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Two Ways of Looking at a Printed Book

RETHINKING COPYRIGHT IN MASS DIGITISATION

On 18 April 2016, the US Supreme Court declined to hear the appeal against the Second Circuit Court of Appeals' decision in favour of Google's mass digitisation of books and other printed matter,[1] thereby conclusively affirming Google Books and the Library Project as involving the 'fair use'[2] of copyrighted works.[3] As authors, the plaintiff-appellants owned copyrights in works that had been digitally scanned and made publicly available for search and snippet view without their permission pursuant to bilateral agreements between Google and its partner libraries. According to the decision, however, Google's copying of the literary works for those 'transformative purposes'[4] fulfilled the copyright system's broad objective of advancing public knowledge by making available to the public significant information about those works without offering any effectively competing substitute for each of them. In other words, it was a fair use of works that did not require any authorisation from the copyright owners – a defence against alleged copyright infringement recognised in section 107 of Title 17 of the United States Code.[5] The 'exclusive control over copying of their works'[6] granted to authors under the copyright system as an incentive to produce those works for public consumption did not restrict the

[1] The decision is *Authors Guild v Google, Inc* No. 13-4829 (2d Cir. 2015).

[2] The doctrine of fair use is codified in Title 17 of the United States Code, section 107. For the Supreme Court's recent discussion of fair use as applied to Google's partial copying of a computer program, see *Google LLC v Oracle America, Inc* 593 U.S. 1 (2021).

[3] Adam Liptak and Alexandra Alter, 'Challenge to Google Books Is Declined by Supreme Court', *The New York Times*, 18 April 2016.

[4] *Authors Guild v Google, Inc*, 16. The meaning of 'transformative purpose' is based on the Supreme Court's discussion of the four statutory factors of fair use in *Campbell v Acuff-Rose Music, Inc* 510 U.S. 569 (1994).

[5] Title 17 of the United States Code, section 107.

[6] *Authors Guild v Google, Inc*, 12.

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technology company's creation and exploitation of a universal database of digitised books.

For readers drawn to a renewed Library of Alexandria, this authoritative recognition of Google's mass digitisation project as fair use might come as a relief from the strictures of modern copyright. In October 2009, when Google was still in the midst of negotiating a final settlement with the Authors Guild and the Association of American Publishers, its co-founder Sergey Brin had justified the project as fulfilling the double goals of preserving and improving accessibility to the world's cultural heritage in books.[7] The thrice burning of the ancient Library was cited as one of the prime historical instances of the fragility of material books, which was a condition to be overcome by Google's and its partners' assembly of 'a [digital] library to last forever'.[8] Once mostly confined within elite academic libraries, the vast majority of literary works not yet in the public domain could now be scanned, indexed and made publicly searchable without any risk of infringing copyrights held by their authors or assignees. One of the most prominent legal scholars to have long argued for both the lawfulness and desirability of the Google Books search function is Lawrence Lessig.[9] When the project still bore the early name of 'Google Print', Lessig already extolled its potential to radically democratise our access to knowledge and culture: 'Google Print could be the most important contribution to the spread of knowledge since Jefferson dreamed of national libraries. It is an astonishing opportunity to revive our cultural past, and make it accessible.'[10] With all the world's books increasingly copied to a single database, Google promises to facilitate access to these books by any user in possession of a digital device, including those underserved by analogue copies for geographical, socio-economic or other reasons. As understood by the techno-futurist Kevin Kelly, however, the mass digitisation of books is but preparatory for the expedited user-led processing of books, which has to some extent already been enabled by the digital innovations of link and tag: 'The real magic will come in the second act, as each word in each book is cross-linked, clustered, cited, extracted, indexed, analyzed, annotated, remixed, reassembled and woven deeper into the culture than ever before.'[11] In Kelly's view, the ultimate significance of Google Books extends from its potential to collapse the instituted boundaries between literary works: 'the universal library becomes one very, very, very large

[7] Sergey Brin, 'A Library to Last Forever', *The New York Times*, 8 October 2009.
[8] Ibid.
[9] Lawrence Lessig, *Is Google Book Search 'Fair Use'?* (YouTube, 16 January 2006).
[10] Lawrence Lessig, 'Google Sued', *Lessig Blog Archives* (blog), 22 September 2005. Whilst initially endorsing the terms of the Google Book Search settlement for securing greater access to books than if the lawsuit were won by Google, Lessig withdrew his support for the revised proposal a year and a half later, mostly on the grounds that it excessively regulated and juridified our access to culture: compare Lawrence Lessig, 'On the Google Book Search Agreement', *Lessig Blog Archives* (blog), 29 October 2008; and Lawrence Lessig, 'For the Love of Culture', *The New Republic*, 26 January 2010.
[11] Kevin Kelly, 'Scan This Book!', *The New York Times Magazine*, 14 May 2006.

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single text: the world's only book'.[12] Alexandria 2.0, 'a single liquid fabric of interconnected words and ideas',[13] could seem less distant a future with the present balance struck between the putatively competing interests of proprietary authors and the public at large, which ostensibly favours the latter.

Nonetheless, Google's mass digitisation project has also been criticised for its fundamental challenges to the tradition of authorship, the copyright system and the global economy of books, information and culture, which persist despite the latest judicial decision. Just a month after Kelly's essay was published in the supplementary magazine to *The New York Times*, John Updike's reply would appear in the newspaper.[14] In the novelist's view, Kelly's prophesised dissolution of the borders between books implied 'the end of authorship'[15] – a tradition of communication between authors and readers prescribed by the written word and print technology. Against the prospect of 'a huge, virtually infinite word stream accessed by search engines populated by teeming, promiscuous word snippets stripped of credited authorship',[16] Updike affirmed the printed book's 'old-fashioned function of … communication from one person to another'.[17] The print medium affords an intimate relation between author and reader that threatens to be permanently disrupted by the next suggested phase of the digital revolution. 'The printed, bound and paid-for book … is the site of an encounter, in silence, of two minds, one following in the other's steps but invited to imagine, to argue, to concur on a level of reflection beyond that of personal encounter.'[18] Google Books is a medial event that spurs the obsolescence of our print-based understanding of authors and readers, no less than that of booksellers and other intermediaries on whom we have traditionally relied for the production and circulation of books.

Scholars of book history, media studies and law have questioned the desirability of Google's project by pointing to some of its anticipated adverse effects on the global information economy and the modern institution of copyright. In Robert Darnton's view, as prescribed by the terms of the initial settlement agreement, Google Books unduly consolidated power in one company, leaving open the possibility of Google's prioritisation of its own private interests over the public good in the long run.[19] Notwithstanding the non-exclusivity of the agreements between Google and its partner libraries, Google would enjoy a de facto monopoly of access to information in the absence of real competitors. The company could favour profitability over access in the future, for instance, not only by charging for the use of its services but

[12] Ibid.
[13] Ibid.
[14] John Updike, 'The End of Authorship', *The New York Times*, 25 June 2006.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Robert Darnton, 'Google & the Future of Books', *The New York Review of Books*, 12 February 2009.

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further by setting high prices for institutional and consumer subscription licences. Siva Vaidhyanathan agreed with Darnton that public and university libraries were better suited for the mass digitisation and facilitation of public access to books.[20] Instead of letting Google secure an inordinate amount of competitive advantage in the global information economy, the public should finance and support libraries to accomplish the task of building the digital archive. For Maurizio Borghi and Stavroula Karapapa, the most troubling aspect of the project concerns not so much its colossal empowerment of a profit-seeking entity as its effective inversion of the copyright system.[21] In dispensing with the need to seek prior authorial consent for the copying and use of copyrighted works through licencing agreements with its partner libraries, Google has transformed copyright from an opt-in system of permissions into an opt-out system, where authors now have to ask for the exclusion of their works from digitisation and display. Google Books has, so to speak, 'turned copyright on its head'.[22] As suggested by Borghi and other commentators, if the case had been tried in other jurisdictions without any exception as broad as the US doctrine of fair use, it would have been unlikely that Google would succeed.[23] That Google Books has now been judicially legitimated in one regime only accentuates a basic tension between mass digitisation and modern copyright: analogue modes of copyright protection might not be as effective in, nor even suited to, the digital environment.

As suggested by the contemporary debate surrounding Google Books, digital technology is in the midst of transforming our dominant cultural–legal understanding of authorship and copyright. It was not too long ago when the legal fiction of the proprietary author, emergent from the historical conditions of late seventeenth- to early nineteenth-century Europe, was criticised for ignoring the manifold social realities of literary production.[24] The outcome of *Authors Guild v Google, Inc* might seem to reflect a further sidelining of the authorial figure, whose work can now be electronically duplicated, diced, displayed and subjected to the mostly hidden

[20] Siva Vaidhyanathan, *The Googlization of Everything (And Why We Should Worry)* (Berkeley: University of California Press, 2011), 169. Other than the antitrust problem, Vaidhyanathan raised a series of objections to the project surrounding user privacy issues, its de facto compulsory licensing system, the further commercialisation of the library space and the inadequacies of Google's search algorithms in regard to books: see Ibid., 149–73.

[21] Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization* (Oxford: Oxford University Press, 2013), 1–18.

[22] Ibid., 5.

[23] Ibid., 8. See also Paul Ganley, 'Google Book Search: Fair Use, Fair Dealing and the Case for Intermediary Copying' (Working Paper, 13 January 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=875384 (accessed 9 September 2024).

[24] See, for instance, Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"', *Eighteenth-Century Studies* 17, no. 4 (1984): 425–48; Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993); Peter Jaszi, 'Toward a Theory of Copyright: Metamorphoses of "Authorship"', *Duke Law Journal*, 40, no. 2 (1991): 455–502; Martha Woodmansee and Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC: Duke University Press, 1994).

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practices of data mining and computation without consent. Updike's hostility towards the liquefaction of formerly distinct works palpably extends from the writer's close attachment to the practices surrounding the more traditional media of writing and print. Instead of the innovative technology company offering its services to users via the shiny interfaces of digital screens, booksellers still manning the 'lonely forts'[25] of stores filled with material books are the intermediaries lauded at the start and finish of Updike's essay. Google Books is but an exemplary instance of mass digitisation projects launched since the turn of the new millennium to have destabilised our received notions of author, work and copyright.[26] By converting printed works into electronic format through digital photographic scanning and their processing by optical character recognition software, these projects have sought to preserve, enhance access to and compute those works which are, to say the least, not undesirable ends in themselves.[27] And yet, the phenomenon of mass digitisation also attests to a massive disruption in the history of books, contributing to what Borghi and Karapapa have theorised as a threefold paradigm shift.[28] To begin with, books are increasingly viewed not so much as 'works' or expressions of the author addressed to the public as 'data' to be mined and processed in order to achieve distinctive ends of the digital-corporate environment such as '[improving] web services, including advertisement and content personalization'.[29] The suggestion here is that books are now read not so much by human readers as by automatic computing machines programmed by adaptive algorithms. Put strongly, Roland Barthes's well-known provocation about 'the death of the author'[30] in postmodernity must now be qualified as implying the death of the reader in mass digitisation, the human having been replaced by artificial intelligence, which alone can process the massive amounts of data in the 40 million books digitised by Google.[31] Further, as already discussed, copyright seems to be transforming from a regime of '*ex ante* authorizations'[32] into an 'opt-out system'[33] that significantly undercuts the intellectual–proprietary interests of authors. Broadened and emboldened by the Second Circuit Court of Appeals' decision, the doctrine of fair use has become a sturdier legal defence against claims of copyright infringement, anticipating further

[25] Updike, 'The End of Authorship'.
[26] Other projects include the Internet Archive, the Open Library, the Carnegie Mellon Million Book project, the HathiTrust, Europeana, and the Digital Public Library of America: see Borghi and Karapapa, *Copyright and Mass Digitization*, 3–8.
[27] See Karen Coyle, 'Managing Technology: Mass Digitization of Books', *The Journal of Academic Librarianship* 32, no. 6 (3 November 2006): 642–43; Borghi and Karapapa, *Copyright and Mass Digitization*, 11.
[28] Borghi and Karapapa, *Copyright and Mass Digitization*, 15–18.
[29] Ibid., 15.
[30] Roland Barthes, 'The Death of the Author', in *Image Music Text*, trans. Stephen Heath (London: Fontana, 1977), 142–48.
[31] Haimin Lee, '15 Years of Google Books', *Google Blog* (blog), 17 October 2019.
[32] Borghi and Karapapa, *Copyright and Mass Digitization*, 16.
[33] Ibid.

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incursions into the so-called exclusive control of authors over their creations. Thirdly, the centrality of powerful intermediaries maintaining the relevant digital databases such as Google is renewed and reasserted. The promise of 'decentralized interaction'[34] amongst users of digital technologies of direct transfer such as peer-to-peer file sharing is, in the context of mass digitisation, threatened by potential de facto monopolies or oligarchies of access to information and culture. Amply borne out by the observations surrounding the controversy of Google Books, these three '"head-turning" traits of mass digitization'[35] urgently necessitate our rethinking of authorship, copyright and their profound co-evolution with media technologies.

This chapter seeks to contribute to our present rethinking of authorship and copyright by revisiting another recent debate that raises very similar questions. The debate surrounds the dominant utilitarian–proprietary approach to copyright, particularly its limits as suggested by three readers of Immanuel Kant's 1785 essay, *Von der Unrechtmäßigkeit des Büchernachdrucks* ('On the Wrongfulness of Reprinting').[36] Through principal recourse to Kant's concept of the book as communicative act, Abraham Drassinower, Maurizio Borghi and Anne Barron have sought to rethink authorship and copyright along non-proprietary lines.[37] I argue that although these leading Kantian voices have demonstrated the power of Kant's essay to reshape our understanding of the thematic conjuncture, they have also underestimated the material dimension of the text that affords the production of its meaning. To generate a more adequate understanding of Kant's text and how it might illuminate the present digital transformation of authorship and copyright, we should look closely at the medial–material specificities of the literary work.

UTILITARIAN COPYRIGHT

Authors Guild v Google, Inc happened despite, and in a sense also because of, the fairly recent global expansion of copyright and intellectual property rights, which has been much discussed and criticised.[38] For example, as Neil Netanel has argued,

[34] Ibid., 17.

[35] Ibid., 15.

[36] Kant, 'On the Wrongfulness of Unauthorized Publication of Books' (1785). For a digitised version of the fifth volume of the *Berlinische Monatsschrift* with Kant's essay stored in the Bavarian State Library, see www.digitale-sammlungen.de/en/view/bsb10926844?q=%28berlinische+monatsschrift+1785%29&page=,1 (accessed 9 September 2024).

[37] The main referenced works include Abraham Drassinower, *What's Wrong with Copying?* (Cambridge, MA: Harvard University Press, 2015); Maurizio Borghi, 'Copyright and Truth', *Theoretical Inquiries in Law* 12, no. 1 (2010): 1–27; Anne Barron, 'Kant, Copyright and Communicative Freedom', *Law and Philosophy* 31, no. 1 (2012): 1–48.

[38] For example, see Mark A. Lemley, 'Property, Intellectual Property, and Free Riding', *Texas Law Review* 83 (2005): 1031–1076; Neil W. Netanel, 'Why Has Copyright Expanded? Analysis and Critique', in *New Directions in Copyright Law*, ed. Fiona Macmillan, vol. 6 (Cheltenham: Edward Elgar, 2007), 3–34; Barron, 'Copyright Infringement: "Free-Riding" and the Lifeworld', in *Copyright and Piracy: An Interdisciplinary Critique*, eds. Lionel Bently et al.

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copyright expansion in the United States is substantially owed to the high levels of involvement of copyright industries and trade associations in the periodic revisions of copyright legislation.[39] Extensive lobbying by the copyright interest groups and their negotiations with the US Congress have led to 'an ever-expanding set of copyright holder rights, riddled with narrow exceptions for various interested parties present at the bargaining table'.[40] The history of legislative amendments relating to the term of copyright protection alone evidences such an industry-driven expansion of copyright. Mark Lemley has pointed to the eleven-time extension of the copyright term between 1963 and 1998, leading up to the present longest term of seventy years in addition to the author's lifetime for works created after 1 January 1978.[41] For Lemley, the rapid growth of intellectual property is accompanied – and legitimated – by the ascendancy of an 'absolute protection'[42] or a 'full-value'[43] paradigm of intellectual property in both legal scholarship and juridical discourse. On this view, intellectual property is rightly seen as a species of private property and, indeed, real property rights, which entails fortifying the exclusionary rights of owners. In economic-theoretical terms, strong intellectual property rights are said to be needed to internalise the 'externalities'[44] associated with the uses of intellectual property and to minimise 'free riding'[45] on the investments of owners. Allowing owners to gain the 'full social value'[46] of their intellectual property – for instance, by charging for any use – is the best means of incentivising their production. In the context of copyright, any unauthorised copying or use of the author's work that enriches the user would constitute free riding.[47] The lawsuit against Google could have been driven not so much by any potential loss in profits suffered by authors and publishers as by the possibility of Google free riding on their products.[48] Indeed, it has been argued that the increased visibility of the books indexed by Google would not only add to their sales but also spare them from the more ignominious fate of

(Cambridge: Cambridge University Press, 2010), 93–127. As succinctly noted by Anne Barron, in the last few decades, copyright has expanded in scope along four main axes: 'the range of acts restricted to the copyright owner has widened, the range of circumstances in which secondary liability will be found has also widened, the likelihood that courts will find partial or non-literal takings "substantial" (and so infringing) has increased, and the reach of defences and exceptions has narrowed': Barron, 'Copyright Infringement', 98.

39 Netanel, 'Why Has Copyright Expanded? Analysis and Critique', 3–10.

40 Ibid., 5.

41 Lemley, 'Property, Intellectual Property, and Free Riding', 1042. See Title 17 of the United States Code, section 302(a).

42 Lemley, 'Property, Intellectual Property, and Free Riding', 1031.

43 Ibid.

44 Ibid., 1032.

45 Ibid.

46 Ibid., 1031.

47 Ibid., 1043.

48 For a similar observation, see Vaidhyanathan, *The Googlization of Everything*, 59.

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cultural oblivion.[49] The authors' persistent action against Google in spite of their foreseeable gains, then, might well evidence the absolute protection paradigm of intellectual property noted in the literature.

By ruling in favour of Google and what was assessed to be in the public's interest, the Second Circuit Court of Appeals would seem to have rejected the emergent absolute protection perspective in intellectual property and reaffirmed the more traditional utilitarian model of copyright as about striking the right balance between two pertinent sets of considerations. In the critical literature, the traditional copyright balance has been theorised in two principal and closely related ways. The first approach is the 'clash-and-balance paradigm',[50] which, as interpreted by Abraham Drassinower and Maurizio Borghi, is reflected in the case law of Canada and the United States. On this view, the two broad considerations on either end of the balance are cast as the putatively competing interests of authors and users, or, more specifically, 'the incentive to create and the imperative to disseminate the works of authorship'.[51] On the one hand, the copyright system accords proprietary rights to authors over their creations as rewards and incentives for the production of original works. On the other hand, the law affirms the public as the ultimate beneficiaries of the system and those works, beneficiaries whose interests extend to consuming those works and, possibly, using them to generate new works. The task of the copyright system is to address the tension between both sides in particular situations and achieve the optimal production and distribution of works that serves society at large.

The other closely related approach is the 'incentives-access paradigm'[52] discussed by Glynn S. Lunney, Jr and Anne Barron, which is a perspective fundamentally shaped by neoclassical economic theory and the calculus of cost–benefit analysis. On this view, copyright imposes two sorts of social costs against which the benefits of granting these rights of exclusion to authors in their creations are to be balanced.[53] First, higher prices can be charged for copyrighted works than for non-copyrighted works in the marketplace, which yields a consumer loss. Second, the creation of new works may be inhibited by the costs of licences for the use of copyrighted works on which those new works are built. These costs are, in sum, the loss of public access to works resultant of any system of copyright. However, similar to the other, this approach assumes that there would be the incentive to invest in the production of

[49] See Cory Doctorow, 'Why Publishing Should Send Fruit-Baskets to Google', *Boing Boing* (blog), 14 February 2006.

[50] Borghi, 'Copyright and Truth', 2. See also Drassinower, *What's Wrong with Copying?*, 17–53. Specifically, Drassinower's account draws on the US Supreme Court decision of *Feist Publications Inc v Rural Telephone Service Co Inc* 499 U.S. 340 (1991) and the Canada Supreme Court decision of *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13: Drassinower, *What's Wrong with Copying?*, 23–30.

[51] Drassinower, *What's Wrong with Copying?*, 21.

[52] Lunney, 'Reexamining Copyright's Incentives-Access Paradigm'; Barron, 'Copyright Infringement: "Free-Riding" and the Lifeworld', 103.

[53] See Barron, 'Copyright Infringement: "Free-Riding" and the Lifeworld', 103–7.

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new works only if the potential to profit from those works is to some extent assured by the law. The challenge for any copyright institution is to '[balance] the benefits of broader protection, in the form of increased incentive to produce such works, against its costs, in the form of lost access to such works'.[54] As Barron clarifies, the incentives-access paradigm is inherently resistant to the sort of maximal copyright protection advanced by absolute protectionists, for the latter is seen as having insufficiently accounted for the social costs of copyright.[55]

Both the justification and outcome of *Authors Guild v Google, Inc* reflect a preference for the public interest to be served not by way of copyright maximalism but through a calibrated balance between incentivising work production via copyright protection and enhancing public access to knowledge. The Second Circuit Court of Appeals' discussion of the law of fair use opens by subordinating the interests of authors to those of the public whom the system ultimately serves: 'Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.'[56] The very development of the doctrine of fair use, which afforded the unauthorised copying of copyrighted works in certain situations that advanced public knowledge, was cited as the law's recognition that 'giving authors *absolute* control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge'.[57] Indeed, the four statutory factors for determining fair use reflect the judiciary's need to strike the copyright balance, that is, 'to define the boundary limit of the original author's exclusive rights in order to best serve the overall objectives of the copyright law to expand public learning while protecting the incentives of authors to create for the public good'.[58] That Google Books was eventually legitimated – despite the project's 'commercial motivation'[59] and 'copying of the totality of the original'[60] – evidences the Second Circuit Court of Appeals' willingness to assess the appropriate balance and their commitment to the traditional utilitarian model of copyright.

For Lemley and other supporters of the utilitarian model of copyright, the Second Circuit Court of Appeals' decision might instantiate a kind of triumph over the absolute protection paradigm and a counterpoint to the recent expansion of intellectual property rights. But for Drassinower, Borghi, and Barron, who reject the frame of neoclassical economics, the decision could simply reflect how deeply

[54] Lunney, 'Reexamining Copyright's Incentives-Access Paradigm', 485.
[55] Barron, 'Copyright Infringement: "Free-Riding" and the Lifeworld', 12–13.
[56] *Authors Guild v Google, Inc*, 13.
[57] Ibid.
[58] Ibid., 15. The four factors are listed in Title 17 of the United States Code, section 107, and extensively discussed in *Campbell v Acuff-Rose Music, Inc*.
[59] *Authors Guild v Google, Inc*, 26.
[60] Ibid., 30. As noted in the judgment, these two facts are typically assessed as operating against the finding of fair use: see Ibid., 27–33.

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entrenched the economic paradigm of copyright is. From the three critical standpoints, the utilitarian model of copyright does not provide any satisfactory account of the proper subject matter of copyright law. It also misconstrues the nature of authorship, the relationship between authors and users, and society at large. Drassinower problematises the utilitarian model or 'value paradigm'[61] of copyright by way of an extended critique of the metaphor of balance as deployed to construe the originality requirement of copyright by the Supreme Courts of the United States and Canada in two landmark cases.[62] One of Drassinower's basic suggestions is that the balance model of copyright fails to account for its adoption of 'value'[63] (specifically, 'economic value'[64]) – as the master category by which to render commensurable the pertinent interests of authors and users. His critique of 'the poverty of value'[65] consists of a series of provocations: Why should copyright law be construed merely as a 'distributive mechanism'[66] that regulates the creation and dissemination of value in a market of authors and users? Does construing the act of authorship as the origination of value, an interest that could be offset by the ultimately weightier alternative of so distributing value as to advance public knowledge, not obscure something specific about authorship?[67] Does the judicial act of balancing the incentive to create works and the imperative to distribute them not fail to account for the originality requirement that more fundamentally determines what falls within the remit of the copyright system in the first place?[68] And does the metaphor of balance not risk mischaracterising the relationship between authors and users as essentially oppositional rather than complementary?[69] Borghi elegantly reframes Drassinower's critique of the copyright balance as relating to the model's failure to afford any serious investigation into the proper subject matter of copyright. In Borghi's words, 'the copyright debate of recent years has focused almost exclusively on the *scope* of copyright … as if … the question of the *subject matter* of copyright was not the preliminary and most important one in this debate'.[70] For Borghi and Drassinower alike, the calculative idiom of 'balance', 'value' and 'interest' forecloses any meaningful discussion of what copyright is really about.

[61] Drassinower, *What's Wrong with Copying?*, 51.
[62] See n. 51. Drassinower also refers to the classic United Kingdom cases of *Walter v Lane* [1900] AC 539 and *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601, whose emphasis on labour or the 'sweat of brow' standard of originality forms the background against which the new standards of 'creativity' and 'skills and judgement' advanced in the North American Courts are assessed: see Drassinower, 30–41.
[63] Drassinower, 18.
[64] Ibid.
[65] Ibid., 17.
[66] Ibid., 51.
[67] Ibid., 55.
[68] Ibid., 17.
[69] Ibid., 55.
[70] Borghi, 'Copyright and Truth', 2.

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Similarly, Barron rejects the traditional utilitarian justification of copyright for failing to provide any adequate account of copyright and society. Barron is deeply critical of both the incentives-access and absolute protection paradigms of copyright because of their fundamental grounding in economic theory, which she denounces as a worldview of 'incurable deficiencies'[71] that denies the full significance of the institution in the wider social order. Specifically, she takes issue with the economic model of society as comprised of self-interested, utility-maximising individuals acting in competition with one another, and the concomitant model of copyright law as about the optimal regulation of relationships of exchange between information producers and consumers.[72] For Barron, neither account adequately captures the significance of law, society and the relationship between them.[73] Animated by a shared logic of economic analysis that reductively prioritises the matrices of 'utility' and 'efficiency', both the incentives-access and absolute protection paradigms fail to provide 'a comprehensive analysis of the social significance of copyright'.[74] Thus, the utilitarian reasoning behind the decision of *Authors Guild v Google, Inc* is unlikely to receive Barron's unmitigated support.

Against the prevailing utilitarian model of copyright, Drassinower, Borghi and Barron advance alternative accounts that depart from the orthodox construal of copyright as a form of intellectual property. For their fundamental rethinking of copyright, these scholars draw on Kant's 1785 essay on the book and author's rights. As we shall see, Kant's essay foregrounded the communicative situation between authors and readers that Updike more recently understood as assailed by the mass digitisation of books.

LITERARY COMMUNICATION

Presently, in both common law systems of copyright and civil law regimes of *Urheberrecht* or *droit d'auteur*, the literary works in which authors hold so-called exclusive rights of copying are treated as forms of intellectual property.[75] Unless otherwise specified in the relevant statutes, the author is generally recognised as the rightful owner of the abstract work that has been fixed in some perceptible medium of expression.[76] This means that property in the literary work could be held by its author even as property in the physical book is held by its lawful purchaser. The authority to grant someone permission to copy the work is but one of the

[71] Barron, 'Kant, Copyright and Communicative Freedom', 9.
[72] Ibid., 7.
[73] In that article, Barron cites Jürgen Habermas's social theory as a potential framework with which to rethink copyright law and society: see Ibid., 28–31.
[74] Ibid., 28.
[75] On the relationship between the common law and civil law models, see Bently et al., *Intellectual Property Law*, 35–36.
[76] See, e.g., Title 17 of the United States Code, section 102.

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distinguishing rights that extend from the author's literary proprietorship.[77] In *Authors Guild v Google, Inc* it was undisputed that the three author-plaintiffs owned copyrights in works that Google had scanned, indexed, and made searchable and available for snippet view. Their works fulfilled the requirement of originality under section 102 of Title 17 of the United States Code, which, as interpreted by the courts, prescribed a standard of minimal creativity: each was 'independently created by the author (as opposed to copied from other works), and ... [possessed] at least some minimal degree of creativity'.[78] As clarified in the same statutory section, the author's proprietorship extends not to the ideas of the work per se, but to the expression of those ideas: it is the embodiment of those ideas in some 'tangible medium of expression'[79] that forms the object of literary property. This basic distinction between the non-copyrighted idea and the copyrighted expression, also known as the 'idea/expression dichotomy',[80] is one of the key conceptual bases on which copyright systems at national, regional and international levels identify the subject matter of protection.

Contrary to some suggestions in the legal literature, Kant was not a proponent of intellectual property.[81] Kant did not regard the author as the owner of any intangible work materially expressed in the book that warranted protection under any system of property rights. Instead, Kant's case for author's rights was based on a concept of the book as a communicative medium that relayed to the public a *speech* necessarily spoken in its author's name: 'In a book, as a writing, the author *speaks* to his reader; and the one who has printed the book *speaks*, by his copy, not for himself but simply and solely in the author's name. He presents the author as speaking publicly and only mediates delivery of his speech to the public.'[82] The publisher, no less than the book, was the channel through which the author communicated with the reading public. Further, rather than the idiom of property, it was the language of

[77] For instance, under Title 17 of the United States Code, section 106, other rights include preparing derivative works based on the work, distributing copies of the work to the public by sale, and performing the work publicly.

[78] *Feist Publications Inc v Rural Telephone Service Co. Inc*, 345.

[79] Title 17 of the United States Code, section 102.

[80] 'Over the next 200 years, the so-called idea/expression dichotomy became an integral part of US jurisprudence and found its way into the 1991 European software directive (91/250/EEC; Art. 1 (2)), the 1994 WTO TRIPS Agreement and the 1996 WIPO Copyright Treaty': Friedemann Kawohl and Martin Kretschmer, 'Johann Gottlieb Fichte, and the Trap of Inhalt (Content) and Form: An Information Perspective on Music Copyright', *Information, Communication & Society* 12, no. 2 (2009): 214. See also Mario Biagioli, 'Genius against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting', *Notre Dame Law Review* 86, no. 5 (2011): 1854.

[81] See, for instance, Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011); William Fisher, 'Theories of Intellectual Property', in *New Essays in the Legal and Political Theory of Property*, ed. Stephen R. Munzer (Cambridge: Cambridge University Press, 2001). For a persuasive critique of these representations of Kant, see Maria Chiara Pievatolo, 'Freedom, Ownership and Copyright: Why Does Kant Reject the Concept of Intellectual Property?', *Società Italiana Di Filosofia Politica*, 2010, 1–10.

[82] Kant, 'On the Wrongfulness of Unauthorized Publication of Books (1785)', 30.

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personhood that defined Kant's account of author's rights. In Kant's view, the author had an 'inalienable right (*ius personalissimum*)'[83] for the speech printed in the book to be communicated in his own name. Under this 'most personal right',[84] it was ultimately the author who spoke through the book printed by the publisher. Pursuant to the same fundamental right, the author granted the publisher the right to publish the book by means of a contract.[85] To reprint the book without such a right was to wrong both the legitimate publisher and the author: doing so not only subtracted the profits of the former[86] but further, in so relaying the speech without his permission, violated the latter's 'innate right in his own person'[87] – that is, to speak only as he willed.

Kant's concept of the book as communication or literary speech act is adopted by Drassinower, Borghi and Barron to advance alternative accounts of authorship and copyright that, in their own ways, resist both the utilitarian model of copyright and its basic concept of intellectual property. Reviewing and comparing their respective positions would help us to appreciate the productive ways in which Kant's essay has afforded the critical rethinking of authorship and copyright. It would also prepare us for another way of approaching Kant's text, one already pointed to by the text itself, that could further illuminate the thematic conjuncture. Drassinower's rethinking of copyright proceeds by way of an anti-proprietary rehabilitation of basic copyright categories relating to the subject matter of protection – especially the originality requirement and the related idea/expression dichotomy – that broadly aligns with Kant's concept of the book as communicative act. As we may recall, in the United States (and indeed other Western legal systems), copyright protection extends only to original expressions. 'The idea/expression dichotomy is inseparable from the doctrine of originality. It provides that not originality per se but rather original *expression* is at stake in copyright law.'[88] This means not only that the work must not be copied but also that the work itself refers to the very form in which ideas are expressed. As presently institutionalised, the literary work is treated as an object of property – that is, as a thing in which the owner (often the author) exercises certain proprietary rights of exclusion and control, including and especially the exclusive right of copying. Drassinower rejects the proprietary view of the literary work while retaining the threshold copyright condition that it be the original expression of its author. For Drassinower, the work is not 'an object of ownership'[89] but rather 'a communicative act'.[90] Consistent with the requirement that the work not be copied,

[83] Ibid., 35.
[84] Ibid.
[85] Ibid., 33.
[86] Ibid., 29
[87] Ibid., 35.
[88] Drassinower, *What's Wrong with Copying?*, 56.
[89] Ibid., 62.
[90] Ibid.

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the 'originality' of this act is understood as extending from 'its being a speaking of one's own, a speaking in one's own words'.[91] Under this renewed Kantian understanding of authorship, copyright infringement is understood not as 'some kind of conversion, whether of the tangible book or of the intangible work . . . [but rather as] compelling another to speak'.[92] As Drassinower acknowledges, his proposed substitution of 'speech', 'communication' and 'action' for the reified object of literary property as the proper subject matter of copyright is substantially indebted to Kant .[93]

Kant's concept of the book as speech act also facilitates Drassinower's construal of copyright as a juridical structure that affirms the equality of authors rather than as a distributive mechanism made to achieve a balance between the competing interests of authors and users. Again, the idea/expression dichotomy is key to Drassinower's renewal of copyright from a Kantian perspective.[94] Under utilitarian copyright and the cost–benefit calculus, the idea/expression dichotomy is broadly justified on the grounds that the social costs of granting copyright protection to ideas per se are outweighed by its benefits. Protecting the original expressions of ideas reflects the optimal balance between incentivising the creation of works and disseminating them. Against such an instrumentalist mode of justification, Drassinower re-reads the dichotomy as copyright's affirmation of an egalitarian ethic of authorship: 'The free availability of ideas is but the rubric under which copyright law affirms and recognizes my equality as an author at the very moment at which it affirms and recognizes yours.'[95] Under the renewed dichotomy, the subjects of copyright law are no longer bifurcated as authors and users whose interests in producing and consuming works are opposed. Instead, both are recognised as author-users who are equally entitled to draw on the ideas embodied in one another's works for the making of their own. As sharply put in a preceding article, Drassinower recognises the communicative acts of authors to be premised on the 'intertextuality of creation'.[96] Other communicative acts provide the ideas on which the authors rely to generate their own. In so protecting original expressions while permitting the free flow of ideas, copyright law affirms the necessary mutual indebtedness of communicative acts and, by the same token, the equality of authors as users.

While Drassinower attempts to salvage parts of the copyright institution from its utilitarian and proprietary foundations, which necessarily risks the account's absorption into the paradigm it opposes,[97] Borghi and Barron take Kant's 1785 essay as the basis on which to imagine almost from scratch non-proprietary systems of copyright.

[91] Ibid., 73.
[92] Ibid., 178.
[93] See Ibid., 112–13.
[94] See Ibid., 66–73.
[95] Ibid 7.
[96] Abraham Drassinower, 'Authorship as Public Address: On the Specificity of Copyright vis-a-vis Patent and Trade-Mark', *Michigan State Law Review* 1 (2008): 211.
[97] For a similar critique of Drassinower, see Barron, 'Kant, Copyright and Communicative Freedom', 36–41.

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They further turn to Kant's wider philosophical oeuvre, drawing on ethico-political ideas articulated 'outside' Kant's essay and its succinct reprisal in *Die Metaphysik der Sitten* ('The Metaphysics of Morals'),[98] and even to other thinkers' theories. Similar to Drassinower, Borghi uses Kant's concept of the book as public address to redefine the copyright subject matter as an act of speaking to the public in the author's name. Borghi accepts Kant's premise that even as the book might, in one sense, be a speech spoken by the publisher who has printed it, such speech is, in another more fundamental respect, necessarily spoken in the author's name. Because of the non-severable link between the speech and its author, a book may be lawfully printed only if the permission (or 'mandate'[99]) to do so has been granted by the author. Under the publishing contract, what passes from the author is not any right in or extending from any object of property, but instead 'a duty (and a faculty) to retell'[100] – that is, a personal obligation to recommunicate the author's speech to the public. Conducted in the absence of any such permission, the act of reprinting books doubly wrongs the authorised publisher and the non-consenting author.[101] For Borghi, then, there is no intellectual property in the work embodied by the book: nothing ideal is owned by the author. There are only actions in and by means of books, which are the true subject matter of copyright.

Revising the copyright subject matter from 'work' to 'action' is significant to Borghi because it paves the way to a new fundamental justification of copyright as a domain grounded in the same *telos* to which such action is directed, namely the furtherance and maintenance of the pursuit of truth.[102] To be sure, in the 1785 essay, Kant did not provide any general theory of action, nor did he specify any orientation to truth in the copyright speech act. An account of the book as an action necessarily coupled to the author-actor in whose name it was enacted had been sufficient for Kant to establish a case for the unlawfulness of reprinting that extended from a personal right of publishing granted by the author, rather than one ultimately rooted in the author's ownership of any abstract thing.[103] But as Borghi sets out to account

[98] See Kant's discussion, 'What Is a Book?' in Immanuel Kant, 'The Metaphysics of Morals (1797)', in *Practical Philosophy*, ed. Paul Guyer and Allen W. Wood, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 437–38.

[99] As Borghi notes, the mandate (*mandatum*) is 'an institution of Roman contract law [that] regulates the relationship between individuals as far as actions to be carried out … are concerned': Borghi, 'Copyright and Truth', 5. The crucial point is that the primary subject matter is not a tangible book or nor a so-called intangible work, but rather an action.

[100] Ibid., 7.

[101] Ibid., 5.

[102] Borghi clarifies that such telos is 'presumptive' rather than actual: it is 'an end which can be reasonably expected in advance, prior to any contingent embodiment of the fact': Ibid., 18. This seems to be his attempt to address the foreseeable problem of differences in motivation between individual authors in particular instances.

[103] See Pievatolo, 'Freedom, Ownership and Copyright: Why Does Kant Reject the Concept of Intellectual Property?', 3: 'Kant, by conceiving the book as an action, adopts a strategy based on the *ius personale* only. By using such a strategy, he concludes that the unauthorized printer has

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for the rightful *end* that the copyright speech act (and copyright law more generally) serves, he develops a teleological account of actions that draws on an Aristotelian idea of action proposed by Hannah Arendt: 'actions, unlike things, cannot be divorced from the aim and purpose they are directed to and for which they have been entrusted to others. Actions have necessarily a purpose or an end [citing an excerpt from Arendt's *The Life of the Mind* (1978)].'[104] Having supposed that any action, including the copyright speech act, cannot be severed from the *telos* to which it is necessarily oriented, he proceeds to claim that the *telos* of the copyright speech act had already been suggested by Kant in the two elements that constituted the act, namely that the act involved speaking publicly and doing so in one's own name. To suggest what these two elements might mean beyond what was briefly stated in the essay, Borghi turns to some of Kant's other philosophical writings on thinking and publicity.[105] From this ensemble of texts bearing Kant's name, Borghi suggests that speaking publicly is the act by which rational human beings think and ascertain the validity of their own judgements: it is 'the way in which humans can distinguish truth from error'.[106] Public communication is conceived as an intersubjective and dialogical process that facilitates the interlocutors' arrival at a commonly agreed judgement that is true insofar as it accords with the nature of the matter in question.

As regards the requirement for the copyright speech act to be spoken in the author's own name, Borghi grounds this in Kant's idiosyncratic perspective on the public use of reason. As Jürgen Habermas once noted, in 1784, the Prussian King Frederick II had declared that private persons were not allowed to pass judgements on the public actions of political and legal officials because the former lacked the knowledge and expertise to do so.[107] The prohibition reproduced the commonplace understanding of 'private reason' as reason exercised by persons in their personal capacity, and 'public reason' as that which underpinned official actions. But in the same year, through another essay published in the *Berlinische Monatsschrift*, Kant

to be compared to an unauthorized spokesperson rather than to a thief. Therefore, it is not necessary to go beyond the Roman law tradition, by inventing a new *ius reale* on immaterial things.'

[104] See Borghi, 'Copyright and Truth', 7, fn 21.

[105] In their order of reference, these writings include Kant, *Was heißt, sich im Denken orientieren?* ('What Does It Mean, to Orient One's Self in Thinking?') in 8 *Werkausgabe Immanuel Kant* (1968); Kant, *Kritik der reinen Vernunft* ('Critique of Pure Reason') in 3 *Werkausgabe Immanuel Kant* (1968); Kant, *Anthropologie in pragmatischer Hinsicht* ('Anthropology from a Pragmatic Point of View') in 12 *Werkausgabe Immanuel Kant* (1968); Kant, *Beantwortung der Frage: Was ist Aufklärung?* ('Answer to the Question: What Is Enlightenment?') in 11 *Werkausgabe Immanuel Kant* (1968). For his account of truth, Borghi also draws on Hannah Arendt, 'Truth and Politics' in *Between Past and Future* (London: Penguin Books, 2006): see Borghi, 14–17.

[106] Borghi, 11.

[107] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (London: Polity Press, 1962), 25.

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subverted the sovereign prohibition by inverting its distinction between the public and private uses of reason: 'But by the public use of one's own reason I understand that use which someone makes of it *as a scholar* before the entire public of the *world of readers*. What I call the private use of reason is that which one may make of it in a certain *civil* post or office with which he is entrusted.'[108] Kant saw the public use of reason as 'an unrestricted freedom to make use of own reason and to speak in his own person'.[109] Previously degraded as beneath the expertise of officials, the individual's exercise of his own reason to critique official actions became a 'public use of reason' that was infinitely freer and more valuable than its 'private use' by political and legal actors. For the purposes of the 1784 essay, Kant had seen the public use of reason as that which furthered mankind's emergence from immaturity, which was his interpretation of enlightenment. Borghi does not call attention to the collective emancipatory function that Kant had ascribed to the public use of reason. Instead, Kant's definition of public reason as speech spoken 'in his own person' serves as the basis for Borghi's interpretation of the second requirement of the copyright speech act. To speak in the author's own name is for the author to act in a way that is unencumbered by official obligations. This freedom to speak in one's own person helps the author to communicate with the public and test one's own judgements with a view to reaching the *telos* of truth together. To speak publicly and in one's own name is for the author to think in common or 'coalesce'[110] with the public in the service of truth. The copyright speech act is thus reimagined by Borghi as that which allows the author and the public to come together and achieve 'the common end of being in the truth'.[111]

As we have suggested, identifying truth as the *telos* of the copyright speech act allows Borghi to unify the interests of authors and the public that utilitarian copyright tends to assume as divided and in competition. Instead of regarding them as merely engaging in 'an exchange of information values',[112] Borghi sees authors and the public as '*coalescing* parties to a common act of thinking'.[113] Under this reconciliation of authors and the public under the rubric of action and truth, the copyright system itself is transfigured into a relational sphere that facilitates the thinking-in-common oriented towards truth. Copyright becomes 'neither (just) about "the author" as such nor (just) about "the public" as such), but is primarily about the author-public coalescence'.[114] Not so much the striking of an optimal balance between the incentive to create works and the imperative to distribute them,

[108] Kant, 'An Answer to the Question: What Is Enlightenment? (1784)', 18.
[109] Ibid., 19.
[110] For Borghi's discussion of the etymology of 'coalesce' and how it fits his account of copyright as about being in truth with others, see Borghi, 'Copyright and Truth', 18, fn 49.
[111] Ibid., 18.
[112] Ibid.
[113] Ibid.
[114] Ibid., 20.

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the dialogical endeavour of truth is that which fundamentally concerns and justifies copyright law.

The ethos of resisting utilitarian copyright and copyright expansionism demonstrated in Borghi's and Drassinower's transpositions of Kant to the present is similarly enacted in Barron's scholarship. For Barron, the attraction of Kant's philosophy extends from its power not only to contribute to these critical contemporary efforts but also to do so in way that makes up for a major deficit in their thinking. Barron explicitly distinguishes her position from three clusters of critiques that, in her view, suffer from the same limitation of failing to provide any rich understanding of what is truly at stake in the growth of copyright restrictions and intellectual property rights in particular.[115] These include not only liberal accounts that have relied on the categories of the public domain, free culture and individual freedom of expression to oppose the privatisation of information[116] but also Kantian interventions such as Drassinower's.[117] Whilst sympathetic to Drassinower's proposal of ensuring reciprocal equality amongst authors through the copyright system, Barron notes that Drassinower does not clarify why the egalitarian ethic of authorship warrants protection beyond alluding to its affirmation of the inherent dignity of authorship.[118] This limitation, Barron suggests, extends from Drassinower's exclusive focus on Kant's 1785 essay.[119] To understand what is truly advanced by a dialogical sphere of authorship unfettered by proprietary rights, Barron argues that it is necessary to situate the essay within Kant's ethical, legal and political thought.[120]

Specifically, Barron suggests that the regime of author's rights proposed by Kant in the 1785 essay is only intelligible within the project of collective emancipation

[115] See, especially, Barron, 'Kant, Copyright and Communicative Freedom', 3–6.

[116] The two main referenced works on the public domain are: Pamela Samuelson, 'Challenges in Mapping the Public Domain', in *The Future of the Public Domain: Identifying the Commons in Information Law*, ed. Lucie Guibault and P. Bernt Hugenholtz (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2006), 7–25; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', *Law and Contemporary Problems* 66 (2003): 33–74. Those on free culture and freedom of expression are: Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004); Neil W. Netanel, *Copyright's Paradox* (New York: Oxford University Press, 2008).

[117] Barron also cites Leslie Kim Treiger-Bar-Am, 'Kant on Copyright: Rights of Transformative Authorship', *Cardozo Arts & Entertainment Law Journal* 25, no. 3 (2008): 1059–1103.

[118] See Barron, 'Kant, Copyright and Communicative Freedom', 8.

[119] Ibid.

[120] In their order of reference, these texts include: Kant, 'Groundwork for the Metaphysics of Morals (1785)'; Kant, 'Critique of Practical Reason (1788)'; Kant, 'The Metaphysics of Morals'; Kant, 'On the Common Saying: That May Be Correct in Theory, But It Is No Use in Practice (1793)'; Kant, 'Toward Perpetual Peace (1795)' all in Immanuel Kant, *Practical Philosophy*, ed. and trans. Mary J. Gregor, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 1996); Kant, *Critique of Judgment (1790)* (Indianapolis, IN: Hackett, 1997).

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involving the public use of reason that Kant referred to as 'enlightenment' (*Aufklärung*) in the essay published a year before. Like Borghi, Barron retrieves from the earlier essay the principle of publicity or 'open public debate'[121] as the critical dialogical process of relying on one's own reason to contest and displace traditional forms of authority like ecclesiastical or state authorities. The latter are but secondary to reason, which alone must guide our actions. However, rather than designate 'truth' as the *telos* of publicity, Barron prioritises its character as 'an emancipatory process that … moves humanity as a whole towards a situation in which "everything submits" to criticism'.[122] The freedom to speak publicly (or what Barron calls 'communicative freedom'[123]) is the key to a collective freedom that is achieved by humankind only when reason has become the definitive authority in the world at large. Communicative freedom and the practice of enlightenment on a global scale would nonetheless require certain legal arrangements as part of its empirical conditions of possibility. As a preliminary move, Barron notes that Kant's philosophy of law or doctrine of right (the *Rechtslehre*) provides a moral justification for imposing a coercive system of laws that is based on the recognition of 'the inevitability of conflict between beings in a context of finitude'.[124] A system of rights has to be enforced so as to secure the empirically conflictual freedoms of persons, though the contents of these rights could and must be subject to public scrutiny.[125] For Barron, the concept of author's rights that Kant introduced in the 1785 essay to address the problem of unauthorised reprinting in eighteenth-century Germany was precisely the legal arrangement proposed to protect communicative freedom in the situation.

More so than Drassinower and Borghi, Barron demonstrates an awareness of some of the historical specificities of Kant's 1785 proposal. As noted in greater detail by Martha Woodmansee, in eighteenth-century Germany, professional writers like Gotthold Ephraim Lessing and Friedrich Gottlob Klopstock were facing a particular problem relating to the burgeoning book trade that occurred in the absence of effective legal mechanisms to restrict the unauthorised reprinting of books.[126] Writers were reliant on publishers and the printing press to publish their books and, from Kant's perspective, relay their speech to the public. Kant himself recognised the importance and value of the printing press and the industry of publishers to mediate the delivery of speech spoken in the author's name: 'Now, publication is speech to the public (through printing) in the name of the author and hence an

[121] Barron, 'Kant, Copyright and Communicative Freedom', 18.
[122] Ibid., 27.
[123] Ibid., 39.
[124] Ibid., 13.
[125] See Ibid., 19: 'In a nutshell, Kant's message is this: subjects must obey the laws in force, but as citizens they should also argue publicly about their rightness.'
[126] See Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"', *Eighteenth-Century Studies* 17, no. 4 (1984): 431–48.

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affair carried on in another's name.'[127] However, print technology also afforded the reprinting of already published books by unauthorised publishers and their sale for a higher profit because there was no need to pay for the author's manuscript. The book privilege system allowed individual states to grant publishers protection against reprinting within their respective borders. But given the proximity of the three hundred or so German states and their differential treatments of book piracy, it was not possible for publishers to obtain a privilege in every state. The profitability of book piracy limited the profits of publishers, which in turn affected the livelihood of authors and their communicative freedom. As Barron puts it strongly, 'in the absence of a right to control unauthorized publication, no publisher would purchase a manuscript from an author in the first place'.[128] The author's freedom to speak publicly depended on the willingness of publishers to print their books. If collective emancipation depended on the use of public reason through the medium of print, then the reluctance of publishers to print the books of authors and adequately pay them for their efforts would have affected the very practice of enlightenment that Kant advocated. In the 1785 essay, Kant pushed for a regime of author's rights that saw unauthorised reprinting as a wrong against the publisher, who had been granted an exclusive right to speak in the author's name via a contract with the author. The right to grant this personal right to the publisher, in turn, extended from the author's 'innate right in his own person, namely, to prevent another from having him speak to the public without his consent, which consent certainly cannot be presumed because he has already given it exclusively to someone else'.[129] Without extending the concept of property to any immaterial thing in the book, Kant advanced a legal arrangement that protected the practice of authorised publication and the communicative freedom of authors in eighteenth-century Germany.

For Barron, though Kant's idea of author's rights proposed a solution to a specific problem in eighteenth-century Germany, it nonetheless necessitates a re-evaluation of today's utilitarian and proprietary systems of copyright. How far can utilitarian copyright protect communicative freedom and affirm the practice of enlightenment on a global scale? Does the expansion of copyright and intellectual property rights not constitute an obstacle or 'impediment'[130] to the collective emancipation of

[127] Kant, 'On the Wrongfulness of Unauthorized Publication of Books (1785)', 32. See also Barron, 'Kant, Copyright and Communicative Freedom', 40, fn 29: 'the 1785 Essay on unauthorized reprinting reflects Kant's recognition that communication between speakers in modern conditions is inevitably *channelled* – by technologies and media of communication (print and books in Kant's day; software and networks in ours), by commercial intermediaries (Prussian publishers in Kant's context; global information and entertainment corporations in ours), and by institutional structures (book markets then; information markets generally now) – in ways that may shape the form and content of communication and so the nature of the communication community itself'.

[128] Barron, 'Kant, Copyright and Communicative Freedom', 34.

[129] Kant, 'On the Wrongfulness of Unauthorized Publication of Books (1785)', 35.

[130] Barron, 'Kant, Copyright and Communicative Freedom', 45.

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humanity at large? Rather than reproducing these dominant economic frames of copyright, Barron argues for the necessity of considering Kant's alternative of author's rights and the culture of public communication that it promises to secure.

MEDIUM OF LITERATURE

We have recalled three distinctive positions on the question of authorship and copyright that adopt differing interpretations of Kant's 1785 essay and its significance to copyright law today. These readings of Kant call attention to different junctures in the essay and, at times, seek to illuminate them by selectively referring to other parts of Kant's philosophical oeuvre. Emphasising the verbal and dialogical nature of the book as suggested in the essay, Drassinower sees authorship as an author's invitation to the public to engage in a dialogue through new communicative acts that draw on the ideas expressed in others. As rethought by Drassinower, the idea/expression dichotomy evidences the law's affirmation of an egalitarian ethic of authorship that sees authors as equally entitled to be inspired by one another's acts. For Borghi and Barron, on the other hand, the dichotomy and the concept of intellectual property it implies are fundamentally incompatible with Kant's notion of author's rights. Moving beyond Kant's essay to consider his reflections on thinking and publicity, Borghi conceives of authorship as the author–public coalescence that affords our common being in truth. The copyright speech act warrants legal protection precisely by virtue of its necessary orientation towards truth. Similarly referring to these 'external' texts but also to Kant's ethical and legal-political philosophy, Barron grounds authorship in Kant's notions of right, communicative freedom and enlightenment. Authorship is an exercise of the freedom to participate in open public debate, which advances the global project of collective emancipation where reason alone governs human actions. For Barron, Kant's regime of author's rights was the rightful legal arrangement to protect communicative freedom in eighteenth-century Germany, and ought to be considered as a corrective to the proprietary notion of copyright that now prevails.

In so constructing their own positions on authorship and copyright through a close engagement with the philosophical meaning of Kant's essay and other writings, the three contemporary intellectual property scholars seem to demonstrate a shared acceptance of what they understand as a central premise of Kant's essay: the book is a speech spoken in the name of its author addressed to the public, who are in turn invited to reply, likewise with speech spoken in their own name. The structural coupling of the speech to the name of the author, which is non-severable by virtue of what Kant understood as the innate right of the author in one's own person, is what justifies each of the contemporary scholars' recourse to the writings bearing the author's name to illuminate the meaning of Kant's speech of 1785. Each scholar's 'speech' could also be understood as assenting to their respective – and even one another's – Kantian perspectives on authorship. From within Drassinower's position,

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the three scholars have drawn on the ideas in Kant's essay to articulate their own original ways of rethinking authorship and copyright. For the purposes of Borghi's truth-oriented theory, the speech acts of the scholars evidence the coming-together in truth of their authors' being, which is their necessary end. Lastly, from Barron's perspective, the affinities and differences in their positions reflect and emanate from the process of critical debate that is the motor of progress in the global project of collective emancipation in reason. All three scholars have approached Kant's essay as a speech addressed to themselves as members of public, to which they have responded with their own speech that could, in turn, be seen as invitations to other members of the public (like ourselves) to interpret and critique their positions. Authorship as a recursive dialogue of interventions is one way of reading Kant's essay and the scholarship it has inspired that appears to have been authorised by Kant himself.

And yet, as Barron shows some awareness of, the 'speech' of 1785 already registers in its philosophical meaning a dimension of authorship that exceeds such emphasis on the acts of interpretation and critique surrounding it.[131] Kant recognised that publishing in eighteenth-century Germany was an activity of relaying a speech coupled to the author that specifically relied on the medium of print. 'He presents the author as speaking publicly and only mediates delivery of his speech to the public … He indeed provides in his own name the *mute instrument for delivering the author's speech to the public* [reference mark]; but to *bring his speech to the public* by printing it, and so to show himself as the one *through whom the author* speaks to the public, is something he can do only in the name of another.'[132] In the accompanying footnote (see Figure 1.1), Kant explained that the printed book was 'mute' because it relayed the author's speech not by means of sound as in the instances of the 'megaphone' or 'mouth', but rather by means of the letter: 'This is what is essential here: that what is thereby delivered is not a *thing* but an *opera*, namely *speech*, and indeed by letters. By calling it a mute instrument I distinguish it from one that delivers speech by sounds, such as a megaphone or even the *mouth* of another.'[133] Kant not only understood the speech of authors in his day to be '*channelled*'[134] by the technology of print, but also saw such a mode of relay as being an optical one that relied on the visual perception of the reader. Print was – and continues to be – an optical medium: it can relay the 'speech' of the author only by means of the visible letters imprinted on the page. The opticality of print is reaffirmed by Kant in the passage on the nature and legal status of the book in *The*

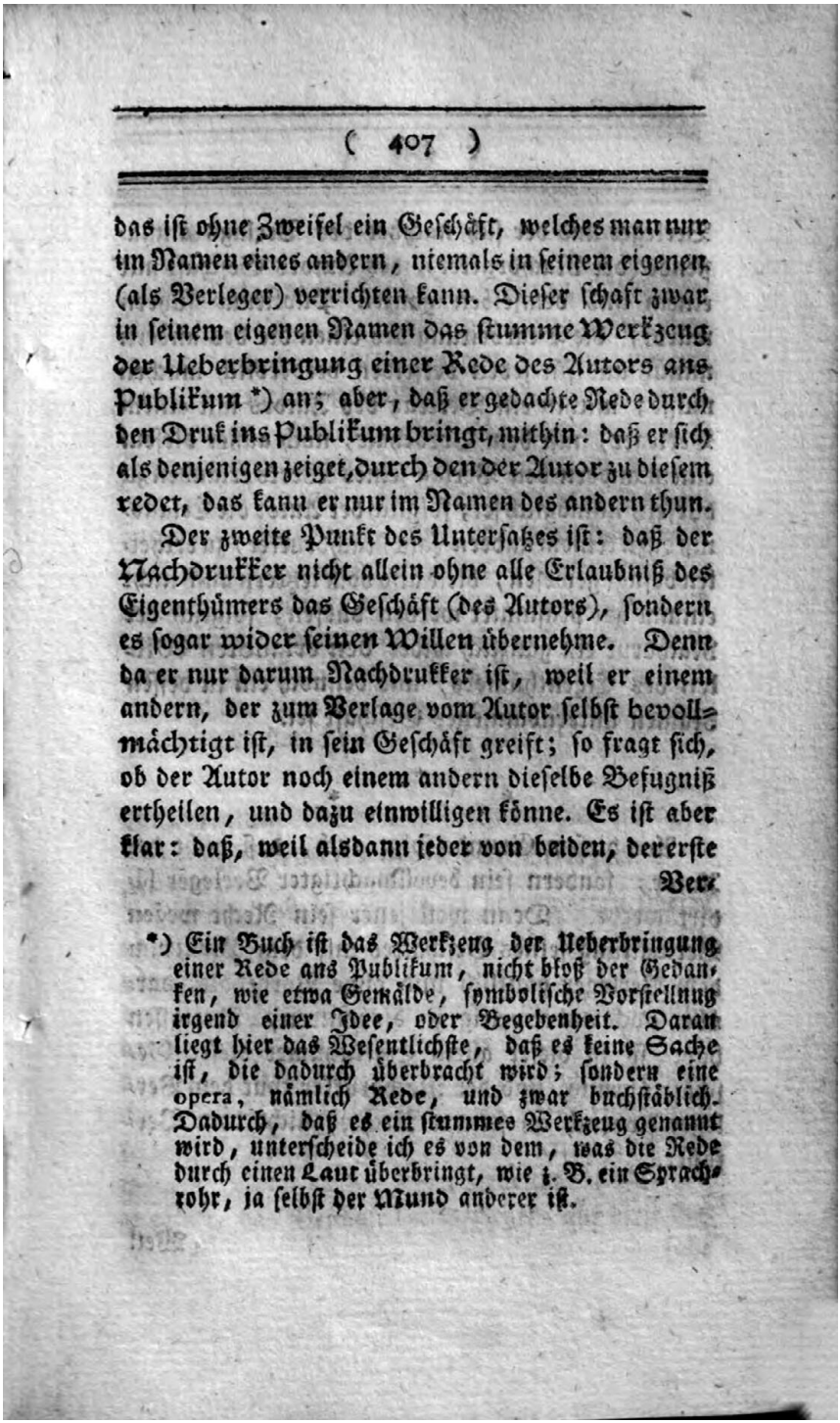
[131] See n. 127 for Barron's important observation of the technological, economic and institutional bases of modern communication that Kant had apprehended.

[132] Kant, 'On the Wrongfulness of Unauthorized Publication of Books (1785)'. See also Kant's ventriloquism of the publisher: 'Through me a writer will by means of his letters have informed you of this or that, instruct you, and so forth. I am not responsible for anything, not even for the freedom which the author assumes to speak publicly through me: I am only the medium by which it reaches you.': Ibid.

[133] Ibid.

[134] See n. 127.

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(407)

das ist ohne Zweifel ein Geschäft, welches man nur im Namen eines andern, niemals in seinem eigenen (als Verleger) verrichten kann. Dieser schaft zwar in seinem eigenen Namen das stumme Werkzeug der Ueberbringung einer Rede des Autors ans Publikum *) an; aber, daß er gedachte Rede durch den Druk ins Publikum bringt, mithin: daß er sich als denjenigen zeiget, durch den der Autor zu diesem redet, das kann er nur im Namen des andern thun.

Der zweite Punkt des Untersatzes ist: daß der Nachdrukker nicht allein ohne alle Erlaubniß des Eigenthümers das Geschäft (des Autors), sondern es sogar wider seinen Willen übernehme. Denn da er nur darum Nachdrukker ist, weil er einem andern, der zum Verlage vom Autor selbst bevollmächtigt ist, in sein Geschäft greift; so fragt sich, ob der Autor noch einem andern dieselbe Befugniß ertheilen, und dazu einwilligen könne. Es ist aber klar: daß, weil alsdann jeder von beiden, der erste Ver-

*) Ein Buch ist das Werkzeug der Ueberbringung einer Rede ans Publikum, nicht bloß der Gedanken, wie etwa Gemälde, symbolische Vorstellung irgend einer Idee, oder Begebenheit. Daran liegt hier das Wesentlichste, daß es keine Sache ist, die dadurch überbracht wird; sondern eine opera, nämlich Rede, und zwar buchstäblich. Dadurch, daß es ein stummes Werkzeug genannt wird, unterscheide ich es von dem, was die Rede durch einen Laut überbringt, wie z. B. ein Sprachrohr, ja selbst der Mund anderer ist.

FIGURE 1.1 Footnote on the opticality of books in Kant's 1785 essay.

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Metaphysics of Morals: 'A book is a writing (it does not matter here, whether it is written by hand or set in type, whether it has few or many pages) which represents a discourse that someone delivers to the public by visible signs."[135]

Why might the mediality and opticality of the book matter? In line with the emphasis on the authorial speech that is shared with the public through publication, there is the possibility of understanding the medium of print as being that which simply facilitates the transmission of the author's discourse to the public. In the previously cited passage from *The Metaphysics of Morals*, Kant did not seem to think there was any significant difference between handwritten and printed texts that might affect our understanding of authorship. A book that has been printed is no less the speech of its author than the handwritten manuscript is. The nature of a book as speech is defined not so much by print as by language. As a broadcast medium, print may help to facilitate the public use of reason that is the collective emancipatory practice of enlightenment. But it is the linguistic nature of the book that first affords the communication of its speech and what the author understands about the world.[136] In so focusing on interpreting Kant's essay in the light of contemporary issues in copyright law and/or Kant's wider philosophical system, the three legal scholars, too, seem to regard as their priority the meaningful content of the speech. The fact that their interpretations of Kant rely on different versions of the text, including the printed translation in *The Cambridge Edition of the Works of Immanuel Kant* (as cited by Drassinower and Barron) and the digital translation in the archive of *Primary Sources on Copyright (1450-1900)* (as cited by Borghi), is apparently immaterial. The materiality of Kant's essay as it was originally published in the *Berlinische Monatsschrift* matters only inasmuch as it affords its translation into a form that permits scholarly interpretation and debate. The perspective here is that the medium is only secondary to the meaningful speech it conveys and incites. The medium matters only inasmuch as it is the vehicle for the message.

But if we were to turn to other traditions of scholarship that take the medium more seriously, we would find that the very technical specificity of a book as a printed text could be the key to its historical significance, which exceeds what is typically understood as its meaningful or philosophical content. Indeed, the latter could be seen as quite derivative of the former, not only in the sense that any meaningful act of interpretation is advanced only on the basis of the material letters perceived but also in the sense that the resultant meaning often entails a forgetting of those medial conditions of possibility that supplement, or even subvert, it. Taking as their methodological starting point Marshall McLuhan's provocation that 'the

[135] Immanuel Kant, 'The Metaphysics of Morals (1797)', in *Practical Philosophy*, ed. Paul Guyer and Allen W. Wood, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 437.

[136] On the equation of transmission channels with language by John Locke and other Enlightenment philosophers, see Bernhard Siegert, *Relays: Literature as an Epoch of the Postal System*, trans. Kevin Repp (Stanford, CA: Stanford University Press, 1999), 1.

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medium is the message',[137] the media-historical studies of Friedrich Kittler have suggested some specific ways in which the mediality and opticality of printed books contributed to the emergence of the Romantic fiction of authorship as the creation of an original work by a sovereign author or poetic genius in Germany circa 1800.[138] Kittler recalls that literary production in eighteenth-century Germany was premised on techno-institutional conditions of possibility (i.e. a 'discourse network'[139]), which included for instance the pedagogical practices of German mothers reading to their children from printed vernacular primers like Ernest Tillich's *Erstes Lesebuch für Kinder* ('First Reader for Children').[140] The elementary operation of alphabetising children and preparing them to be future German authors was administered by mothers through ABC books of the like, which attests to the subjectivating function of print media and their ancillary techniques.

Even though it was by means of print that alphabetised authors wrote and created the meaningful works in which they claimed ownership, they tended not to see those material conditions of possibility, which, in the case of the printed page, were ironically visible. Consider, for instance, the scenes involving a hallucinating young poet in E. T. A. Hoffmann's *Der goldne Topf* ('The Golden Flower Pot'),[141] which Kittler reads as emblematic of German Romanticism's blindness to the optical medium that first afforded the construction of meaning. As the young student Anselmus sat in the azure chamber of Archivarius Lindhorst's house copying the latter's manuscripts, he heard whispers from Serpentina ('I am near, near, near! I help you: be bold, be steadfast, dear Anselmus! I toil with you so that you may be mine!'[142]) that facilitated his completion of the task almost without having to refer to the manuscript ('he scarcely needed to look at the original at all'[143]). The materiality of the letter, otherwise visible to any reader, was ceded to a speech that was of infinitely greater significance to the writer himself: 'Whereas the caffeine-drunk bureaucrat Heerbrand beheld dancing Fraktur letters and the insane Klockenbring hallucinated the syllables and images of absent books, the Poet Anselmus hears only a single Voice whose flow makes his roman letters rounded, individualized,

[137] Marshall McLuhan, *Understanding Media: The Extensions of Man* (Cambridge, MA: The MIT Press, 1994), 7.

[138] See Friedrich Kittler, 'Authorship and Love', *Theory, Culture & Society* 32, no. 3 (2015): 15–47; Kittler, *Discourse Networks 1800/1900*; Friedrich Kittler, *Optical Media: Berlin Lectures 1999*, trans. Anthony Enns (Cambridge: Polity Press, 2010). See also Friedrich Kittler, 'Unpublished Preface to Discourse Networks', trans. Geoffrey Winthrop-Young, *Grey Room* 63 (2016): 90–107; Friedrich Kittler, 'The Perspective of Print', trans. Geoffrey Winthrop-Young and Michael Wutz, *Configurations* 10, no. 1 (2002): 37–50.

[139] See Kittler, *Discourse Networks 1800/1900*, 369.

[140] See the section on 'Learning to Read': Ibid., 27–53.

[141] E. T. A. Hoffmann, 'The Golden Flower Pot', in *The Best Tales of Hoffmann*, ed. E. F. Bleiler (New York: Dover Publications, Inc., 1967), 1–70.

[142] Ibid., 34.

[143] Ibid., 35.

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and – the distinguishing feature – unconscious.'[144] Only belatedly – that is, after the deed had been accomplished – did Anselmus see what he had written in a state of alphabetised intoxication: 'authorship arises in rereading what had been unconsciously written in the delirium'.[145] From an alphabetised culture extended the work, whose 'ownership' was belatedly ascribed to the author. But the author did not even notice the letters he transcribed, much less see the wider technical infrastructure to which he and the work were coupled. As we have suggested, such an instance of the denial of the materiality of the letter and other nodes of the discourse network is not an exclusive privilege of the Romantic poet. In so centring their reading of Kant's text on its philosophical content (that is, Kant's 'speech'), so too have the contemporary legal scholars slipped into the position of Anselmus. The medial-materialities of Kant's 1785 essay as a printed text that forms part of the German periodical have ceded visibility to its ideal propositions.

The printed book of eighteenth-century Germany responded to the public's desire for images at a time before images could be physically stored and transmitted by means of photography.[146] In technical and scientific volumes we find realistic illustrations and pictures that claim to represent the world as it is, which further the Enlightenment's search for objective knowledge. In Romantic novels, on the other hand, we see phantasmal scenes like those of Anselmus's hallucinations, which are not unlike the projections of the *lanterna magica*. Be they the images of 'fiction' or 'non-fiction', of 'real' or 'imagined' perception, of the *camera obscura* or its ghostly successor, the book's imagery relies on the printed page with its arrangement of graphic marks that affords reading. '[S]ince everything depended on putting individual letters in their place, Gutenberg's print technology required a spatial geometry. Each lead letter was located in relation to its neighbour to the right, left, top and bottom; in other words, each letter filled an empty space that was already waiting for it.'[147] The printed page is that visible layer of the book that enables the book to perform its imaginary and meaningful functions.

Other than in media theory, the printed page has been studied in the overlapping fields of bibliography, book history, print culture, literary studies, typography and graphic design for its interplay with the sphere of meaning to which legal scholarship has largely restricted itself when approaching a text like Kant's 1785 essay.[148] To

[144] Kittler, *Discourse Networks 1800/1900*, 100.
[145] Ibid., 109.
[146] See Kittler, *Optical Media: Berlin Lectures 1999*, 89–117.
[147] Kittler, 'The Perspective of Print', 38.
[148] See, e.g., Genette, *Paratexts*; Jerome J. McGann, *The Textual Condition* (Princeton, NJ: Princeton University Press, 1991); George Bornstein, *Material Modernism: The Politics of the Page* (Cambridge: Cambridge University Press, 2001); Alberto Manguel, 'A Brief History of the Page', in *A Reader on Reading* (New Haven, CT: Yale University Press, 2010), 120–27; Peter Stoicheff and Andrew Taylor, eds., *The Future of the Page* (Toronto: University of Toronto Press, 2004); John Trimbur, 'Delivering the Message: Typography and the Materiality of Writing', in *Rhetoric and Composition as Intellectual Work*, ed. Gary A. Olson (Carbondale:

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cite a recent example, in *How the Page Matters* (2011), Bonnie Mak traced the evolution of the page as a material interface between the designer and the reader across the communicative-medial epochs of scribal, print and digital culture by comparing three corresponding versions of a fifteenth-century treatise, Buonaccorso da Montemagno's *Controversia de nobilitat* (1428). In so juxtaposing the manuscript, print and digital copies of the text, she showed how different editorial decisions relating to textual presentation (or what she called the 'architectures of the page'[149]), ranging from the materials out of which the pages were made to their layout of distributed letters, blank spaces and images, affected the message it transmitted. The choice of typeface at a particular moment in history that afforded different options, for instance, could evidence some relations between the text and various traditions that were then operative – consolidating, inflecting or perhaps diverging from them. Our interpretations of textual meaning could be determined by the media-materialities of the page that communicates it. Indeed, we may suggest that the optical page could be read as an index of its historical significance – or what Walter Benjamin called the 'aura'[150] of the work of art – which necessarily exceeds its interpretive content. To ask not so much what the printed page 'means' (a hermeneutic question) as what it 'evidences' (a techno-historical question) could be the starting point in an attempt to correct the bias against the materiality of the text in question. But, of course, as we may already have seen in our review of the contemporary takes on Kant's essay, the two questions relating to the two slopes of the printed book are necessarily intertwined: as we try to grasp the 'meaning' of the text, we already find ourselves operating within a field circumscribed by the material text. And an inquiry into the media-historical specificities of Kant's original text could well affect what is understood as its proper 'message'.

How might we re-read Kant's 1785 essay such that due regard is given to the printed text as an optical medium and to the material page as a spatio-temporal index? In Brad Pasanek and Chad Wellmon's 'Enlightenment, Some Assembly Required' (2016), we find an exemplary reading of Kant's *Beantwortung der Frage. Was ist Aufklärung?* ('An Answer to the Question: What Is Enlightenment?') (1784) essay that may serve as our model for an alternative way of looking at a printed book.

Southern Illinois University Press, 2002), 188–202. See also Daniel Berkeley Updike, *Printing Types: Their History, Forms, and Use; A Study in Survivals* (Cambridge, MA: Harvard University Press, 1922); Lucien Febvre and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing 1450–1800*, ed. Geoffrey Nowell-Smith and David Wootton, trans. David Gerard (London: NLB, 1976); Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe, Volumes I and II* (Cambridge: Cambridge University Press, 1979); Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge: Cambridge University Press, 1983).

[149] See Bonnie Mak, *How the Page Matters* (Toronto: University of Toronto Press, 2011), 9–21.

[150] Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (London: Fontana Press, 1992). For this interpretation of Benjamin's aura as relating to the presence of a work in time and space as evidenced by the material features of the text, see Bornstein, *Material Modernism*, 30–31.

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Let us consider their treatment of the title of Kant's earlier essay. As it had originally appeared in the lead essay of the December 1784 issue of the German periodical (see Figure 1.2), the essay title did not consist only of the words. According to the bibliographic norm that was operative at the time of Kant's writing, the parenthesis was a citation that directed readers to a page of an essay in the December 1783 issue of the same periodical, namely Johann Friedrich Zöllner's *Ist es rathsam, das Ehebündniß nicht ferner durch die Religion zu sancieren?* ('Is it wise to no longer sanction marriage through religion?'). If we were to turn to page 516, we would find the question *Was ist Aufklärung?* in the footnote, accompanied by Zöllner's complaint about the absence of any satisfactory answer to the question despite its importance.[151] By thus citing Zöllner's own essay in his essay title promising 'an answer to the question' Kant directs the readers to a network of references – in which his essay is located – as the reply. The public use of reason that Kant had suggested in his 'speech' as essential to the practice of enlightenment was, thus, fundamentally dependent on the system of print (or 'bibliographic system'[152]) that the title foregrounded. The 'entire public of the *world of readers*'[153] before whom one's own reason was to be exercised did not precede the printed books with which one was engaging. There was no 'public sphere' of rational subjects before the subjectivating practices of reading and writing that extended from the infrastructure of print. Rather, books, authors and readers had co-evolved as a culture mediated by the technology of print and the techniques surrounding it.

In the title of Kant's original essay of 1784, we find a visible trace of the bibliographic system in eighteenth-century Germany that conditioned its articulation. But in its subsequent reprints, the parenthetical cross-reference was excised, which contributed to the de-historicisation and de-mediatisation of Kant's reflections on the practice of enlightenment. The English translation in *The Cambridge Edition of the Works of Immanuel Kant* is only one recent participant in this continual erasure of Kant's own awareness of some of the technical a priori on which his articulation of authorship as speech act depended. The editorial and/or translational decision is symptomatic of a wider tendency to neglect the medial-materialities of the text in contemporary interpretations of Kant. 'Despite this linking of essay to essay, scholars have long read Kant's essay in isolation, as *Kant's* essay, an autonomous piece of thinking [citing James Schmidt, 'Misunderstanding the Question: What Is Enlightenment' (2011)]. Dislocated from its position in the Enlightenment network of citation, it has been reduced to its ostensible *philosophical* content and arguments.'[154] Though referring to posterior treatments of Kant's

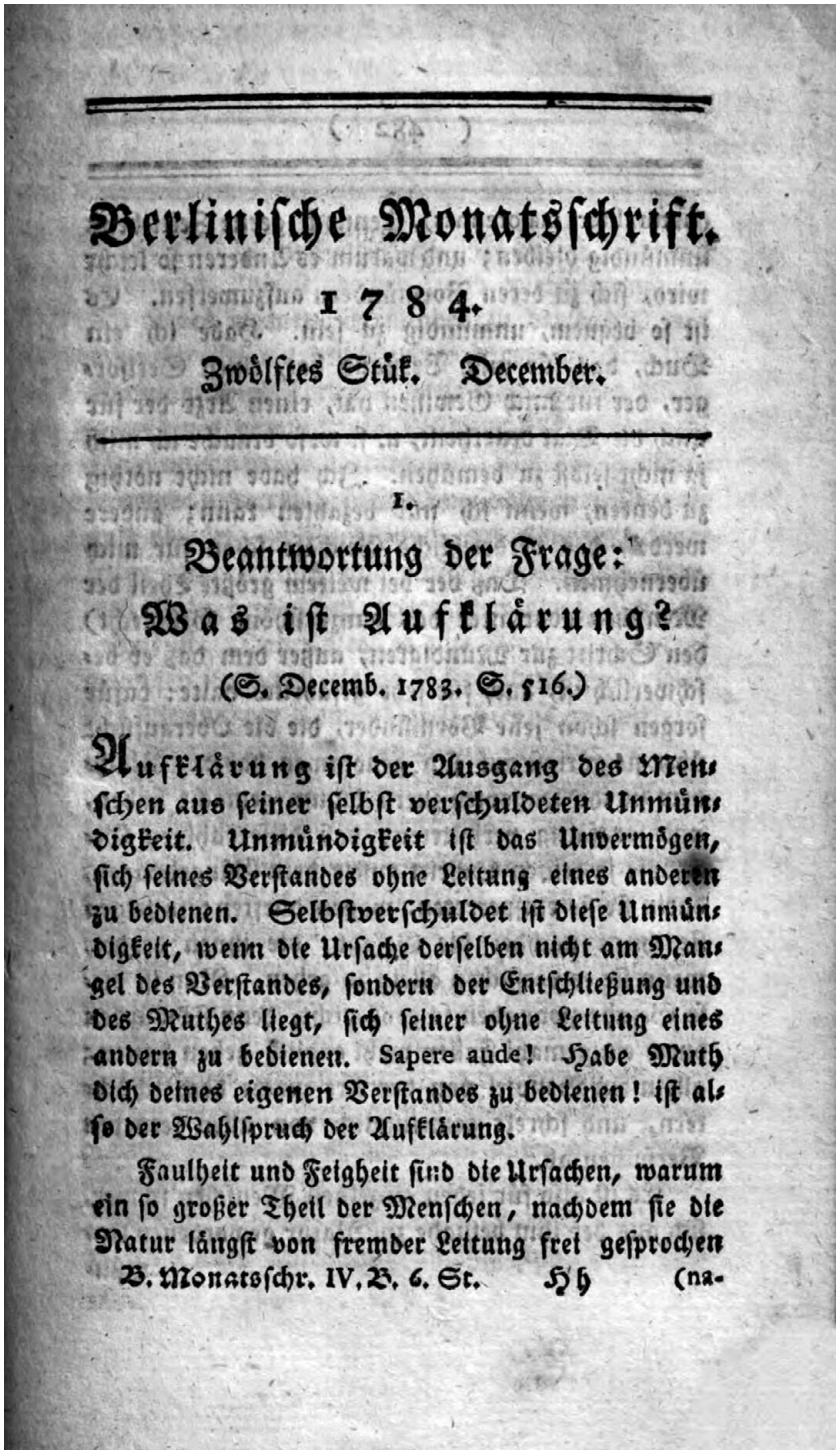
[151] See 'J. F. W. Zöllner: Ist es rathsam, das Ehebündniß nicht ferner durch die Religion zu sancieren? (1783)', Universität Bielefeld: Universitätsbibilothek, accessed 9 September 2024, http://ds.ub.uni-bielefeld.de/viewer/image/2239816_002/535/LOG_0076/.

[152] Pasanek and Wellmon, 'Enlightenment, Some Assembly Required'.

[153] Kant, 'An Answer to the Question: What Is Enlightenment? (1784)', 18.

[154] Pasanek and Wellmon, 'Enlightenment, Some Assembly Required'.

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Berlinische Monatsschrift.

1784.

Zwölftes Stük. December.

I.

Beantwortung der Frage:

Was ist Aufklärung?

(S. Decemb. 1783. S. 516.)

Aufklärung ist der Ausgang des Menschen aus seiner selbst verschuldeten Unmündigkeit. Unmündigkeit ist das Unvermögen, sich seines Verstandes ohne Leitung eines anderen zu bedienen. Selbstverschuldet ist diese Unmündigkeit, wenn die Ursache derselben nicht am Mangel des Verstandes, sondern der Entschließung und des Muthes liegt, sich seiner ohne Leitung eines andern zu bedienen. Sapere aude! Habe Muth dich deines eigenen Verstandes zu bedienen! ist also der Wahlspruch der Aufklärung.

Faulheit und Feigheit sind die Ursachen, warum ein so großer Theil der Menschen, nachdem sie die Natur längst von fremder Leitung frei gesprochen

B. Monatsschr. IV. B. 6. St. Hh (na-

FIGURE 1.2 Title page of Kant's 1784 essay on enlightenment.

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1784 essay, this critique by Pasanek and Wellmon could just as well apply to those of Kant's later essay.

To be sure, none of the three Kantian scholars has been oblivious to the medial-materialities of the cultural works whose production, distribution and use copyright law purports to regulate. For instance, reflecting on the decision of *Authors Guild v Google, Inc*, Drassinower has suggested that Google's mass digitisation project involves a 'merely technical, noncommunicative reproduction incidental to the operations of digital technology'[155] rather than any act of recommunicating authorial speech to the public. On Drassinower's view, rather than instantiating any fair use of copyrighted works, the scanning and indexing of these works to be made searchable on Google's website could be more adequately understood and legitimated as a 'nonuse'[156] of works, which does not involve compelling authors to speak. As noted from the outset, Borghi and his co-author Karapapa have assessed the phenomenon of mass digitisation as involving a threefold paradigmatic shift relating to the transformation of works to data, the inversion of copyright into an opt-out system, and the recentralisation of informational power in digital intermediaries such as Google. This latest phase in the digital revolution is thus seen as radically disruptive to our received notions of authorship and copyright. Other than literature, Barron has studied other cultural works of music, film, the visual arts and the distinctive places they occupy within copyright law and other disciplinary discourses, recognising their generic differences.[157] In their own ways, these moments in their scholarship evidence some attentiveness to the technological (re)mediation of cultural works.

And yet, in interpreting Kant's 1785 essay for the purposes of rethinking copyright and authorship, these scholars have largely prioritised its 'message' over the 'medium'. In so doing they have obscured the dependence of the meaningful work on its material body, and the possible transactions between them. This tendency to underestimate what Hans Ulrich Gumbrecht and Karl Ludwig Pfeiffer have called the 'materialities of communication'[158] is not at all distinctive to the legal academy. Shortly before his death, Kittler suggested that until recently, Western philosophy had devoted itself to preserving Aristotle's distinction between form (*eîdos*) and matter (*húle*).[159] Whereas the ideal aspects of beings were regarded as their essence, their material or corporeal bases were deemed inconsequential and irrelevant to

[155] Drassinower, *What's Wrong with Copying?*, 225.
[156] Ibid.
[157] See, for instance, Anne Barron, 'Copyright Law and the Claims of Art', *Intellectual Property Quarterly* 4 (2002): 368–401; Anne Barron, 'The Legal Properties of Film', *Modern Law Review* 67, no. 2 (2004): 177–208; Anne Barron, 'Copyright Law's Musical Work', *Social & Legal Studies* 15, no. 1 (2006): 101–27.
[158] Hans Ulrich Gumbrecht and Karl Ludwig Pfeiffer, eds., *Materialities of Communication* (Stanford, CA: Stanford University Press, 1994).
[159] Friedrich Kittler, 'Towards an Ontology of Media', *Theory, Culture & Society* 26, no. 2–3 (2009): 23–31.

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ontological inquiry. To undo the characteristically philosophical violence of privileging form over matter, it is arguably necessary for copyright scholars to attend closely to the medial-materialities of literature and other cultural works. Doing so could help to clarify our understanding of the present digital transformation of authorship and copyright. With respect to Kant's 1785 essay, what remains to be done is to revisit it in the light of media theory and restore to sight its printed pages.

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