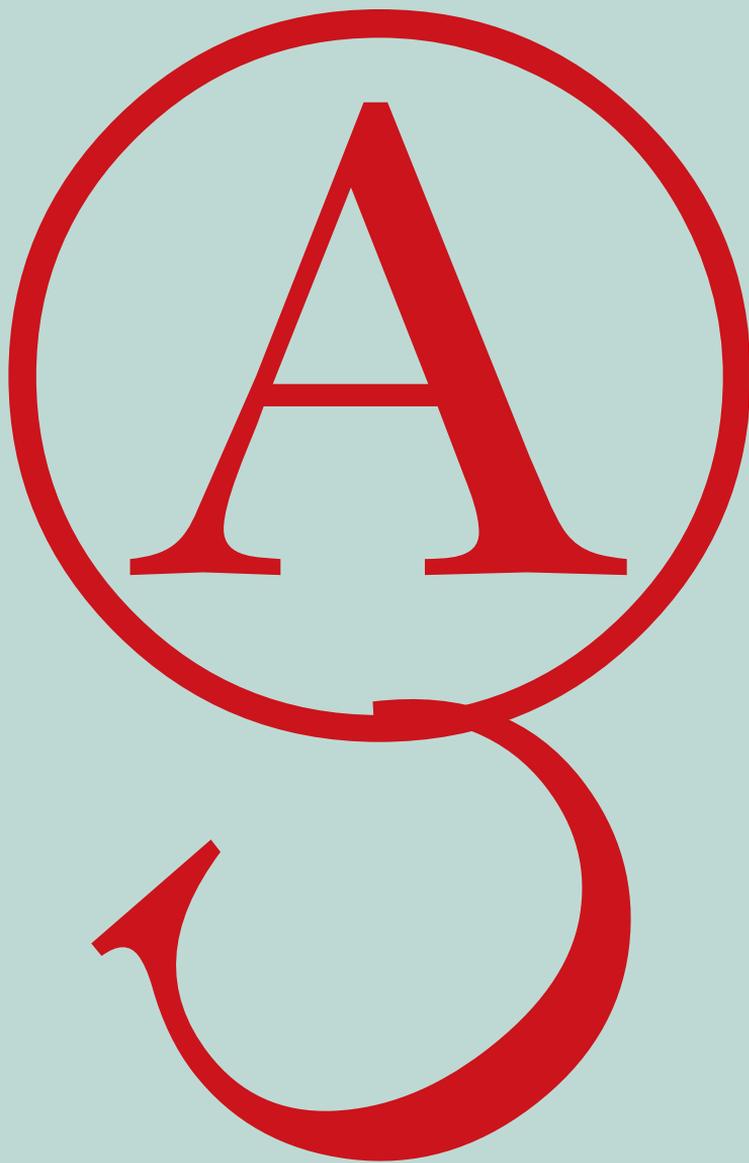


Edited by Mireille van Eechoud

# The Work of Authorship



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University  
Press

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*Edited by*  
*Mireille van Eechoud*

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# Creative work and communicative norms

Perspectives from legal philosophy

*Laura Biron*

In consideration of the application of insights from the humanities to the interpretation of core legal concepts in copyright, this chapter examines three questions: first, what is a ‘work of authorship’, and why does copyright law place such a strong emphasis on originality for determining what counts as a work? Second, can and should we modify ‘romantic’ conceptions of authorship, to take into account the various ways in which authorial practices seem to conflict with their highly individualistic and creator-centred focus? Finally, how might copyright law make sense of the various ways in which authorship is collaborative, in light of its somewhat restrictive definitions of co-authorship?

This chapter will consider the contribution that existing philosophical literature on the justification of copyright might have to these questions. It begins by outlining three categories that have application to questions about authorship – labour, personality and communication – and explaining a deeper distinction between proprietary and non-proprietary accounts of authorship which underlies these categories. It goes on to illustrate how these differing approaches to authorship can be applied to the three questions under consideration. For reasons of space and practicality, the focus of this chapter will reflect my expertise in Anglo-American copyright theory and doctrine.

## Philosophical accounts of ‘authorship’

Leaving aside utilitarian or consequentialist justifications for copyright, which tend to focus more on incentivising acts of authorship than the nature of authorship *per se*, there are, broadly speaking, three different theories distinguished in the literature: *labour* theories, associated with John Locke; *personality* theories, often thought to be linked to the writings of Hegel; and *communicative* theories, taking inspiration from Kant’s writings on intellectual property.

It should be noted at the outset that these justificatory theories are not usually directly applied to questions about authorship; indeed, the labour and personality accounts are more conventionally viewed as theories of property, rather than theories of authorship as such. The Kantian approach may seem more directly linked to authorship, through its focus on communication and explicit rejection of proprietary language, but it is still at an early stage of development in the philosophical literature. Thus, a central question explored by this chapter is the extent to which communicative accounts of copyright have more direct application to questions about authorship than labour or personality theories. The chapter argues that we should not fall into the trap of assuming that one set of theories (based, for example, on communicative norms) can provide a complete answer to the complex questions at stake, but rather that we should be aware of the need to develop 'hybrid' theories of authorship, drawing together the key premises from communicative, labour and personality theories which have application to the questions at stake.

Before moving on to discuss the three sets of theories in more depth, a further observation is needed about the role of the concept of authorship in philosophical discussions. Although it might seem as though authorship is one of copyright law's most central concepts, Waldron points out that policy defences of copyright are 'seldom cast in purely individualistic terms. Officially, the justification is supposed to have more to do with the social good than with the individual rights of authors' (Waldron, 1993, p. 848). Why, then, does there seem to be such a strong focus on authors' rights in debates about the justification of copyright? Waldron draws attention to many ways in which social defences of intellectual property become cast in individualistic terms, and notes that 'social policy, judicial and scholarly rhetoric on the topic retains many of the characteristics of natural rights talk' (*ibid.*, p. 849). Another explanation is given by Peter Jaszi, who argues that theorists of copyright have become entranced by a 'mythologised' conception of authorship, viewing it as a privileged category of intellectual activity, tied up with notions of self-ownership, personality and originality (Jaszi, 1991, p. 455). At the same time, Jaszi draws attention to the fact that authorship is anything but a unified or fixed category of aesthetic experience, something which could provide a 'stable foundation for the structure of copyright doctrine'; rather, he seems to agree with Waldron's observation that authors' rights lie at the centre of a tension between social and individualistic defences of intellectual property, describing authorship as 'the locus of a basic contradiction between public access to and private control over imaginative creations' (*ibid.*, p. 457).

What are the implications of these observations for philosophical conceptions of authorship? It seems fair to say that, in the philosophical literature on authors' rights, a similar tension exists between individualistic and social theories of authorship. On the one hand, there is a tendency to assume that the relationship between an author and their work can be viewed analogously to the relationship between an individual owner and an object of property. Certainly, this is the assumption underlying most interpretations of the labour theory of authorship, as we shall see below. This means that authorship and ownership become intertwined categories, and authorship is often cast as a matter of individual entitlement. Nonetheless, there are justificatory theories of copyright that focus less on individual authors (*qua* individual owners), and more on the social goals that acts of authorship can promote – in particular, goals associated with communication and public knowledge. This distinction between *proprietary* and *non-proprietary* conceptions of authorship will emerge as we unpack some of the different theories of authorship that have been said to be associated with labour, personality and communicative theories.

### Authorship and labour

Judges often appeal to labour in intellectual property rulings. A well-known example is Justice Potter Stewart's observation that: 'The immediate effect of our copyright law is to stimulate a fair return for an author's creative labour' (*Twentieth Century Music Corp. v. Aiken*, 1975, para. 156). In UK law, copyright's originality requirement is even specified by reference to labour (Bently and Sherman, 2005, p. 94). This has led to discussion about whether such appeals could be grounded in philosophical theories of property based on labour, and in particular the work of John Locke, whose account of property will be considered in this section.

Locke's theory of property has three central components: an initial commitment to common ownership, arguments for privatising the commons, and a specification of some provisos that must be in place before ownership is fully justified. The implications for Lockean accounts of authorship and author entitlement vary, depending on which component of his theory we emphasise. Indeed, a brief look at the literature on Lockean theories of intellectual property reveals a divergence of views about the implications of Locke's theory for the justification of authors' rights. According to Nozick (1968, pp. 178–181), Hughes (1988, p. 291) and Becker (1993, pp. 610–612), Lockean arguments can be used to support strong intellectual property rights, assigning authors expansive rights to control uses of their intangible assets

by others. On the other hand, commentators such as Gordon (1993), Shiffrin (2001), Damstedt (2003) and Hull (2009) stress the various limitations on ownership of intellectual property that follow from Locke's account, arguing that his justifications for intellectual property would be weaker than his justifications for tangible property. Although it is not necessary to choose between these different interpretations, it is important to be aware that there is no one definitive 'labour' account of authorship. In the remainder of this section, I outline the four most popular interpretations of Locke's theory in the literature.

Interpretations of Locke's account of copyright often begin with Locke's famous 'labour mixing' argument for the justification of property, according to which 'every man has a property in his own person' and in 'the labour of his body and the work of his hands' (Locke, 1689, book II: sec. 27). When a person removes a thing from its natural state, he has:

[...] mixed his labour with it and joined it to something that is his own ... and thereby makes it his property ... For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to (ibid., II: sec. 27).

The idea behind this argument is that, through mixing our labour with what is available in the common for appropriation, we extend our natural property in our persons to that which is available, thereby grounding property rights in particular resources. If another person takes what you have mixed your labour with, that person also takes your labour 'which another had no title to' (Locke, 1689, Book II: sec. 32). Locke describes this argument as providing the 'great foundation' of his theory of property (ibid., II: sec. 44). What are its implications for Lockean theories of authorship?

Although some commentators have been sceptical about the application of labour-based arguments to copyright, arguing that labour 'generates too many indeterminacies and problems to provide a justification for intellectual property' (Drahoš, 1996, p. 54), others have been keen to ground defences of authors' rights on the basis of Locke's labour-mixing argument. The first, most popular description of Locke's theory is known as the *labour-desert* theory. This suggestion is made explicitly by Becker (1993, p. 620), Hughes (1988, p. 305) and Tavani (2005, p. 88), and even when not explicitly made it is implied by the comment very often made that Locke's theory of intellectual property is a matter of rewarding authors for the fruits of their labour. And the idea of intellectual property rights being a 'reward' for authorial labour has certainly been influential in the courts, for

example: 'Sacrificial days devoted to ... creative activities deserve rewards commensurate for the services rendered' (*Mazer v. Stein*, 1954, p. 219). But it is important to note that desert-based interpretations of Locke's account of authorship do not fit neatly with the spirit of Locke's own discussion of the justification of property through labour.

Indeed, Locke's discussion of the relationship between a subject and their labour seems to preclude it being wholly framed in terms of desert. For example, he admits that the productivity of one's labour can depend on luck and other conditions that are independent of the labourer's efforts whereas, of course, whether or not a person deserves a reward for a particular action should depend on the effort they put in. The same can be said – perhaps to an even greater extent – for the case of authors; after all, authors benefit from talents that are in many respects dependent on natural endowments (over which they have no control, and hence cannot be said to deserve) and also on various social factors that reward certain kinds of talents over others, depending on the context. In Rawlsian terms, it would be 'morally arbitrary' for individuals to be rewarded for the fruits of their talents because the natural and social factors that determine their value lie outside of their control (Rawls, 1971, p. 74). It follows that it makes little sense to ground a labour theory of authorship in a theory of desert. This means that, whatever emphasis might be placed on the connection between authorship and desert in judicial settings, such an emphasis cannot find philosophical support in labour theories of property.

Setting aside desert-based labour theories of authorship, a second account of Lockean authorship can be termed the *creationist* account. Taking its inspiration from interpretations of Lockean labour as God-like, *ex nihilo* activity that does not depend on what comes before it (Tully, 1980, pp. 108–9), the creationist account supports the view that Lockean natural rights to intellectual property can be easily derived, since 'it seems as though people do work to produce ideas and that the value of these ideas ... depends solely upon the individual's mental work' (Hughes, 1988, p. 291).

Even though the creationist account of Lockean labour has been criticised as limited in its application to tangible property (Simmons, 1991, p. 259; Waldron, 1988, p. 199), it might nonetheless apply to questions about authorship and intellectual property. After all, when Locke considered the material common, he was thinking about an expanse of resources that was 'given' to mankind by God to be used and enjoyed by all, which makes it difficult to see how individuals could labour *ex nihilo* without building on pre-existing raw materials. But, arguably, the intellectual common is not always construed as a given set of raw materials, because it depends

crucially on activities by human beings over time, and this points to a difference between resources that are given to us by nature and intellectual resources that are given to us as a result of individuals creating, producing and inventing them. If such a distinction can be maintained<sup>1</sup>, it follows that creationist interpretations of Lockean labour – which focus on labour as something not dependent on the prior labour of others – lead one toward strong, creator-centred theories of authorship. The implications of this account for the broader questions considered by this chapter are made clear below.

A third interpretation of Lockean labour, which I have termed the *intellectualist* account, leads to a more balanced picture of Lockean rights of authorship than is suggested by the creationist account. The first point to note about this interpretation is that it views Lockean labour not in physical terms, but as connected to Locke's remarks on personhood. Indeed, Locke speaks of an individual having property in their 'person', not their body, which provides reason for thinking that labour should be understood as fundamentally connected to our nature as persons – rational, reflective beings capable of choice and self-awareness. This also connects Lockean labour to the more general right to self-government – a 'right of freedom to his person' (Locke, 1689, Book II: sec. 190) – which underlies his theory of rights. If we understand Lockean labour as intellectual activity broadly construed – or, in Simmons' phrase, 'purposive activity aimed at satisfying needs or supplying the conveniences of life' (Simmons, 1992, p. 273) – it follows that, when a person mixes their labour with an object they do not literally change that object, but the object becomes part of their labour through being brought within their purposes, aims and actions. Provided such labouring does not encroach upon others' rights to self-government, the object cannot be removed from the labourer without interfering with their labour and thereby violating their right to self-government.

What are the implications of the 'intellectualist' account of labour for Lockean theories of authorship? One interesting observation is that, through connecting labour to personhood in this way, we actually move towards a Lockean theory of authorship that has much in common with personality theories (see below). This makes it possible to discuss 'hybrid' theories of authorship that blend elements of both labour and personality theories together, and may be able to give us a more comprehensive theory of authorship than when these theories are considered separately. A further, important element of the Lockean intellectualist account is that, through grounding authors' rights in rights of self-government, authorship (like ownership) becomes a category that generates internal constraints on its scope and extent.

That is to say, the intellectualist account of authorship states that authors should be given opportunities to originate and control their works provided that they do not violate others' rights to self-government – by pretending a work by another author is really the product of their own labour, or by merely copying another author's work without investing any new labour of their own, for example.<sup>2</sup> From the perspective of the intellectualist account, limitations on the extent of appropriation are considered part and parcel of what it means for an individual to mix their labour with an object, and not external constraints on the activities of owners (or authors).

The three interpretations of the labour theory of authorship considered above make use of an analogy between individual owners and individual authors. The fourth, and final account, found in the work of Seana Shiffrin (2001), is more radical, and attempts to move away from the proprietary framework offered by labour theories. The key difference between Shiffrin's *non-proprietary* account and most other interpreters of Locke is that she does not place a great emphasis on Locke's argument that private property is justified through individuals mixing their labour with unowned resources. In her view, conceptions of authorship which focus on the importance of labour give authors rights to their works that are too strong to be justified on other Lockean grounds, such as material survival and subsistence, not to mention Locke's basic commitment to equality. Shiffrin argues that access to intellectual products is not necessary for survival or subsistence and, due to their non-rivalrous, inexhaustible nature, they can be used by an infinite number of people without being used up. As she puts it: 'The fully effective use of an idea, proposition, concept, expression, invention, melody, picture or sculpture generally does not require prolonged exclusive use' (Shiffrin, 2001, p. 156). According to Shiffrin, this feature of intellectual products precludes their privatisation from the common on Lockean grounds.

Shiffrin's interpretation seems to give us a highly limited Lockean account of author entitlement: on her account, many of the property rights that authors have in their works under the current copyright system are unjustified. Her interpretation of Locke would favour systems of copyright that provided very little proprietary protection for authors – authorship would be seen as a shared endeavour, and most intellectual works would be viewed as existing in a kind of permanent common, outside the scope of propertisation. This view might be gaining support in certain 'Copyleft' movements, but it is not usually one that is seen as having philosophical support from Lockean accounts. Shiffrin's interpretation of Locke goes against the grain of some standard accounts of Lockean authorship, then, and this is largely because she chooses not to give Locke's labour-mixing

argument for the justification of property much prominence. In Shiffrin's view, labour plays a 'subsidiary' role in Locke's account of appropriation, 'justifying the appropriation by one individual rather than another once private appropriation of the given sort of property is antecedently valid' (2001, p. 144). Even if controversial as an interpretation of Locke, it might nonetheless have interesting implications for copyright law's definitions of authorship and, in particular, it provides a way of bringing Lockean insights into the burgeoning literature on non-proprietary accounts of copyright (discussed below).

### Authorship and personality

A different set of philosophical theories has been developed to support the proposition that an author's right to their work is justified on grounds that it expresses their personality. Applied to tangible property, Radin (1982, p. 957) has described this as the 'personhood perspective', noting that 'to achieve proper self-development – to be a person – an individual needs some control over resources in the external environment' (in the form of property rights). In the context of intellectual property, the personality theory requires that we grant creative works strong legal protection (against misattribution, for example, or other actions which inhibit the author's control over their work). Not only is the personality theory said to be a creator-centred theory, elevating the importance of the individual author at the expense of both copiers and the public domain, but it is also assumed to lead to stronger protection for copyright owners than other justifications for copyright (Bently and Sherman, 2005, p. 39).

When we look further into the roots of the personality theory, however, we find a confused and under-analysed picture of its philosophical lineage. As Fisher notes, personality theories of intellectual property are thought to be 'loosely derived from the writings of Kant and Hegel' (2001, p. 171). However, such theories may turn out to be very 'loosely' derived from the writings of these philosophers, and there is little scholarly work on personality theories in Anglo-American philosophical literature on copyright.<sup>3</sup> As Wendy Gordon notes:

[...] for investigation of whether and how the "personal" element [of intellectual property] should be important, we should probably look to sources such as Kantian and Hegelian philosophy. At least in the English-speaking world, although some valuable work has been done, application of those schools of thought to IP is still at an early stage (Gordon, 2003, p. 10).

Legal discussions of the personality theory so far have looked more to Hegel's theory of property for support and clarification than to Kant's (Hughes, 1988; Fisher, 2001; Netanel, 1993; Palmer, 1990). In this section, I consider whether Hegel's discussion of intellectual property justifies such a connection.

The personality theory of intellectual property is often said to apply particularly well to the legal protection of artistic work. Indeed, it seems especially well suited to support systems of 'moral rights' which include artists' rights to 'control the public disclosure of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, and above all to protect their works against mutilation or destruction' (Fisher, 2001, p. 174). These rights are said to be 'perpetual, inalienable and imprescriptible', as is stated in Article L121-1 of the French Act on intellectual property (*Code de la propriété intellectuelle*). The personality theory that underlies these legal protections, then, has two features: first, it gives philosophical grounding to copyright law's acknowledgement that some intellectual property rights are *inalienable*. Second, it is a *creator-centred* justification for intellectual property (Spence, 2007, p. 45). That is, the theory is used to justify legislation that protects creators of intellectual works against those who use, copy or modify their works.

Let us consider the first feature of personality theories – their focus on the inalienability of an author's personality. Hegel's account offers a nuanced and complex perspective on this issue. His discussion of *Entäußerung* ('alienation') at paragraphs 65-71 in the *Philosophy of Right* contains his most extensive remarks on intellectual property. On the one hand, his comments on the status of personality and mental traits such as ideas supports the view that they are inalienable: '... those goods, or rather substantive characteristics which constitute my own private personality and the universal essence of my self-consciousness are inalienable' (§ 66). This seems to align closely with the personality theory's recognition of inalienable authors' rights. On the other hand, Hegel was prepared to view authors' works as alienable 'things', despite the 'internal' or mental nature of intellectual production:

The distinctive quality of intellectual production may, by virtue of the way in which it is expressed, be immediately transformed into the external quality of a thing [*Sache*], which may in turn be produced by others (§ 68).

Although it might seem that alienation of an author's work is 'alienation of personality – a prohibited act in Hegel's system' (Hughes, 1988, p. 347), Hegel goes on to argue that the author nonetheless remains the 'owner of

the universal ways and means of reproducing such products and things' (§ 68) suggesting that the author has a stronger right than the person to whom they have alienated the external use of the object – a right to control the various external uses of the work by others, in keeping with the personality theory's support of moral rights. This means that there is some support for the notion of inalienable moral rights within Hegel's account; however, this is not because there is anything internal to the work which 'embodies' the author's personality – the work is external, alienable property, unlike personality which is inalienable – but rather because the author's personality is inalienably connected to the work through the author's control and choice over the way it is used by others. The implications of this view for copyright's notion of the work are considered in more detail later below.

As regards the second feature of the personality theory – its creator-centred focus – Hegel's discussion begins by focusing on the legal protection intellectual property offers to individual authors or creators:

The purely negative, but most basic, means of furthering the sciences and arts is to protect those who work in them against theft and to provide them with security for their property ... (§ 69).

This suggests that Hegel viewed intellectual property as a system that secured individual creators rights to their property; in keeping with the standard personality theory, he viewed its purpose and goals from the perspective of individual creators. Nonetheless, it soon becomes clear that the central focus of Hegel's account is the social nature of authorship:

The purpose of a product of the intellect is to be apprehended by other individuals and appropriated by their representational thinking, memory, thought, etc. Hence the mode of expression whereby these individuals in turn make what they have learned (for learning means not just memorising or learning words by heart – the thoughts of others can be apprehended only by thinking, and rethinking is also a kind of learning) into an alienable thing, will always tend to have some distinctive form, so that they can regard the resources which flow from it as their property, and may assert their right to reproduce it (§ 69).

Hegel is implying here that individuals who 'apprehend' or 'appropriate' existing intellectual products can build upon them in such a way that it might become very difficult to determine when repetition of ideas becomes a special property of an individual, rather than part of the common pool of

ideas. As such, his focus seems more balanced than standard interpretations of personality theories would allow.

We should not be surprised that Hegel's discussion moves away from a purely creator-centred or individualistic account of authorship, since the need for individuals to supersede or transcend subjectivity is crucial to his philosophy. Hegel argues that the development of individual personality involves some sort of 'transition' from the inner subjective world to the external objective world, and that property is an important part of this transition:

Abstract property contains the arbitrary moment of the particular need of the single individual; this here is transformed ... into care and acquisition for a communal purpose, i.e. into an ethical quality (§ 179).

More generally, as the *Philosophy of Right* develops from abstract right to *Sittlichkeit*, Hegel ceases to draw any distinction between the collective interest of a community and the individual interests of the members of that community. Hegel's communitarianism and his developmental model of personality mean that we should be cautious about describing his theory of authorship as creator-centred and individualistic, along the lines of the personality theory.

## **Authorship and communication**

Before moving on to address the specific questions about authorship at stake in this chapter, I shall briefly outline the final set of theories under consideration: those rooted in a desire to steer discussions of copyright away from proprietary frameworks, focusing instead on communicative norms. In recent years, philosophers have engaged with some conceptual issues raised by the very idea of intellectual 'property'.<sup>4</sup> Although some have argued that it is perfectly coherent to treat works of authorship as works of property (Biron, 2010), others have attempted to move the debate in a more radical direction, seeking alternative (or supplementary) conceptual frameworks for justifying copyright. Most theories of this sort are united in the claim that works of authorship should be viewed not as commodities to be owned but as vehicles of authorial communication. Often taking inspiration from Kant's writings on copyright and linking them to his discussion of public reason (Barron, 2012; Biron, 2012; Borghi, 2011; Capurro, 2000; Chiara Pievatolo, 2008 and Johns, 2010) communicative approaches to copyright

attempt to put forward principles of communication that can be drawn on to distinguish an author's legitimate communication 'in their own name' from their derivative communication in another's name.

I have engaged with Kant's writings on copyright, autonomy and public reason in depth in previous work, so for the purposes of this piece I shall provide only a brief summary of the communicative approach I have defended elsewhere (Biron, 2012). Kant puts forward three principles of communication in the *Critique of Judgement* (Guyer, ed., 2000, p. 173) – principles I have termed authority, intelligibility and consistency – and they can be applied to questions about authors' rights in the following ways. First, the principle of authority – to 'think for oneself' – points to the need for an author's speech to be non-derivative: the authority of the author's speech must not be derived from another person's speech; rather, it must be carried out in their own name. Second, the principle of intelligibility – to think from the standpoint of everyone else – can be read as a necessary condition for authorship that aims at public communication, not just self-expression. Third, the principle 'always to think consistently' can be read as a demand that authors adjust their communications to meet the requirements of intelligibility consistently, depending on the interaction with and also the scope of their possible audiences. As Garrath Williams puts it, this condition entails 'regarding oneself, first, as the genuine author of one's judgments, and second, as [epistemically] accountable to others' (Williams, 2009, sec. 3:2). If principle [3] is in some sense regulative of [1] and [2], we can see that public reasoning is not static but, just like all communication, dependent on its audience, its interlocutors and the willingness of authors to reconsider and re-evaluate their communications in light of the testing and mutual questioning of their writings.

The above principles of public reason provide a way for copyright scholars to engage with questions about the relationship between authorship, copyright and freedom of expression, but with some important modifications. Indeed, Kant's approach does not really warrant the label 'expressive autonomy' or 'autonomy of expression' (Treiger-Bar-Am, 2008, p. 1075), at least to the extent that such labels emphasise a somewhat individualistic and creator-centred approach to authorship. When we focus not on individual acts of expression but more broadly on *principles* of communication – such as intelligibility or consistency – we appreciate Onora O'Neill's point that 'freedom of expression can provide only one part of an adequate ethics of communication' (O'Neill, 2007, p. 169), because rights of self-expression can be exercised without meeting other important principles of public communication.

We have now outlined three philosophical accounts of the justification of copyright: based on labour, personality and communication respectively. Interestingly, the extensive literature on labour theories has provided room for a discussion of non-proprietary Lockean accounts of copyright; the literature on the personality theory is at a less developed stage, in the Anglo-American sphere at least, and still seems firmly rooted in a proprietary framework even if, as we have seen, Hegel's writings do not support the creator-centred standpoint that it is often taken to justify. Finally, a Kantian approach based on principles of communication is explicitly non-proprietary, and may seem to have more direct relevance to questions about authorship; however, to fully appreciate the implications of these theories, we can now apply them to the questions under consideration in this chapter.

### Author, work and originality

Let us begin with the question about originality and the 'work'. Taking the overarching distinction between proprietary and non-proprietary conceptions of authorship, it has been argued that proprietary conceptions of authorship are more committed to a notion of a 'fixed' work of authorship, understood analogously to a tangible object of property, and with the concept of originality invoked to draw boundaries around it (Litman, 1990). Non-proprietary conceptions of authorship seem less focused on the work as a fixed object and more focused on viewing the work as a process of communication or a means to promote valuable social goals.

Let us now consider the above theories in more depth, starting with Lockean conceptions of authorship. It is interesting that Shiffrin's non-proprietary theory is the most 'work-centred' Lockean account, because she begins her analysis with a discussion of possible objects of ownership (or authorship), and then considers whether their nature is such as to justify rights of ownership on Lockean grounds. Since she severs the connection between labourer and product, she also seems to sever the connection (important as it is to copyright law) between authorial originality (understood as *origination*) and the work. Once 'the work' is allowed to float free of any connotations of authorial labour, Shiffrin is able to consider it more in terms of its social value – the ways in which works of authorship might stimulate others, be read or accessed by a range of different individuals and, thereby, transformed and used in a variety of ways that promote valuable social goals such as freedom of speech.

The creationist labour account of authorship, on the other hand, would seem to support a strong and intimate connection between authorial originality and the work. Indeed, it would support attempts to define originality in value-laden ways – viewing works of authorship as shot through with creativity and novelty. Of course, viewing originality in terms of ‘novelty’ is not at all in keeping with how copyright law defines the term: a work of authorship ‘... need not be ... novel or unique’ (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, SCC 13) to count as original and thus protected by copyright. But there have been some recent attempts in US courts to specify copyright law’s originality requirement in terms of creativity as opposed to mere ‘sweat of the brow’ (most notably, the ruling in *Feist v. Rural Publications Inc.*, 1991). It might be argued that such appeals to creativity have shifted the focus of copyright’s originality requirement towards ‘the gospel of Romantic “authorship”’ (Jaszi, 1994, p. 34).<sup>5</sup> That is to say, appeals to creativity move beyond a fairly neutral specification of originality in terms of origination and towards a more normatively loaded conception of originality which could imply artistic merit, even genius, thereby elevating the status of individual authors, and according them stronger rights to control their works. Creationist conceptions of Lockean authorship might indeed be invoked to support these more value-laden conceptions of originality, though it must be noted that they offer just one particular interpretation of Locke, and are by no means fully representative.

Finally, on the intellectualist labour account of authorship, there does not seem to be a presumption that works of authorship are original in the sense of being ‘novel or ‘creative’, even though there is still an important connection to be drawn between an author’s labour and their work (unlike Shiffrin’s non-proprietary account, which severs this connection). According to the intellectualist account, we should look at the author’s intellectual input – such as judgement or choice in bringing raw materials within their plans and purposes<sup>6</sup> – to determine what counts as a work, and thus leave room for a definition of originality that is more neutral than the creationist focus on ‘novelty’ or ‘creativity’. How expansive this definition of originality should be – and hence how extensively we might grant rights over works of authorship – would be determined by considerations of the contours of more general rights to self-government, held equally by authors and users of works. Overall, then, labour theories of authorship offer a variety of answers to the question of how copyright law could understand the ‘work’ and ‘originality’, and the most promising theories for addressing questions about internal constraints on the scope of authorship are Shiffrin’s non-proprietary account and the intellectualist account outlined above.

What are the implications of Hegel's personality theory for copyright law's category of 'the work'? We have seen that, far from there being an intimate connection between an author's personality and the work in which personality is expressed, Hegel seems to sever the connection between 'personality' and 'work'. As Netanel puts it: 'Hegel regarded intellectual works as external things rather than as extensions of personality' (Netanel, 1993, p. 377). This goes against copyright law's suggestion that works of authorship can be delineated by looking for a 'stamp of personality' or individuality as evidence for authorial originality. Hegel's focus seems to be not on the work itself, and the extent to which it displays the author's personality, but rather on the ways in which an author's personality can be expressed through various aspects of control and choice over how their work is used. This means, of course, that Hegel's account supports the idea that authors' works should be protected from mutilation, destruction or misattribution, if so desired by the author. But that is not to say that there is anything inherent to 'the work' that need display or contain the author's personality, and that personality is somehow ontologically built into a work of authorship; personality, rather, is a category associated with choice and control over how a work is used by others.

Finally, as I have argued elsewhere, copyright law's originality requirement harmonises with the first principle of Kantian public reason outlined above – the principle of authority. Copyright's originality requirement applies to both new and transformative work and, in both cases, the key to determining originality rests on the question of the source of the work: to count as original for the purposes of copyright it '... must not be copied from another work ... it should originate from the author'.<sup>7</sup> Understanding originality in this sense as *origination*, we can revisit the distinction between derivative and non-derivative forms of communication, which underlies the principle of authority. A transformative work of authorship whose authority is actually derived from a primary work cannot be classed as having 'originated' from the transformative author – in this sense, works of authorship that count as 'derivative' under the principle of authority would likewise not count as 'original' for the purposes of copyright protection. On the other hand, provided the transformative work's authority is derived from the transformative author's own communication, the transformative work would count as 'non-derivative' under the principle of authority – and, for the purposes of copyright protection, it would count as original. Although a lot more needs to be said about exactly how the contours of originality might be drawn, this approach indicates that copyright need not base its conception of authorial originality on a proprietary model, as is so often assumed to be the case.

## Romantic authorship

Let us now turn to some questions about romantic authorship, and the extent to which the theories outlined above either reinforce or challenge it. Exactly what copyright scholars mean by 'romantic authorship' is, of course, a complex question to address. As Erlend Lavik notes in his contribution to this book, the so-called 'myth' of romantic authorship, and its impact on copyright law, requires detailed examination and is by no means settled. For the purposes of this section, I draw on the interpretation of romantic authorship offered by Martha Woodmansee, according to which authors are solitary geniuses who, 'blessed with unique insight, bring forth new and original works of art into the world' (Woodmansee, 1984, pp. 429–31). There has been a tendency to view some Lockean accounts of property as giving support to theories of this sort. As Netanel puts it, 'drawing upon a combination of Lockean labor-desert theory and nineteenth-century romanticism ... [it is argued that] copyright should be immune from exceptions and limitations' (Netanel, 2008, p. 21). However, we have already seen that the labour-desert theory of property, let alone authorship, is conceptually confused. And Shiffrin's account – focused as it is on the maximal use of intellectual products or works, rather than the labour of individual authors – seems far removed from anything like a romantic conception of authorship. Might the other interpretations of Locke – the creationist or the intellectualist accounts – nonetheless be connected to romantic conceptions of authorship?

To answer this question, we must return to the issue of the extent to which we might view an author's labour as dependent upon the prior labour of others; according to the definition of romantic authorship outlined above, a strong emphasis is placed on the input of the author as having created something new and unique, unencumbered by external influences. And this sort of view is not uncommon in discussions of authorship. Lawrence Becker, for example, defines authorship as an activity in which the author's labour is 'the beginning of the causal account of the product' (Becker, 1993, p. 614). Jeremy Waldron also makes a similar point:

What copyright appears to uphold are rights of pure agency, rights in something that literally did not exist in any form before the author put his mind to work (Waldron, 1993, p. 879).

The idea behind both of these claims is that holders of intellectual property rights have rights to objects that might not have come into existence at

all without their efforts. And this means that we can ask various questions about the ways in which they were invented or created, and imagine that they might never have existed in the first place. If we simply left our analysis of authorial labour at this, the most suitable Lockean theory of authorship to support it might be the creationist accounts which focuses on unencumbered acts of authorial creative labour, harmonising well with romantic conceptions of authorship.

However, although the above interpretation of authorial labour as essential to the formation of intellectual products might be an accurate description of the ways in which authors labour to produce their works, this is not to say that we should leave our analysis at that. Indeed, the two quotations by Becker and Waldron leave open the (highly likely) possibility that authors often mix their labour in ways that are dependent upon the prior labour of others. Thus, we can acknowledge that authors do indeed exercise 'agency' in producing their works, without sliding into a seemingly strong proposition that they do so entirely unencumbered by external influences. As Hettinger argues:

Invention, writing and thought in general do not operate in a vacuum; intellectual creation is not creation *ex nihilo*. Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products (Hettinger, 1989, p. 38).

Even so-called 'primary' authors are said to be transformative authors of a kind, on this view, because their writings are nonetheless dependent on a number of different background conditions, including works of authorship that might have inspired and influenced them in their writing. It is still important to have some way of recognising the extent to which a particular act of labouring has transformed some previously existing idea or ideas into something different – thereby enabling us to give recognition to that author's effort – but this is not to say that even the labour of primary authors can be separated entirely from the prior labour of others. The intellectualist account, as opposed to the creationist account, can leave room for this sense of the 'intertextuality' of authorship, since it does not focus on the nature of the work – i.e. whether it was created from nothing or from some previously existing thing – but focuses instead on the author's use of the work, and the author's labouring on it in the sense of bringing it within their legitimate plans and purposes. As such, the intellectualist account can fit a wider range of cases of authorship, and does not automatically support the questionable

view – associated with some forms of romantic authorship – that authors work in a kind of a vacuum, independently of the labour of others.

Turning now to personality theories, much of the literature assumes that they are closely allied with romantic conceptions of authorship. Palmer, for example, suggests that the traditional personality theory errs in its excessive focus on the personality of the author and in its appeal to romantic notions of creativity, which stress subjective experience and its expression, emphasising the sublime experience of the artist as opposed to the experience of the user or copier (Palmer, 1990). However, our above outline of Hegel's theory revealed a more complex picture: although Hegel argued that personality is an inalienable part of the self, he also thought that acts of expression could transform inner personality into external, alienable property. Moreover, he viewed the alienation of property as crucial for the development of personality. This has the result that Hegel's own account of authorship is not individualistic or creator-centred, but thoroughly communitarian in its outlook. As noted above, Hegel argued that 'the purpose [*Bestimmung*] of a product of the intellect is to be apprehended by other individuals and appropriated by their representation, thinking, memory, thought, etc.' (§ 69), expressing concern for the common pool of ideas, not the legal protection of any one particular author or creator. As such, the conception of authorship we should associate with Hegel is neither 'romantic' nor 'individualistic', but leaves room for the various senses in which we might speak of authorship as collective, even when understood within some kind of personality-based framework. It should be clear, then, that Hegel's writings cannot be used to give strong philosophical support to romantic conceptions of authorship. This is a view echoed by Schroeder, who argues that 'the personality theory of intellectual property that dominates American intellectual property scholarship is imbued by a romanticism that is completely antithetical to Hegel's project' (Schroeder, 2005, p. 454).

A closer reading of Hegel's account of intellectual property might also challenge scholars to rethink the ways in which the personality theory should be applied as a theory of authorship. Returning to Waldron and Jaszi's separate observations about authorship being at the nexus between individual and social defences of copyright, Hegel makes some important observations about the social goals that copyright can promote – for example, his comment that legitimate copying can be a way of learning or acquiring knowledge brings out a connection between copyright and valuable social goals such as education. As Hegel notes, the 'purpose [*Bestimmung*] of a product of the intellect is to be apprehended by other individuals ... for learning means not just memorising or learning words by

heart – the thoughts of others can be apprehended only by thinking, and rethinking is also a kind of learning' (§ 69). And Stillman points out that people take possession of themselves, on Hegel's account, through *Bildung* (education), 'acquiring the capacity to think of ourselves as persons by regarding ourselves as members of a community of persons, a universal self-consciousness' (Stillman, 1991, p. 219). Theorists looking to strengthen the connection between promoting authorship and encouraging desirable social goals such as education might therefore find support in Hegel's writings.

Finally, does a Kantian approach help to unpack and challenge copyright's alleged appeal to romantic conceptions of authorship? Kant's writings on copyright illustrate that he was committed to the view that the creative process is in fact transformative; authors often use, copy and transform existing materials in order to exercise their own communicative abilities. This seems quite a different conception of authorship from the romantic conception considered above. Moreover, in contrast to the emphasis on 'authorial genius' we often find connected to romantic accounts of authorship, Kant mentions the role of genius in his work on public reason as an example of how genius must be independently governed and constrained by the norms of reason. Rather than being a solitary exercise of individual expression, that is, even the operations of genius must be constrained by standards and principles. This is a far cry from the traditional ideal of the romantic author-genius, sometimes thought to be responsible for so much of the rhetoric surrounding the expansion of authors' rights. Thus, neither personality nor communicative approaches to copyright provide support for romantic conceptions of authorship, and only one particular and limited interpretation of the labour theory does so.

### Collective authorship

Finally, we can turn to some questions about collective authorship. It is important to keep in mind three different models of collective authorship as we reflect on the extent to which these different justificatory frameworks might be relevant to questions about multiple authorship:

- i. *transformative authorship*, where an author or composer takes an existing work and transforms it into something else;
- ii. *multiple authorship*, where a work might be divided into separate but multiple contributions by different authors (such as an encyclopaedia, classified in copyright law as a 'collective work'); and

- iii. *collaborative authorship*, where it is not possible to distinguish ‘isolated’ contributions, and there is joint collaboration between authors towards some shared end (in copyright law terms, a work of ‘co-authorship’).

The discussion of romantic authorship above has already addressed questions about transformative authorship; the focus in this section will be on collective authorship as either ‘multiple’ or ‘collaborative’ authorship.

At first sight, it might seem that non-proprietary accounts of authorship would apply well to collective models of authorship. But it would be a mistake to equate ‘single author’ with ‘proprietary author’. After all, property rights can be held by groups and collectives – such as corporations or co-operatives – as well as by individuals. In the case of a collaborative work of authorship, why should we assume the authors in question would be any less likely than single authors to view their efforts as requiring some kind of proprietary protection? And there may be even more of a case for allocating proprietary rights to multiple authors of the same work, since boundaries would need to be drawn up making clear which elements of the work belonged to whom, to ensure certain authors were not given undue credit, or vice versa. With cases of transformative authorship, we could see Shiffirin’s non-proprietary account having some application, but it would still be important to analyse the sort of transformation involved, and the challenge is to offer an appropriate theoretical framework for doing this, if we assume that the primary author is not the ‘owner’ of the primary work.

On the creationist account of labour, it would seem that any attempt to make sense of collective authorship would be done with a strong presumption of proprietary control to the primary author. However, with the case of a collaborative work, there is a sense in which the different authors of the work together form one ‘single’ author. It is conceivable that such a group of this kind could be viewed under the lens of romantic authorship – after all, we might describe their work as creative, and we might assume that as a group they worked together in a solitary way, in the sense that they were unencumbered by the influences of others except themselves. With cases of multiple authorship, however, the creationist account would analyse the distinct contributions of each author in a particularly slanted way: it would be unlikely to allocate a share of proprietary protection to each author equally, but would instead look to give priority to the ‘star’ or ‘lead’ author, understood as having had the truly original idea which the other contributors were merely embellishing or developing in some way. The same would apply for cases of transformative authorship, as we have seen.

According to the intellectualist account of labour, there would be no problem arguing that intellectual production was a shared enterprise, as with the case of collaborative authorship: a group could be given similar rights of self-government to individuals. But there would be no need to view groups as having produced their works ‘romantically’ or in a solitary or unencumbered fashion. With the case of multiple authorship, there would be no obvious need to prioritise the ‘lead’ or ‘parent’ author as with the creationist account, but each would depend more quantitatively on the extent of the labour involved. Finally, with regards to transformative authorship, we would consider the extent to which the transformative author had brought the (transformed) work within their own legitimate plans and purposes, rather than merely ‘free-riding’ on the labour of the primary author, thereby violating their right to self-government.

Turning now to Hegel’s account, it might seem as though the notion of personality is strongly tied to particular individuals, which makes it difficult at first sight to see how an individual’s personality could be ‘merged’ with a group or collective, whilst still retaining its personal quality. However, Hegel’s own developmental model of personality, which I discussed above, draws a connection between embodiment of personality in external objects and the development of individual personality. As Charles Taylor puts it:

[...] personhood involves recognition – that space of evaluation of the person’s existence is intrinsically and inseparably a public space ... The very struggle to gain recognition is fated to self-frustration because it can never be properly achieved until we achieve the kind of community described in the passage which ends this section [§ 195] in the *Phenomenology*: a society where the I is a we and we is an I (Taylor, 1991, p. 68).

Thus, Hegel’s developmental model of personality provides an interesting basis for personality theories of authorship to be applied to cases of joint or group communication.

Finally, Kantian standards of public reason might be applied to groups as well as to individuals – at least, there is no conceptual problem with the idea of ‘group’ communication, and no obvious bias towards individual communicators. Indeed, the point of grounding Kantian theories in principles of communication rather than individual autonomy is precisely to guard against ‘individualistic’ readings of communications as ‘expression’. For example, in cases of contested joint authorship – where one party claims authorship and another denies it – standards of public reason might be drawn upon to adjudicate between the claims. After all, copyright

requires that a contribution of joint authorship be original – and, as we have seen, this harmonises with the principle of public reason called the principle of authority. Copyright also requires there to be collaboration in the sense of a shared purpose of some kind: and this might be spelled out using the principle of consistency, which focuses on the dynamic nature of communication, and the need for an author's communication to be adjusted in light of input from others. In some cases, individuals who enable communication to be adjusted might not be 'authors' as such but rather assistants or aids to authorship. But in other cases, the input could be significant enough that two such individuals share a common design for the work, and thereby become joint authors. Thus, communicative models of authorship enable us to broaden our inquiry about authorship beyond a proprietary focus on the fixed 'work' and an exclusive focus on the 'creator's' role in its production.

Of course, further refinement would be needed to address fully the questions about which forms of communication are authorial and which are not, short of very broad principles of public reason, but the brief sketch above indicates that the communicative approach has resources at its disposal for such a project.

## Conclusion

This chapter has examined some different interpretations of the writings of Locke, Hegel and Kant, under the headings 'labour', 'personality' and 'communication' respectively. It has considered the extent to which they have application to three important questions about copyright's conception of authorship: originality, the work and collective authorship in copyright law. We have seen that, under these broad headings, various conceptions of authorship seem to follow: neither the labour nor personality theories are unified, complete theories of authorship, but might be interpreted in a variety of ways; even the communicative account I have outlined is just one amongst many explanations for how copyright might be grounded in communicative norms.

Thus, as scholars from law and humanities continue to grapple with categories of 'authorship' and 'the work', they should be prepared to challenge the traditional bifurcations we tend to create in philosophical accounts of copyright. Indeed, one important overarching question to consider is whether scholarship on authorship in the humanities has anything to say about authorship as a category that can generate its own

internal constraints against so-called copyright ‘expansionism’, rather than these constraints being imposed from outside (by focusing on user privileges, for example). This article has argued that certain components of labour, personality and communication do indeed support the idea of authorship as an internally constraining process – one that may contain within its very definition the power to generate limitations on the legal rights that attach to its products. The next stage forward for researchers in philosophy is to work through the issue of how we might blend together these theoretical approaches which are so often wrongly presented as in theoretical opposition.

## Notes

1. The distinction could be challenged on the basis that the material common is not completely static; people labour on land and raw materials to change and ‘cultivate’ it. But there does seem to be a difference between resources that are given to us by nature and intellectual resources that are given to us as a result of individuals creating, producing and inventing them; the difference lies, as Shiffrin notes, in the fact that the initial expanse of material resources exists ‘independently of human efforts’ (Shiffrin, 2001, p. 158). Nonetheless, it must still be noted that this construal of the common does not really explain the shared basis upon which individuals create (such as linguistic conventions and ideas), and is silent on questions about how to isolate one person’s labour from the shared basis upon which it depends. I am grateful to Mireille van Eeoud for clarifying this point.
2. I am aware that these examples only relate to individual acts of authorship: I discuss the implications for collective authorship further in the section Collective authorship.
3. Although the personality perspective has obvious application to continental systems of copyright, here I consider their application to Anglo-American copyright doctrine and their discussion in Anglo-American copyright theory. I am aware that personality theories have been discussed extensively outside of the Anglo-American context, and regret that there is not scope in this chapter to explore this literature.
4. See, for example, the collection of essays in the 2010 edition of *The Monist* (93c: 3).
5. It is not clear that courts have in fact adopted this approach (Lavik and Van Gompel, 2013). See also Lavik’s contribution in this book, especially the section entitled ‘A lack of interpretative constraint’. Regardless of its practical implementation, I mention it here to illustrate the theoretical possibility of Lockean accounts being used to support such a position.

6. For discussion of the ways in which an approach of this kind is adopted by EU and Dutch Courts, see the chapter on 'Creativity, Autonomy and Personal Touch' elsewhere in this collection by Van Gompel.
7. Peterson, J., *University of London Press Ltd v. University Tutorial Press Ltd* (1916).

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