of having rights into goods that are available publicly. Therefore, one has to determine the waste of intellectual goods by different means. Would an idea be wasted, if an inventor allows only the production of a certain number of machines based on his idea? There is no internal deterioration of the invention and the spoiling is seen only against a social backdrop. While the value of an idea may change depending on the social context it is placed in, the value of the idea itself remains constant. According to the Lockean proviso, it is not a waste of the work and the labour that went into producing an idea if the inventor allows only a limited edition of patented goods. Since he can patent it only through publication, the idea, thus, is accessible to the public.

The introduction of money demonstrates another aspect of ideas. One cannot deprive someone of an idea; consequently, it is difficult to exchange an idea for money. It is possible, though, to gain access to an idea with money and to buy an expression of the idea. Here, an actual exchange takes place. However, this is followed by several problems. If a concert takes place without an audience being present, would the expression be spoiled in the Lockean sense? Probably not, since this is only an ephemeral expression, which cannot be exchanged. In case the audience does have access to the concert, they still cannot exchange anything in return for the music they 'consumed'. Any exchangeable expression is fixed in something tangible. Therefore, the non-waste condition applies only to tangible things, which are already part of the common property theory of Locke. An idea can only be spoiled if it is destroyed before anyone can take notice of it. Since intellectual property law is applicable only if the idea is published, the non-waste condition can never be applied to an idea that is protected by intellectual property law. It is impossible to waste an idea that has already been published.

2. Locke: Summary

Locke's theory builds the foundation of today's intellectual property law. The labour-desert approach is reflected by the economic focus of contemporary patents and copyright law. Unfortunately, it does not contain a principle, which would be readily available and intersubjectively ascertainable measure for intellectual property. Such an inherently subjective standard provides only a questionable foundation for the abstract and general rules that guide intellectual property law. This applies to the whole theory of Locke. Even if it not limited to any area within intellectual property, it is sometimes too indifferent. A so-called intellectual property theory of Locke basically is the result of the reader's interpretation and not a product of Locke's own property theory. He does provide some outlines, thereby also providing the frame for a wide range of interpretations to be justified. Additionally, Locke would dismiss any interpretative approach that includes moral laws, since in his opinion, personality does not play a significant enough role for property law.

II. Immanuel Kant

Kant developed not only a theory of right including a property theory, but also wrote explicitly about intellectual property. The analysis of two works in particular is important in understanding his approach: First, Kant's 'Science of Right', published in 1796 as a metaphysical exposition of the philosophy of law. Its task was to determine the components of a logical division of the science of law, a priori, in a complete and definite genuine system.[50] The other significant work is the essay 'Von der Unrechtmäßigkeit des Büchernachdrucks' [Of the Injustice of Counterfeiting Books], published in 1785.

1. The theoretical foundation of property

Kant assigns property rights as a private right to his system of the science of law. The property right is based on the single innate right, the birthright of freedom:

> "Freedom is Independence of the compulsory Will of another, and insofar as it can coexist with the Freedom of all according to a universal Law, it is the one sole original, inborn Right belonging to every man in virtue of Humanity." [51]

Besides rationality, this is the only pre-legal possession of human beings.[52] Included in this right is the right of common action: every man may do towards others what does not infringe their rights. This rule is accepted by the society a priori. The right of common action includes the obligation not to take away something that belongs to someone else. There is a second rule that can be derived from the previous argument: the general acceptance that a thing can be brought under power ('in Gewalt') by

50 Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, 1974 (1st edition 1796-97), 121

51 Loc. cit. 56

52 Manfred Brocker, *Kants Besitzlehre: zur Problematik einer transzendentalphilosophischen Eigentumslehre*, 1987, 103

an individual, allowing individual possession on first act.[53] The *a priori* acceptance of this rule enables the single human to take possession by his own will. Anything is 'mine', when the owner is connected with it in the specific form. As soon as someone makes use of another person's property without the consent of the owner, that individual injures upon the latter's property right.

Besides the pre-legal possession of the innate right, all other possible possessions are external. There is nothing external that is, as such, originally owned without the intervention of a juridical act in any kind. All possessions (and rights) have to be acquired.[54]

Real rights (for example the right in a thing) demand a different act of acquisition than personal rights. 'Real' rights should not be understood as equal to 'real' property. The definition of a real right is a

> "...Right to the Private Use of a Thing, of which I am in possession – original or derivative – in common with all others."

The process of acquiring is original, or primary, if one acquires something that no other person has made his or her own, yet. In contrast, a personal right can never be acquired the same way. It always has to be derived from another person's own rights by positive transference or conveyance.[55]

2. Intellectual property

For intellectual property, a special situation is given, at least as far as books are concerned:

> "A book is a Writing which contains a Discourse addressed by some one to the Public, through visible signs of Speech."[56]

This definition of a book is the key to gain access to Kant's system of copyright. Kant grants the author the right in his work, that is, the discourse, but not in the book itself, the 'opus mechanicum'. The right to own the discourse is different from the property right in the book. According to Kant, a book can be owned by anyone, but a purchase of a book entitles the buyer to own the book only and not its content, that is, the discourse contained on the pages of the book.[57] In this sense, Kant's argumentation is a predecessor of today's definition of intellectual property rights as rights in ideal (and intangible) objects, which are distinguished from the material substrata in which they are instantiated.

53 Loc. cit. 104

54 Thus, the existence and availability of things are pre-requisites for people to acquire possessions. Kant is not concerned about the pure existence of things, which is a given pre-condition for him. See loc. cit. 69.

55 Kant (note 50), 101

56 Loc. cit. 129

57 Immanuel Kant, *Kants Werke: Akademie-Textausgabe* vol. 8, 1968, 80: "Hier kommt alles auf den Begriff einer Buchs oder einer Schrift überhaupt (er sei bevollmächtigt oder nicht) an: ob nämlich ein Buch eine Waare sei, die der Autor, es sei mittelbar oder vermittelst eines andern, mit dem Publicum verkehren, also mit oder ohne Vorbehalt gewisser Rechte veräußern kann; oder ob es vielmehr ein bloßer Gebrauch seiner Kräfte (opera) sei, den er andern zwar verwilligen (concedere), niemals aber veräußern (alienare) kann; [...]".

However, it is unclear precisely how the author acquires the right in the discourse. Even Kant does not give clear evidence in his writings. On the one hand, for Kant all things are acquired externally even if the object that is acquired, for example the discourse, consists of the author's thoughts.[58] Thus, the act of acquirement follows external rules. On the other hand, Kant believes it is an innate right of the author to prevent others from speaking in his name to the audience.[59] This confusion is based on the fact that Kant is not sure whether the right in a created discourse is a personal or a real right. According to Kant, the publisher is given from the author a personal right to print the discourse, which the author can grant only once.[60] This indicates that the author himself does have a personal right in the discourse he created. However, the author's right in the discourse does also fit the Kantian definition of a real right.

In order to be able to determine the solution, the differences between the results of the process of working and a work need to be clarified. The Latin words 'operam' and 'opus' designate the difference. Kant understands the efforts of an author as 'opera', as opposed to an 'opus'. If someone is working for another person, he is putting in some efforts, but he is not producing a work. Someone who simply makes use of his powers or abilities can allow others to use them (opera), but can never alienate them, because they belong to the person. The alienation would give somebody a right as in the person himself. This would be contradictory to Kant's system, as he confirmed in another work.[61] A work, an opus, can be sold. It is finished, and therefore it is the opus that can be alienated. An author cannot alienate his or her own rights in the discourse. The right in the discourse is therefore presumably a personal right established in the person of the author as a 'ius personalissimum'.[62]

The concept of the author plays a significant role within Kant's theory. Kant limits the protection of artistic works to books. The reason for protecting books is the fact that they are not an immediate (direct) presentation of a conception. According to Kant, a book is a discourse in a particular form. In other art works, such as a portrait or a bust, Kant sees the direct presentation as already given. For him, no expressible thought can be hidden within these works.

At this point, the understanding of the concept of 'author' of Kant's contemporaries might have influenced his way of thinking. During the second half of the eighteenth century, the meaning of 'author' in the modern sense emerged as part of German Romanticism.[63] It was during this time that the most distinguished German thinkers

58 Loc. cit. 79: "Denn das Eigenthum des Verfassers an seinen Gedanken (wenn man gleich einräumt, daß ein solches nach äußern Rechten statt finde) bleibt ihm ungeachtet des Nachdrucks;...".

59 Loc. cit. 86 (footnote): "Der [Autor] nimmt das Buch als Schrift oder Rede... Dieses Recht des Verfassers ist aber kein Recht in der Sache, [...] sondern ein angeborenes Recht in seiner eignen Person, nämlich zu verhindern, daß ein anderer ihn nicht ohne seine Einwilligung zum Publicum reden lasse, welche Einwilligung gar nicht präsumiert werden kann, weil er sie schon einem andern ausschließlich ertheilt hat.".

60 Loc. cit

61 Loc. cit. 295, (Über den Gemeinspruch: Das mag zwar in der Theorie richtig sein, taugt aber nichts für die Praxis): "Obgleich der, welchem ich mein Brennholz aufzuarbeiten, und der Schneider, dem ich mein Tuch gebe, um daraus ein Kleid zu machen, sich in ganz ähnlichen Verhältnissen gegen mich zu befinden scheinen, so ist doch jener von diesem, wie also wie Taglöhner vom Künstler oder Handwerker, der ein Werk macht, das ihm gehört, so lange er nicht bezahlt ist, unterschieden. Der letztere als Gewerbetreibende verkehrt also sein Eigentum mit dem Anderen (opus), der erstere den Gebrauch seiner Kräfte den er einem Anderen bewilligt (operam)."

62 Loc. cit. 86

63 Martha Woodmansee, *The Author, Art, and the Market : Rereading the History of Aesthetics*, 1994, 36

debated intensely the meaning of authorship for nearly two decades.[64] In this discussion, the role of the artist was considered to be that of an active creator, which in 1795 led Schlegel to say that

> "Now the beauty of art is not any more a gift of a gracious nature, but man's own work, property of his mind."[65]

In the debates, the author appeared to be put in an exceptional position as opposed to other artists (for example painters or sculptors), as Herder articulated:

> "An author abandons with his book, be it good or bad, so to speak a part of his soul to the audience."[66]

This abandoning distinguished the author from other artists. Other arts were not regarded as inferior, but the works in these arts were not seen as having a creator in the same sense as a book. Only an author was able to create and pass a message within and through his works. For example, the creator of a bust may have been considered to be a great artist, but was not trusted to communicate thoughts through this work as the author communicates through a text. However, the sculptor can claim property rights in the bust.[67] This understanding of the concept of arts and the author might be the reason why Kant distinguished between literary property and the other arts. Today, obviously the reception of art has changed. Usually, every artist implies a message or certain thoughts in an artwork. This understanding of art may even have changed Kant's stance in regard of other artworks.[68]

Kant does not accept property rights in other intellectual goods as well, such as trademarks and patents. Protection cannot be applied to these variants, since they do not include even the slightest form of discourse. Deriving property rights for patents from Kant's general theory of right cannot be done without violating an argument he made in 'Von der Unrechtmäßigkeit des Büchernachdrucks'.[69] However, there is an open

64 Loc. cit. 47

65 Friedrich von Schlegel, *Über das Studium der griechischen Poesie*, 1795, 103; own translation.

66 Johann Gottfried Herder, *Ideen zur Geschichte der Menschheit* (ed. by Julian Schmidt), 1869, 3; own translation.

67 Obviously, other artists did not find a strong lobby among writers, who gave priority to their own needs.

68 Interestingly, we can draw a parallel to Servan. Servan is interested in the letter, even in the public letter, which comes close to a speech, regardless of the fact that it is addressed to a particular person. In Kant's definition of a book we can find similar elements, suggesting that it is a discourse addressed to the public. This indicates the influence of the common understanding of a text on both Kant and Servan.

69 See Kant (note 57), 86: "Kunstwerke als Sachen können dagegen nach einem Exemplar derselben, welches man rechtmäßig erworben hat, nachgeahmt, abgeformt und die Kopien derselben öffentlich verkehrt werden, ohne daß es der Einwilligung des Urhebers ihres Originals, oder derer, welcher er sich als Werkmeister seiner Ideen bedient hat, bedürfe. Eine Zeichnung, die jemand entworfen, oder durch einen andern hat in Kupfer stechen, oder in Stein, Metall, oder Gips ausführen lassen, kann von dem, der diese Produkte kauft, abgedruckt oder abgegossen und so öffentlich verkehrt werden; so wie alles, was jemand mit seiner Sache i n s e i n e m e i g n e n N a m e n verrichten kann, der Einwilligung eines andern nicht bedarf. Lipperts Daktyliothek kann von jedem Besitzer derselben, der es versteht, nachgeahmt und zum Verkauf ausgestellt werden, ohne daß der Erfinder derselben über Eingriffe in seine Geschäfte klagen könnte. Denn sie ist ein Werk (opus, nicht opera alterius), welches ein jeder, der es besitzt, ohne einmal den Namen des Urhebers zu nennen, veräußern, mithin auch nachmachen und auf seinen eigenen Namen als das seinige zum öffentlichen Verkehr brauchen kann."

back door for trademarks and trade secrets. Since Kant does not even mention once other intellectual property rights, he is likely not to consider them as being equal to copyright and patents. As mentioned in the introduction, the term 'intellectual property' (and thus the conception of forming a group out of the different fields of intellectual property) is a product of the 20th century. Therefore, it is valid to argue for trademarks with the help of Kant's metaphysical science of right. An argument in favour of these rights in trademarks would include the acceptance of the general community to allow a monopoly (as it is in the nature of trademarks), which could be given in the form of written laws. However, it is more likely that Kant would have treated trademarks similar to other artworks. Thus, they would not enjoy special intellectual property protection. He would let it to the rules of fraud to prevent a misuse of trademarks.

In the case of copyright, Kant's approach acknowledges a small right for the creator of a text. The author's name and his discourse are tied together firmly. According to Kant, the author can forbid a reprint of the discourse under the author's own name; the print needs permission. But the discourse is considered to be original within very limited boundaries only. As soon as the author's work has been sufficiently manipulated by someone else, it is not the author's discourse any more and therefore free to be published.[70] For Kant, a translation is not the work of the original author any longer and therefore free to print, even if the thoughts are the same. [71] It is a new discourse by another author. Therefore, we can see that the author has a right to prevent the reprint and publication of the discourse only as long as it remains unchanged.

3. Kant: Summary

Kant's work does not help to explain today's characteristics of copyright such as limited existence, or the public domain. He does not distinguish between an idea and its expression, even if quantity does matter for him, since in his opinion, a discourse must contain at least a few pages.[72] Presumably, he would not grant a copyright for a shorter text. His explanation that an author loses the right in a discourse, if it is changed in a way that would make it unlawful to print the text under the name of the original author, does not really help to determine exactly under which conditions and circumstances a discourse is transformed into a new one.[73] On the other hand, his work offers a radical stance towards works which have been changed only slightly. According to Kant, works belong to the 'new' author after only the slightest change has been made. This kind of reasoning is illustrated by the Kantian example of the translation mentioned above.

The situation is different for other artworks. The creator of a painting, for example, can only claim a right in this painting as long as it has not been sold. It is not a vessel for a thought like a book, since other artworks serve representational purposes only: as a result, there is no equivalent to an author. According to Kant, these kinds of artworks are nothing but an 'opus', which can be sold only as a whole because no other right besides the real right in the object itself exists.[74] Kant applies the same

70 Loc. cit
71 Loc. cit. 87
72 Kant (note 50), 129
73 Kant (note 57), 86
74 Kant (note 50), 130

reasoning to patents. For him, they do not constitute a discourse and thus, do not express a thought. Therefore, the name of the creator does not have to be mentioned. Hence, they are free.[75] For Kant, it does not matter whether or not they have a typical style, whether or not one can recognise a work as the work of a specific painter. They simply do not carry a specific thought. When the name of a painter or an inventor is mentioned in the context of their creation, it is a mere coincidence. The discourse is the only creation that obliges a person who wants to make use of it to mention the name of the author.

In order to formulate an intellectual property theory based on Kant, one would have to accept his tight constraints of what constitutes an intellectual good. The gist of his intellectual property theory is that there is no intellectual property besides the right of an author to control the publishing of his discourse in its original form. A particular law for copyright does not seem to be necessary for Kant, since the right for interdiction of a reprint already results from the general rules of law.

III. Michel de Servan

Michel de Servan mentions a new aspect of intellectual property. His two essays on this topic were published in 1783 and 1784.[76] Servan does not care about other forms of intellectual property than literary property. Indeed, he is concerned about just one problem in particular. Servan asks why the property of a letter belongs only to the author, breaking new ground by assuming that all letters are part of a correspondence. Servan derives this idea from considering the dangers of publication. He compares the ephemeral conversation of a limited amount of interlocutors with the perpetuated correspondence accessible to an unlimited amount of readers through printing. In a correspondence, both sender and recipient influence the content of the letter. Therefore, according to Servan, the publishing right of letters should not be at the sole discretion of the author. He argues that because of their special relationship, both recipient and author should own the letter together.[77] He uses this principle to condemn the violation of the epistolary property ranging from the use of letters in the courtroom to the posthumous publication of an author's letters. He concludes by stating that it is the monarchy's responsibility to protect the privacy of correspondence.[78]

For the first time we encounter the possibility of more than one author and owner of intellectual property. This is a fundamental break with the common concept of the author as represented by one person only, as understood by Kant. Servan argues that even someone who constantly receives written documents without ever contrib-

75 Kant (note 57), 86

76 The titles show that during his time there was no need for easy-to-remember titles: The first one is named '*Réflexions sur le Confessions de J.-J. Rousseau, sur le caractère et le génie de cet écrivain, sur les causes et l'étendue de son influence, enfin sur quelques principes de ses ouvrages*' (1783), while the second one is titled '*Commentaire sur un passage de livre de M. Necker, ou éclaircissements demandés à Messieurs les commis des postes, préposés à décacheter les lettres*' (1784).

77 Servan, *Oeuvres choisies*, Vol. 2, p. 408, quoted in Dena Goodman, Epistolary Property: Michel de Servan and the Plight of Letters on the Eve of the French Revolution, in: *Early Modern Conceptions of Property*, ed. by John Brewer, et al., 1995, 347.

78 Loc. cit. 351

uting to the correspondence himself enjoys a property right in the letters he received. However, this situation has to be distinguished from a dialogue, which always combines answers and questions. Usually, a question has an impact on the way the answer will be formulated. Therefore, the answer is closely related to the question and may result in admitting the person asking the question to claim certain property rights. Servan expands his train of thoughts along the fact that a letter is usually created with a certain person to receive it in mind, which allows the recipient to claim property rights in the letter as well. In Servan's opinion, the fact that the recipient may claim a right in the received letter does not mean that the recipient needs to be given a chance to actually influence the letter beyond his or her general behaviour. Given this condition, Servan grants a right to the recipient.

In order to explain this in greater detail, one may use the argument of identity and knowledge. This approach offers a way to validate Servan's idea of the context-related distribution of intellectual property right. We would have to argue that a person is the sum of his or her own characteristics. This is not only the body, but also the mind with all its ideas, thoughts, and qualities. The behaviour and communication of an individual with the outer world defines this person as well. A person's identity depends on the reaction to and of the outer and inner worlds. Consequently, an element of identity is hidden in any reaction of the outer world to this person. A person has rights in his or her identity and knowledge, even property rights. It is the state developing and shaping the nature of property rights. While it is very difficult to grant property rights in simple reactions of other people to one's own behaviour, there is a chance to grant rights in property (which comes close to the labour-oriented theory of Locke) and intellectual property, since the state has an immediate influence on these rights. When someone has an influence on another person's work, for Servan the former should have some rights in this work, since at least one element of the former's person identity becomes part of the work. Following this argumentation, one gains the impression that the focus is not on property theory, but on personal rights and the private sphere. Servan himself does not hold on to such an individualistic argumentation. He is concerned about the citizen as a subject of laws. Context matters to Servan. He believes that a text is always written in and the product of a context and this context creates special rights in an intellectual good. Based on the duty of the state to protect the liberty rights of its citizen, the state is obliged to grant its citizens rights in an intellectual property only if it relates to these liberty rights. Thus, the state's obligation to protect the privacy of letters is in order to guarantee civil peace. The aspect of civil peace is from special interest, since pamphlets were among the most popular forms taken by anonymous authors during the French Revolution.[79] If the 'recipient' of such a pamphlet was to own any rights in a public response as such, he could decide how to deal with it, since the original author chose to stay anonymous. According to Servan's theory, the recipient would be the only one holding property rights in the text.

In regard to today's intellectual property, one could extend Servan's idea – that anyone involved in a dialogue should have permanent rights in the dialogue – to justify the limited ownership in an intellectual product. When an author creates a text or a painting, his efforts are based on knowledge received from society. Therefore, an author participates in benefits from the efforts and work of society as a whole. Thus,

79 Loc. cit. 345

society may hold some shares in a work of an author: the efforts of society are part of the author's work through shared knowledge. According to Servan, the author cannot be allowed to be the only one holding property rights, but has to share it with everyone who is involved. This imperative is in accordance with the function of intellectual property rights. These rights mainly have the function to exclude non-owners from actions like copying a work. In the beginning, the most involved persons should exercise these rights. The right of exclusion cannot be exercised against the persons who are involved in the process of creation, since they hold the right. For that reason, the right weakens with the amount of people involved, because the right cannot be exercised against them, but only against the rest of society. If the whole society holds the right in an intellectual good, nothing of the right of exclusion is left, since no one can be excluded under these circumstances.

The limitation of intellectual property rights in time offers a way to understand Servan properly. Society can exercise its rights in a certain product after a limited period of time. Before, the person related most closely to the work should exercise the rights in the product. This is primarily the author, but can be extended to the recipient. The state is responsible for drawing a line between those persons owning a product, thereby authorised to exercise a right, and those who cannot claim ownership. According to Servan, the criteria for the lawgiver ought to be involvement in the process of creation, but not to be the aspect of single authorship.

One can apply Servan's scheme to other artistic works. Any bust or even a web page is intended to communicate a message and therefore targets a certain addressee. Servan's approach does not work with monologues, for example a diary. Servan limited his analysis to letters and was not aware that it could be applied to other intellectual goods as well. His concept does not work with patents and trademarks, since both do not address a specific addressee. Servan's approach to literary property does not offer a sophisticated theoretical background like the theories of Locke or Kant, but it shows aspects of intellectual property, which are of the same interest to understanding intellectual property as the theories of other philosophers. Servan combines utilitarian elements with a personal-right theory. Of special interest is the idea of acknowleding more than one creator, that is owner of an intellectual good, which goes beyond the typical contemporary understanding of an author.

IV. Georg Wilhelm Friedrich Hegel

Hegel attempts with his work 'Grundlinien der Philosophie des Rechts' [The Outline of the Philosophy of Right], first published in 1821, to give a coherent and systematic account of rights. He wrote his book in a time, when natural rights were no longer seen as a satisfactory final authority, thus provoking a critical review of the understanding of natural law.[80] His theory is an attempt to explain law by departing from an empirical facticity without reducing norms to facts.

80 Maletz in David Lamb, *Hegel*, 1998, 202

1. Basic outline of Hegel's theory

Hegel explores and moulds the concept of freedom and will, while embedding it in a social context. He is concerned about the problem how the free will can be realised. 'Will' stands for the whole personality in its conscious relation to its environment, to which the will is practically committed.[81] Hegel distinguishes two elements of the will. The first is the element of pure reflection of itself (§ 35).[82] It is not the knowledge of a particular thought, but of a thought in general. The second element is the aim of the will. Will is directed towards something; it cannot exist without an aim. As soon as an aim exists, something can be distinguished from the rest. For Hegel, this includes at the same time a restriction; when a person wants something, it is always specific. Conversely, without this specification, it is impossible to want anything, thus, to have a will, since to have a will requires the status of wanting something.

'Freedom' is the highest value concept in Hegel's political theory. Real freedom is only achieved for a concrete individual via the unification of objective and subjective freedom. To Hegel, law is an essential element of the free will. It constitutes the institutional framework in which the individual can exercise its legitimate rights and in which the individual can act freely (objective freedom). The autonomous activity of individuals (subjective freedom) depends on this framework. Conversely, this framework depends on the activities of the individuals. Freedom would be impossible, if human could not accumulate and dispose of the assets required to support their conception of the right and good life.[83] Without law, the realisation of freedom would be impossible. Hegel's philosophy does not work on a sole individual right. Freedom exists only in a system of reciprocal rights, granted by individuals to each other. Hegel introduces the concept of law in § 3, stating that the right is positive:

> "[L]aw properly speaking is right, or the free will, become positive."[84]

Law is positive as long as it corresponds with the free will and the freedom of the individual, in comparison to the understanding of positive law in legal positivism. Freedom is both the substance of right and its aim, while the system for right is the realm of freedom made actual.[85] Only free individuals can be subject to law. To have a right means for Hegel to be a person. It is the personality that involves the capacity for rights.[86]

Within this concept of law, personality and its ties to the free will, Hegel develops his understanding of property. In a social context, one is recognised as a person dependent on the ability to set the content of one's own will. A person can only be recognised if the free will is recognisable by other ones. For this an outer sphere of freedom is needed.[87] In this sphere, other individuals can see the strength of a will and its free-

81 György Markus, Political Philosophy as Phenomenology: On the Method of Hegel's Philosophy of Right, *Thesis Eleven* 48 (1997) 1, 7
82 Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, 1967. All references in the text are to Hegel's *Philosophy of Right*, unless specified otherwise.
83 Knowles in Lamb (note 80), 417
84 Maletz in loc. cit. 218
85 Hegel (note 82), 20
86 Loc. cit. § 36
87 Loc. cit. § 41

dom, if one's will commands things, which also may be commanded by another will. Hegel calls it property. Therefore a personality needs property to form an existence in the word.[88] Hegel explains how the structure of property-regulating systems derives from the conceptions of humans as persons, for example as possessors of will.[89]

> "A person must translate his freedom into an external sphere in order to exist as Idea."[90]

Therefore Hegel can declare in § 51 that "property is the embodiment of personality". As soon as person puts the will into something, property applies.

Since property is an expression of the self-determination of the will, it cannot be divided. Ownership means to own something in its entirety. Nothing can be left over which can be owned by another one.[91] Otherwise it would not be property, since it is its very nature to be 'free and full'.[92]

There is no prior determination to what can or cannot become property:

> "A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'."[93]

This includes all objective things. A subjective entity, for example an individual, cannot become property. It is also existential to have the ability to alienate property, provided the thing in question is a thing external by nature.[94] Alienation shows again the freedom of the will through property.

2. Intellectual property

Hegel continues to apply his theory of property to intellectual property. While his outline of a property theory is rarely illustrated with examples in general, he quite often gives examples out of the realm of intellectual property. Even in the comments and additions of the Philosophy of Right examples of intellectual property take a relatively big part.

How intellectual property comes into the world is explained in § 43. The possession of the body and mind, as achieved through education, study, and habit, exists as an inward property of mind. The mind has to externalise itself before a legal concept of property can be applied to the externalised:

> "Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them ..., and in this way they are put into the category of 'things'."[95]

88 The concept of personality is very complex; see Georg W. F. Hegel, *Grundlinien der Philosophie des Rechts*, 1996, first published in 1821, §§ 35, 36. Property is one condition of personality. I will not explore the other aspects of personality, since it is not necessary for the examination of property here.
89 Knowles in Lamb (note 80) 408
90 Hegel (note 82), § 41
91 Loc. cit. § 61
92 Loc. cit. § 62
93 Loc. cit. § 44
94 Loc. cit. § 65
95 Loc. cit. § 43

Thus it is the process of externalisation of the mind that creates an object of intellectual property. It is not necessary to apply the will to this object to own it, since the process of creation itself is sufficient to put the will in the object. Due to the fact that there is no restriction on what can and cannot be property, anything can become intellectual property as well. Given today's technical inventions, even the blueprint of animal life forms may turn into intellectual property.[96] However, something that has been already externalised cannot be a product of the mind and therefore not become intellectual property. When Hegel denies language-signs as an object of property this is due to the fact that they exist already within society. They are not a product of the particular mind because the mind makes only use of them.[97]

Locke and Hegel both state that it is the individual creating the work.[98] Locke emphasises the labour, which has to be invested to create property. For Hegel it is the will showing itself through production of the good. The will has to externalise its talents to create something from value. Even if labour plays a crucial role in Hegel's theory, it plays only a secondary role in the creation of intellectual property.[99] Hegel explains the concept of labour as something that is applied to the raw material delivered by nature.[100] It is not clear, whether the production of an intellectual good involves natural products. However, it would not make any difference, whether labour is involved or not: the creator can claim ownership in both cases.

After the externalisation of the talents, the creator enjoys free, full property in his creation (§ 62). Intellectual property can be abandoned by will, but to be abandoned, it must be externalised first. It is not before the sub-chapter C, 'Alienation of Property', that Hegel has a closer look at intellectual property.

What happens to a creation depends on the creator. If he sells it, he gives the complete property into the hand of his contractor:

> "If the whole and entire use of a thing were mine, while the abstract ownership was supposed to be someone else's then the thing as mine would be penetrated through and through by my will, and at the same time there would remain in the thing something impenetrable by me, namely the will, the empty will, of another. [...]- an absolute contradiction. Ownership therefore is in essence free and complete."[101]

This is a remarkable sequence in the intellectual property approach of Hegel, but only a logical consequence of his understanding of property.[102] It would follow that if the creator sells a creation, he cannot hold back any rights in the object. He can only sell

96 See Drahos (note 29), 78

97 See Hegel (note 88), amendments to § 68. Hughes reads Hegel based on the assumption that there is only one kind of intellectual property embodying personality, namely, artistic works, which are regarded as particularly close expressions of personality. See Hughes (note 38), 340. However, this assumption is incorrect. When Hegel speaks of property as the embodiment of personality, he does not only refer to artistic products.

98 In contrast to Foucault, as we will see later on.

99 Knowles in Peter Drahos, *Intellectual Property*, 1999, 194. Knowles applies the Master-Slave dialectic unsuccessfully. See also Hegel, *Phänomenologie des Geistes*, §§ 193, 194.

100 See Hegel (note 82), § 196

101 Loc. cit. § 62

102 It is therefore inexplicable, why Drahos in his interpretation of Hegel does explain the effect of the will and the externalisation, but does not mention the effect of the free and full property. See Drahos (note 29).

it completely. The new owner would be free to copy a purchased book, since he enjoys full and free property. He could do with the text what he wants, according to his property rights:

> "But besides this, the new owner at the same time [by taking possession] comes into possession of the universal methods of so expressing himself and numerous other things of the same sort."[103]

This does not satisfy Hegel. The result would be the end for almost any copyright. With the application of the concept of the value of a thing he attempts to overcome this result. For Hegel, the value is the worth of something in comparison to other things, and has a strong social component. In § 63 Hegel declares that the owner of a thing is eo ipso owner of its value as well as of its use. It does also apply to intellectual objects, with an important distinction: they do not have only one value, which is the worth of the pure material as specified within society. Hegel explains in § 69, why this is not the case for intellectual goods:

> "Since the owner of such a product, in owning a copy of it, is in possession of the entire use and value of that copy qua a single thing, he has complete and free ownership of that copy qua a single thing, even if the author of the book or the inventor of the machine remains the owner of the universal ways and means of multiplying such books and machines, &c. Qua universal ways and means of expression, he has not necessarily alienated them, but may reserve them to himself as means of expression which belong to him."[104]

In the remarks to § 69 Hegel speaks explicitly of two values, while the additional value of intellectual property is the copyright.[105] Someone can enjoy full and free property *even without* the copyrights, because the new owner does not need the second value, the copyright. Therefore the original creator can hold back the second value.

For Hegel, a printed book represents two values. The second value is not sold with just one copy of the book. If someone sells a book, he wants to gain not only the first value, but also the value of his ideas in money. An illegal reprint prevents the author from getting the full value of the book cashed out. According to Hegel, the second value depends on the taste and financial investment of the public. Hence Hegel places the intellectual property right within the market. He is not concerned about the literary or aesthetic aspects of a creation. An aesthetic value does not have any importance within his property theory (at least not here).

Hegel also investigates the case of plagiarism. The right use of a product of mind is to read it, as in the case of literary property. Given the situation that the reader may produce something, which contains the thoughts of the original author, Hegel declares that the original author can claim property rights in the new production, but not in any case. Hegel now introduces the form, which can change the status from being just a repetition of a former work to something, which is the own product of the new creator, even if he uses bits of information from the former work. It depends how much creativity applied to the original work influences the production of the new piece, i.e. the re-formation. In § 68 he declares that every artistic reproduction, since it is the

103 See Hegel (note 82), § 68

104 Loc. cit. § 69

105 Hegel (note 88), amendment to § 69: "Es ist zweierlei Bestimmung, – Benutzung, – was ist die direkte Bestimmung des Verkaufs eines Exemplars? Verkauft nur das, was und insofern es Gedanken vorstellt – diesen Wert, – nicht den andern Wert, der die Vervielfältigung in sich schließt – dieser Wert ein weiteres Vermögen – [...]".

work of another artist, must contain necessarily so many individual characteristics that it cannot be seen as a property of the original painter. On the other hand, the form of a book is mechanical. Therefore, a reprint of a book cannot turn into a new art piece. According to Kant, it is not an artistic reproduction.

It shows that Hegel thinks in terms of the practical process of generating a piece. However, especially for scientific works it would be quite difficult to produce something that is not based on former texts.

The legal implications from this result are different. The form is individual for every piece of mental production. Hegel declares that it would be impossible to give a precise principle of determination for the form:

> "To what extent is such repetition of another's material in one's book a plagiarism? There is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation. Hence plagiarism would have to be a matter of honour and be held in check by honour."[106]

To avoid an unpredictable or erratic application of legal rules, every slightly changed copy has to be regarded as a new form. For Hegel, it has to be a question of honour to avoid plagiarism, even if it is not a very powerful force.

One may think that Hegel offers the solution of protection through honour because his theory deals on such a rational and universal level, that he is not concerned about a solution for an individual case. In fact, he is concerned about any particular case; otherwise he would not attempt to find a principle that would finally settle the problem. But he sees the insufficiency of any principle to offer a decisive norm as well as a just sanction on the level of application. Since for him neither law nor any other principle may offer a just solution in general, he opposes the application of any legal norm at all. Any imposed legal norm would have a random application, which is not only unjust, but also opposed to the characteristics of legal norms. Since he cannot guarantee the same application under the same circumstances, he prefers in this situation another, more just, concept.

Additionally, he might have chosen the idea of honour because it fits very well into the development of copyright, which can be shown in the history of copyright in musical pieces. During the 16th century it was well accepted that a musical piece could only be performed by naming the author. It was regarded as dishonourable to claim the composition of someone else as a self-written composition. Thus, it was a question of honour to accept and publicise the link between a work and its composer's name.[107]

The idea of preventing plagiarism with the help of a concept of honour is not convincing. Hegel developed a strong principle for his comments on plagiarism with his theory, while the concept of honour hovers freely as a moral value above his former theory. A moral protection would not be a problem, if he would not impose on honour alone the task to control plagiarism. In the same sentence he refutes the idea that law could fulfil this position, because no general rule could be applied. Even if Hegel accepts a law against the copying of books, he does not accept it to secure the (second) value. He is aware of the limited value of a copyright law without a law against plagiarism. Despite this, he cannot accept a law against plagiarism, because it would be subject to indeterminate interpretation.[108]

106 Hegel (note 82), § 69
107 Pohlmann 1962, (note 8), 41
108 Hegel (note 82),§ 69

In regard of the limited time until a right in an intellectual good expires, Hegel gives a particular reason, why intellectual property ought to become part of the public domain. To own something, the will is a necessary element. The will, however, is determined through use, employment or other events in time. Without an active will, the thing falls to the common. Hegel does not exclude things, which exist only through the activity of a person. All things can get lost due to the limited duration of ownership. In § 64, he speaks of two forms of intellectual property: the right of the state in public memorials and private property, which a family of an author has inherited in his publications. From the latter we can follow that as long as an author is alive, he enjoys full rights in his publications. It seems also crucial for Hegel in this context that an author can change his work in as many parts as he wants as long as he is alive (§ 64 comments). The reason for this is that as long as the author is alive, his will is manifest.

Hegel applies his concept of the necessity of a constant will also to the property of a nation in public memorials. Without the memory of the nation and the people the state would lose its right in the public memorials. The diminishing will is one reason for loosing the right of private property in the inherited author's work:

> "If [public memorials] lose [the spirit of remembrance and honour], they become in this respect res nullius [...]. The right of private property which the family of an author has in his publications dies out for a similar reason; such publications become res nullius in the sense that like public memorials, though in an opposite way, they become public property, and by having their special handling of their topic copied, the private property of anyone."[109]

As a second reason, it is also the adaptation of society that enhances this process. Over a certain time, everyone becomes familiar with the topic. This is a typical feature of information. It spreads all around, but it cannot lose its characteristics, because otherwise it would be different information.[110] Everyone appropriates the topic, thus it becomes part of the memory of society. Hegel does not mean that now anyone has copyright in the topic. Otherwise the private property of anyone would be a contradictory expression. It belongs to the shared knowledge of society, and it would be like a denial of culture to deny individuals to use the topic, i.e. the work. This is the reason, why even the vigorous enforcement of intellectual property rights through today's authors' trusts, a clear expression of will, cannot avoid that the intellectual property becomes part of the common. However, for Hegel this process takes quite a while, and cannot take place before the death of the author. Until the death, the will of the author cannot be overruled. Afterwards, it is the slow process of appropriation that overcomes even a pursued copyright.

The diminution of the will stands in contrast to an interpretation of the Lockean approach, which does not see the necessity for a work to become part of the public domain as long as the provisos are secured. The Hegelian approach alone uses the diminution of the will to change the status of a work from a protected, individually owned work to a work that is part of the public domain.

The objects of the Hegelian copyright enjoy only a very small protection. As long as the original owner is not deprived of the second value, individuals can use their copies of an intellectual good to whatever the full and free property allows. The scope for

109 Loc. cit. § 64

110 For this reason, information is compared to viruses and to organic life forms. It is difficult to restrain the spread of information. "Information wants to be free."

what a subsequent owner can do with his property depends on the concept of the second value.

Different examples may illustrate the problem of defining the concept of the second value. One could re-engineer the source code of software, which is forbidden under current law. It is more problematic with, e.g., an OEM-license which allows the use of a software program only on a specific computer. Imagine the case that the buyer of the software package installs the program on his home computer and also on his computer in the office. Does this violate a condition of the purchase, which would be invalid due to the free and full property, or does it violate the second value of the program? Unfortunately, Hegel offers two ways to define the actual content of the second value. First he says that value corresponds to the investment made, either in time or in money (§ 58 comments). On the other side he says in the comments to § 64 that the value depends on the selling and the taste of the public.

If we apply the first definition for value, it would indicate a limited use until the owner of the second work has regained his investments. Afterwards the work would be free and no restrictions to the reproduction could be set, even if the will may give the author moral rights. The second definition that is to make the value dependent on the selling and the taste of the public cannot help, either. It would make the second value a permanent variable compared to the fixed second value of the first approach, but would also fail to clarify whether the owner of the software violates the rights of the creator or not. For a definition of value its borders must be clear, otherwise the definition is useless. The second definition fails to clarify when the value is affected and when it is not.

3. Hegel: Summary

Hegel has a very broad concept of intellectual products, including inventions. With his approach, almost every mental product can be legally protected. The state can own public monuments and their intellectual value. Excluded are those things (he classifies mental products as things, which has not a philosophical, but a legal implication), which are already known to the public (for example externalised through someone else). If an intellectual product is simply a reproduction of an idea someone expressed before, the former creator owns also the reproduction.

His theory explains the creation of intellectual property embedded in his philosophical theory of the free will. He also explains how someone can sell an object without selling the intellectual value as well. Moreover, his approach is useful to understand the time limit of property rights in intellectual goods, and extends to the question, why the right in one's work cannot end before one's death. This indicates why some works, which may become part of the general culture within days, are still protectable. On the other side, he fails to clarify the range of protection; moreover he talks about useless tools of protection and prevention like the more historically interesting ethical instrument of honour. The protection is gone as soon as the product is slightly changed or if a copy requires own artistic efforts. Hegel also fails to give an understandable account of plagiarism and of modified works. It seems that his understanding of paintings and other works in the context of plagiarism has been strongly influenced by the debate about the author, which took place two decades before he wrote his piece, as explained above. Maybe he would have another opinion about how much new artistic effort has to be invested to produce a copy of a painting, if he would have known the invention of the photocopy machine. However, it is probably

the most complete approach towards a theory of intellectual property, which can be found up to today.

V. Michel Foucault

The property theories of Hegel, Kant and Locke are based on a strong connection between the author and his work. Either the author's will or his efforts give him the right to own the work. Society plays a secondary role. Foucault offers another way of how to understand the role of society in intellectual property and the ties between the author and his work; he emphasises the role of society and diminishes the importance of the creation process. In his essay 'What is an author?', first published in 1977, Foucault does not mention the term 'intellectual property' once. Instead, he is concerned about the relationship between a text and its author, which in fact, may have an impact on a theory of intellectual property.

1. Defining the Function of an Author

Foucault distinguishes between the socio-historical analysis of the author's persona and the problem of constructing an author-function. While the former is important for the literary discourse, the latter has a juridical impact.[111]

The author-function is the essential element of Foucault's essay. Simply, the author-function is the process when the name of an author is applied to a text. The author-function serves "to characterise a certain mode of being of discourse", while Foucault compares the name to a trademark.[112] According to him, the author-function does not work with an author's name just to indicate quality. The name has the function of a signal to society, indicating that something must be received in a certain mode. Generally, the name shows the status of any discourse within a society and a culture. Therefore, also the work to which the name has been applied must receive a certain status.[113] The author-function gives a work the privileged moment of individualisation of ideas;[114] it is the moment of a distinct awareness of the idea and its realisation compared to others.

Foucault compares the role of an author engaged in the arts with the role of an author in the sciences. In the sciences, the author does not have any particular function, because the value of the work depends solely on the scientific value of the work itself. In the arts, however, it is the author and the author's name dominating the value of the work. According to Foucault, this condition has not been the same over the course of the last centuries. In medieval times, the value of a scientific theory depended on the author. The example indicates that Foucault does not consider the author-function as being fixed. For him, it is a variable in two ways; first, the general way of application of an author-function can change within time, and second, the status of an individual work can rank differently with time.

111 Brad Sherman and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law*, 1994, 10
112 Michel Foucault, What is an Author?, in: *Textual Strategies: Perspectives in Post-Structuralist Criticism*, ed. by Josuâe V. Harari, 1979, 147
113 Loc. cit., 147
114 Loc. cit., 141

For Foucault, the author has the function of a transmitter of the ideas of society. Since it is not the author who creates his own property, but the society, he is dependent on the opinion of society. The property of an author in his work is fragile.

Foucault decreases the importance of the role of the original creator for a work in favour of the role of society. When Foucault talks about the author-function, he refers to something that society applies to a text. The author is not able to apply the author-function to a text by himself, even if the author is the only one who could be linked to. It does not need much effort to apply the author-function. Even if Foucault does not explain this process in much detail, one can imagine that an understanding of this process exists within society. For example, the name printed on the cover of a book may be sufficient. For Foucault, the author may create a work, but does not precede it:

> "The author is not an indefinite source of significations to fill the work; [...] he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction."[115]

This outcome should be sufficient to encourage the society to make use of the author-function.

While for Hegel and Locke intellectual work comes into being by creation alone, Foucault presupposes a second act. The second act is to apply the author-function, which can only be done within and through society. Foucault's approach is a remarkable turning point, since it implies that it is not just the author creating intellectual property. It is taken out of the hands of the individual whether someone creates something that may be intellectual property or not. Society defines what intellectual property is simply through applying the author-function, even without the application of law.

Thus, we can estimate the importance of society particularly in an intercultural context. A contemporary Western audience may fail to grasp the artistic character of a Japanese Kabuki-theatre play or to recognise the value of an African painting. Vice versa, it is unlikely that indigenous people would enjoy a play of Molière without ever having been exposed to Western culture.[116] Therefore, the context of society lifts an artwork into the status of being an artwork.

Foucault is concerned about the idea of a 'work' as well.[117] According to him, when a society recognises the link between a work and an author, a work is created. 'Text' and 'work' have a distinct use and meaning. Without applying a name to a text, it would not have any value within society. Furthermore, it would not even be a work. The acceptance of someone as an author alone is not sufficient:

> "Even when an individual has been accepted as an author, we must still ask whether everything that he wrote, said, or left behind is part of his work."[118]

Before this happens, the work may have been a written text. But a text alone cannot be seen as a piece of work. Foucault gives examples of texts, which are regularly classified as a 'work' or not. While a poem is something that can be regarded as a

115 Loc. cit., 159
116 Palmer (note 17), 848
117 Foucault (note 112), 143
118 Loc. cit., 143
119 Loc. cit., 148

work, a laundry list does not have the same status. The same applies not only to the status of a text in general, but also to its boundaries – where it starts and where it ends. While some deleted passages may be regarded as part of the work, others are regarded as a by-product without any chance to be classified as part of the work. At this moment, law becomes an object as well. When Foucault talks about the privileged moment of individualisation of ideas, he refers to the moment when law gets an object specified sufficiently for protection, even if it may be a laundry list.

For this reason an intellectual property theory based on Foucault does not need objective criteria to define the invisible border between an idea and the expression of an idea. The definition can rely solely on the opinion of the society and give a case-by-case decision. As a functionalist theory, this approach guarantees the correct result for definition of intellectual property just with the help of discursive procedures. Foucault's approach seems close to theories of Habermas or Luhmann. Both do not care much about the input, but rely on the correct process to get the correct result. For Foucault, it is the process of the application of the author-function. It is the opposite of Hegel's theory, who sees the crucial act of creation given and made by the author.

According to Foucault, it is not only necessary that a text has an author, but also has to be published before it turns into a work. In his opinion, not every text can be seen as work. Bringing the text into discourse to the recognition of society establishes and forms the work. The process of publishing precedes the application of the author-function:

> "A private letter may well have a signer – it does not have an author; a contract may well have a guarantor – it does not have an author."[119]

However, it does not matter in which context the text appears first. Therefore, public access to a text can be seen as a pre-condition for the application of the author-function. For this reason, Foucault is probably the only philosopher who would deny a private letter a copyright. Since the society applies the author-function, it must have access to the text. Consequently, a private letter cannot enjoy the status of a work. This does not mean that a private letter cannot be protected by law: as soon as someone would publish the letter, the society can apply the author-function to it and thereby, legal protection of the letter is provided. Additionally, other laws can help to protect the private sphere of a letter: it does not take copyright law.

Foucault does not take this step to legal questions, but we can see the functions of trademarks, namely distinction and identification, lying behind the author's name and the author-function.[120] Interestingly, the returning motive of tribal signs is reflected in the author-function. Like the name of the author, the tribal sign would be meaningless without the recognition of society (the tribes). Other philosophers do not attribute any particular funtion to the name, but consider the application of the name to the work as a natural by-product of the process of creation itself. In a theory interpreting the author's will or labour as the elements justifying intellectual property, the author's name

120 The importance of an affixed name can be traced throughout history, e.g. the French edict of 1551 stated that without affixing the author's name it was forbidden to print a text. The author's name does not only work within a discourse;, it has also been used as a weapon against the spread of heterodox texts. To some extent, it is possible to say that the idea of the individualistic author as the bearer of property rights was introduced as a tool for monarchist regulation. See Sherman and Strowel, (note 110), 18

is insignificant. A sign does not work in a world with only one human being. Therefore, the author's name would become meaningless under those circumstances as well and intellectual property would not exist. For Locke or Hegel, this would not make any difference: the creator of a text would own this text even if they were the only person on earth. Foucault takes a different view, and a look at our world today supports his approach. The author-work relation is institutionalised in our system of marketing cultural products. Every great name, like Errol Flynn or Diego Velásquez, becomes a kind of a brand name.[121]

The essay by Foucault reveals differences between the Anglo-Saxon and the continental European law system, which turn out to be quite similar with regard to the missing element of an author-function.[122] The continental European system focuses on the creation process almost entirely; a personality-based theory forms the foundation of German and French copyright law.[123] The approach brought the invention of moral rights, exercised by the author. In contrast, the Anglo-Saxon copyright never recognised the status of a writer as an author. For Foucault, this does not make a difference, since both approaches fail to recognise the role of society within the process of changing the status of a text to that of a work.

The role of society leads some authors to see a "faulty appreciation" of the relationship between artist, artwork, and audience in moral rights.[124] For it is on the audience that the artwork depends for its continued existence, and not on the artist. Although society plays an important role, Foucault does not deny the artist a right to influence the perception of his work within society. Indeed, it may even be the artist's task to insist on a specific perception to change the stance of society towards his artwork. The condemnation of moral rights cannot be concluded from Foucault's essay. They do not conflict with his approach.

2. Foucault: Summary

In his essay, Foucault does not go beyond the construction of the author and the work. Foucault speaks of the author in a literal context only, but still his theory can be extended to the whole area of copyright and trademarks. All works within this area enjoy the status of being recognised with a particular creator, be it an artist or a company. Therefore, a modified author-function (in regard to other arts) can be applied. Patent law may fail, since society does not recognise the inventor through a discourse, but through the law alone. Foucault's approach does not answer the question whether or not an author should be financially rewarded for his work. While Hegel based his theory on the value of a work, Foucault does not care about any value besides the value in a discourse. It is unlikely that he had an impact on intellectual property theory in his mind, when he wrote his essay. On the other hand, Foucault himself linked the author-function to the juridical and institutional system and mentioned the fact that the function of the author may have an impact on 'owning' a text.[125] However, he does

121 Rose (note 39), 1
122 David Saunders, Approaches to the Historical Relations of the Legal and the Aesthetic, *New Literary History – A Journal of Theory and Interpretation* 23 Iss. 3 (1992) 513
123 Palmer (note 17), 820
124 Loc. cit. 848
125 Foucault (note 112), 153

not have any other intention besides explaining the situation of an author in a discourse, since he is concerned about the literary implications of the notion of an author rather than about the legal implications.

C. Conclusion

All five philosophers have a different approach to intellectual property, since naturally, they accord with their respective system of philosophy. Nonetheless, we can see links between all their theories and today's intellectual property law. While Locke provides the Labour-dessert character, it is Hegel who provides moral law aspects, which are still prevalent today. The exemple reflects the patchwork character of the present intellectual property law. It seems that today's law is a compromise and tries to integrate almost all ideas, although utilitarian and Lockean ideas are among the most prevalent.

However, today we have several problems, which cannot be explained by the governing utilitarian approach to intellectual property. A purely utilitarian approach is weak, because it cannot deal with dimensions of intellectual property beyond the economical. Especially new technologies and ancient cultures represent constant challenges to intellectual property law. For example, indigenous groups claim rights in intellectual goods which have been invented centuries ago, but are of spiritual value and considered to be a collective property of their society.[126] Another challenge can be found in computer generated texts, which are independent from the creator of the program. It is almost impossible to name an author for the computer generated texts.[127] To master these challenges, it may help to look at the ideas of some of the philosophers discussed above. The ideas of all philosophers would have to be taken into account. Foucault may see the work of a computer as something unprotectable, since the author-function does not work, but on the other hand, the idea of more than one author (and therefore intellectual property belonging to a collective) may fit into his concept.

Furthermore, intellectual property itself is currently at stake. While some authors see the end of copyright close at hand, due to the new methods of digital copying, others warn of the advent of complete digital control.[128] However, as this overview of intellectual property in philosophy has shown, its concept is deeply rooted in our contemporary understanding of the world. In addition, it has shown that the total control about any ideas and expressions, even if technically possible, cannot be justified by any philosophical arguments. Consequently, the conclusion is justified that there is no radical solution as how to modify intellectual property law in order for it to walk the fine line between freedom, control and protection. Intellectual property law will always be a compromise between numerous different philosophical approaches and, indeed, ideas.

Anschrift des Autors: Daniel Stengel, MA (USyd), Bergstr. 69, 10115 Berlin, Email: dst@daimos.com

126 Rosemary J. Coombe, *The Cultural Life of Intellectual Properties : Authorship, Appropriation and the Law*, 1998
127 Selmer Bringsjord, *What Robots Can and Can't Be*, 1992
128 Lessig (note 18)

I would like to thank Dr. Dugald McLellan, Friederike Kärcher, MA and Dipl.-Kffr. Valerie Feldmann, MA for their support.