Owning Form, Sharing Content:
Natural-Right Copyright and Digital Environment[*]

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Abstract

A cornerstone of copyright law is the so-called 'idea/expression distinction' according to which copyright is not a property in ideas but only a (temporary) protection of their expression. This distinction, which seems to have now reached a crisis point in the digital environment, has traditionally different rationales in common law and in civil law countries. In the latter it is grounded in the natural-law notion of the creative work as a joining of 'form' and 'matter' expressing the personality of its author. In Anglo-American copyright, the dichotomy appears instead to have an utilitarian justification – specifically, that of 'balancing' authors' private interest (in claiming property in their work) and the public interest (in being free to make use of the work and to build upon it). The paper explores these two rationales and their underlying principles. In particular, it focuses on the concept of 'knowledge' emerging respectively from the natural-law and the utilitarian approach. It finally suggests that the natural-right approach to copyright is more suitable to the present day 'digital world' than the utilitarian one.

0. Form vs. content. Current terms of a venerable old question

Of fundamental importance to every modern copyright system is the principle according to which copyright does not give authors any monopoly in using the matter they disclose by publishing a work, but only a legal protection on the form in which the matter is expressed. Matter as such – i.e. ideas, concepts, thoughts, theories, reasoning, facts, information, news, and the like – can be freely used and adopted by anyone without asking permission, as long as the form in which the matter was originally expressed is not copied or imitated. In the tradition of civil law this cornerstone of copyright doctrine has been expressed in various terms and with different nuances, while in common-law practice it is univocally known as the 'idea/expression dichotomy'[1].

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[1] This wording now tends to represent the 'standard' also in civil law doctrine. However, in this paper I will use the umbrella term 'form and content distinction' when I am referring to the principle in general.

However simple it is to state, the principle cannot be easily put into practice without a clear understanding of what 'form' (or 'expression') means, and this task has become even more difficult due to the advent of new information technologies and digital medium of dissemination. As has been recently pointed out, "in the digital world, in ideal, all cultural production will be digital and culture will be disembodied information that is controlled through code". Moreover, although culture is something broader than mere information, as a consequence of this widespread 'disembodiment' the difference between cultural products and information becomes increasingly blurred, insofar as "this blurring can be seen in many cases involving the copyrighting of facts, in which the basic principle that ideas and facts cannot be copyrighted seems to have lost any bite"[2].

It is obviously no accident that this fundamental principle of copyright law becomes weaker precisely when copyright is applied to wholly digital materials, namely, software. In the last twenty years, courts and lawyers have grappled with this problem in the attempt to set a functional, unambiguous criterion to distinguish what can be protected under copyright law and what can be copied in a computer program. In this attempt to adapt a traditional principle to a new subject matter, a twofold trend has emerged: "On the one hand, some courts are taking doctrines developed in the traditional context of writings and applying them forceably in non-traditional contexts involving emerging computer technologies. On the other hand, and sometimes simultaneously, some courts are taking new doctrines, or at least refinements of old doctrines, developed in non-traditional computer-related contexts and applying them broadly to traditional contexts."[3] According to this trend, concepts like 'form' (or expression) and 'content' (or ideas), that took their original meaning in the traditional context of literary writings, are adapted and tailored to fit the new digital entities, specifically software, and after being thus modified, following the new meaning that emerged in the computer science, they are subsequently re-applied in the traditional environment[4].

Regarding the intellectual property discourse, the main result of this growing confusion between the concepts related to computer science and those belonging to the literary domain, is that basic concepts like 'form' and 'content' lose all normative effect and become nothing more than functional hypotheses that set the boundaries of copyright protection. What 'protected form' and 'unprotectable content' are, depends more on contingent considerations of interests than on

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[2] Shubha Ghosh "Deprivatizing Copyright", 54 *Case West. Res. L. Rev.* (2003).

[3] Jon O. Newman "New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age", 17 *Cardozo Arts & Ent. L. J.* (1999), at 692.

[4] A good example of this 'short circuit' between (traditional) writing practices and the (new) computer environment is the use of concepts like 'openness', 'freedom' or 'sharing', that is, concepts originally belonging to communication of thinking in a broad sense and then re-shaped through computer practices and finally re-used in the world of literary communication at large in this new, narrower sense. (On the concepts of 'knowledge sharing' and of 'access to knowledge' see Maurizio Borghi "'The Public Use of Reason': A Philosophical Foundation of Knowledge Sharing", *Int. J. of Humanities*, 2006).

substantive grounds. The time when the boundaries between private and public domain are determined by negotiations between bargaining lobbies is not far off.

Faced with this situation, it is perhaps time to grasp this nettle and ask whether this basic principle of traditional copyright can still have a normative legitimacy, or whether it can be abandoned. In any case, the form and content distinction appears to be the most vulnerable side of the current copyright paradigm, and the survival of traditional copyright structure in the digital environment depends largely on the capacity to give a new meaning to this dichotomy.

This paper aims to explore the origins of this cornerstone of copyright systems and the underlying rationales. In particular, attention will focus on the arguments belonging, respectively, to the so called 'natural-right' and 'utilitarian' approaches to copyright with the aim of showing that the natural-right approach, rooted in a more radical philosophical discourse, is more likely to achieve the purposes of copyright in the new digital environment than the utilitarian one.

The paper is divided into five parts. The first part focuses on the historical function of the dichotomy in building copyright as a 'content-neutral' system of regulation, on the background of the previous system of printing-privileges. The second part discusses the problem of the natural-law foundation of the distinction between form and content, through a reading of a seminal work by the German philosopher Johann G. Fichte. The third part examines the 'utilitarian' rationale for this distinction and its underlying 'evolutionary' concept of knowledge. The fourth part examines the principal critiques of the form and content distinction as applied to the new environment of copyright and explains how the natural-right approach represents a sound framework for giving a new sense to the form and content distinction in the digital environment. Finally, I shall draw some conclusions regarding consequences of the predominance of the utilitarian argument in current copyright law, and show how a critique of its core-concept of 'knowledge' could be carried out in the light of future challenges to copyright doctrine.

1. From privilege to copyright: building a content-neutral regulation system

Looking back at the history of copyright, we can find in the Venetian printing privileges of the early 16th Century a first organic system of regulation of the book trade. Therefore, compared to many other legal entities, copyright has a relatively recent origin and dates back 'only' 500 years. However, if f we consider that in many respects printing privileges are essentially different from copyright, to such an extent that the discontinuity between the two legal entities has probably more weight than the continuity, it would be more correct to pinpoint the birth of copyright no earlier than 300 years ago.

As a matter of fact, there are more structural differences between privileges and copyright. Privileges are basically exceptions to the law[5], selectively granted to singular individuals for individual books, whereas copyright is originally regarded as a universal right, affecting every author as such provided his or her work met some basic standard requirements. Accordingly, while privileges are granted in response to a petition and could, in principle, be refused for a number of reasons, copyright protection, in spite of formalities that could be in some cases required, was granted automatically.

What is noteworthy is that, unlike modern copyright, the old privilege system provides a scrutiny of the work to be protected. Such a scrutiny is not merely a censorial control over the content of the book or the engrave, but a more substantive one involving different factors. In the context of a guild's economy, such Britain's until the end of the 17th Century and of all the main continental European countries until the end of the 18th, the system of granting privileges can be considered, in a very general and formal way, as a three-step process[6]. First, the petitioner applied to the Authority. Although there were normally no written rules, petitions usually included a short description of the subject of the book, a reference to its learning or entertainment utility (sometimes the specific category of readers that the publication would benefit was mentioned), and most importantly a remark on the considerable investment the work required in terms of time, money, and skill. The Authority subsequently undertook a scrutiny , whose overall criteria were not the same and ranged from a minimum requirement of censorial approval (obviously no privilege was granted to censored books or prints) to more sophisticated requirements such as novelty, value of the work, proof of author's consent to publish[7]. Finally, privileges were granted under certain conditions, usually that the book or print meet standard criteria of quality, was issued within a given time, and sold at a given price. Most privileges were granted on the simple principle of ensuring a

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[5] *Privilegium* means etymologically a law (*lex*) made for a single individual or for a single case (*privus*). In his 1791 booklet entitled *Proof of the Illegality of Reprinting* (see *infra* notes 27-44 and accompanying text), Johann Gottlieb Fichte said ironically: "what is a book privilege? By definition, a privilege is an exception to a generally valid natural or civil law […] It thus presupposes a natural law which would logically read as follows: everybody has the right to reprint every book" (Quoted in M. Woodmansee *The Author, Art and the Market: Rereading the History of Aesthetics*, Columbia University Press: New York, 1994, at 45-6)

[6] This scheme refers to different contexts in which the publishing industry rapidly expanded seemingly paving the way to a corresponding evolution in the law. A general study on the pre-copyright juridical institutions is still lacking. A recent exhaustive study of the Venice and Rome privileges for books and prints is Christopher L.C.E. Witcombe *Copyright in the Renaissance: Prints and the* Privilegio *in Sixteenth-Century Venice and Rome*, Leiden-Boston: Brill, 2004. For a detailed reconstruction of the French privilege system see Elizabeth Armstrong *Before Copyright: The French Book-Privilege System 1498-1526*, Cambridge: University Press, 1990. For the 18th Century Kingdom of Sardinia privileges see Luigi C. Ubertazzi *I Savoia e gli autori*, Milano: Giuffrè, 2000.

[7] This latter condition, which represents a significant step in the process of legal acknowledgement of authorship, was first stated in a Venetian act of 1545: "It shall be forbidden to any Printer of this City to print or to sell any work in any language, unless it is proved by authentic document […] that the Author of the work or his nearest heirs are satisfied and endorse its printing and selling […]" (In Cons. X, 7 Feb. 1545; quoted in Nicola Stolfi *La proprietà intellettuale*, vol. I, Torino 1915, at 29. See also Horatio Brown *The Venetian Printing Press*, New York: G.P. Putnam's Son, 1891, available on the Internet Archive: <http://www.archive.org/details/venetianprinting00brownuoft>).

fair return for expenses; others involved considerations on the value of the work for learning. In both cases, granting privilege implied a (more or less in-depth) scrutiny of the *content* of the work, either in the sense of its 'economic' content (labour involved in making it) or 'spiritual' content (broadly speaking, the ideas divulged). We can therefore characterize the privilege-system as a *content-based regulation system*.

On the contrary, copyright protection does not depend on any preventive scrutiny, and therefore does not – in principle – imply any assessment of the value of the content of the works. In other words, unlike privilege, copyright is not concerned with 'what' is disclosed when a writing or print is published, but only 'how', in which form, a work is, so to say, clothed[8]. It is only a matter of the cloth, and not what is inside the cloth itself – to such an extent that, in principle, legal protection is given even to works whose content is unlawful or illegal, or that have been created by infringing the law[9]. Copyright provides legal protection without any substantive evaluation of the content of the work. Modern copyright is fundamentally neutral vis-à-vis the content divulged by the work: it is a *content-neutral regulation system*[10].

This shift from a content-based regulation system to a to a content-neutral one involved a long process of cultural and legal transformation that took different paths in different countries, and took more than one century to be completed. The meaning of this process is, however, similar in every country and in every legal tradition: the content-neutral regulation system came to be shaped within the framework of *property rights*. The starting point of this process in England, and probably in the whole western world, is the celebrated 1710 Statute of Anne. By stating that "the Author of *any* Book […] shall have the sole Right and Liberty of Printing such Book"[11] the Statute marked an important passage in making copyright protection independent from the scrutiny of the content. As Mark Rose has pointed out: "the passage of the statute marked the divorce of copyright from censorship and the re-establishment of copyright under the rubric of property rather than

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[8] On the use of the metaphors of 'clothing', 'embodying' or 'fixing' in the legal discourse about the copyright dichotomy, see Allen Rosen "Reconsidering the Idea/Expression Dichotomy", 26 *U. Brit. Colum. L. Rev.* (1992).

[9] See Dan Markel "Can Intellectual Property Law Regulate Behavior? A 'Modest Proposal' for Weakening Unclean Hands" 113 *Harv. L. Rev*. 1503 (2000). It has long been a controversial question whether intellectual property also applies to illegal material, for example, to obscene books or to writings spreading illegal content, such as subversive or immoral doctrines and the like. Up to the beginning of the 20th Century, English jurisprudence and doctrine was generally of the opinion that copyright protection could be denied for blasphemous or libelous works (as ruled by Lord Eldon in the famous case *Southey v. Sherwood* 2 Meriv. 435, 1817). In the same period, however, the German doctrine maintained that a work must in any case be considered an inviolable property of his or her author, who is responsible *in toto* for its content. In the Berne Convention, revised in Berlin 1908, the German approach was adopted and discipline on the content was left out of copyright matters and left up to the legislation of individual States.

[10] By 'regulation system' I generally mean a mechanism of control over the access to and the use of a resource.

[11] An Act for the Encouragement of Learning, 8 Anne c. 19 (1710), emphasis added.

regulation"[12]. Since no property in mental labour is codified in the traditional sources of Roman and canonical law, so-called 'literary property' (this wording came into use only in the mid-18th Century) had to be somehow invented *ex novo*. Incidentally, we may note that property rights can be generally understood as a regulation system, but, on the other hand, not every regulation system is necessarily based on property rights: in fact, printing privileges are an example of a trade regulation system which, in principle, did not imply any reference to property. It is interesting to observe that the acknowledgement of human labour as primary justification for granting an exclusive right in the work, does not necessarily imply the emergence of *property* rights in the work itself. As a matter of fact, privileges were based on the need to fairly reward labour by ensuring a fair commercial exploitation of the work created through that labour, but neither the privilege nor the labour itself could *de jure* give rise to a 'property right' on the work itself.[13]

Copyright and related issues became a burning question in 18th century legal thought, and throughout the 19th century a considerable effort was made to incorporate this new regulation system within the framework of classical property rights. Content-neutrality and property regime became the two pillars of copyright.

The first and most important issue to be clarified in this process was how to set the boundaries of this new right. As a matter of fact, property on tangible goods is clearly defined by physical boundaries and a limited range of possible uses. On the contrary, a property right in intangible goods like the fruits of mental labour, however justified, must not only be identified as regards its boundaries but also as regards its actual object. The Statute of Anne, as well as the corresponding disciplines in the European laws of the mid-18th Century[14], did not answer the question of how to draw such boundaries. Using the language of 'control' over the 'printing' of 'books', rather than that of 'property' on 'works', the laws did not provide a judicial criteria to determine a real object of property rights. It was only in the legal discourse of the second half of the 18th Century that the approach in terms of property right began to be wholly embraced, and the corresponding judicial concepts shaped. In England, the issue arose in the legal debate following the 1774 *Donaldson v. Becket* decision. According to Sherman and Bently, proponents of literary

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[12] M. Rose *Authors and Owners: The Invention of Copyright*, Cambridge MA: Harvard University Press, 1993, at 48. It should, however, be pointed out that the language of property only came to be explicitly used some decades after the Statute of Anne.

[13] In Roman law, property cannot be derived from labour, since labour is always a unilateral act of a person (*persona*) on a thing (*res*), while property is essentially a relationship *between persons with respect to things*. As everybody knows, Locke derived property precisely from labour, thus infringing the tradition of Roman law. Although Lockean theory of property exerted (and still exerts) a great influence on modern law doctrine, especially in the intellectual property law, it nonetheless remains problematic in its fundaments. (This point is clearly made, with respect to copyright, in Abraham Drassinower "A Right-Based View of the Idea/Expression Dichotomy in Copyright Law" 16 *Can. J.L. & Jurisprudence* 3, 2003).

[14] For example, the French Law of the 1777 and the Venetian *decreto* 29th August 1767 (published in Horatio Brown *The Venetian Printing Press*, *supra* note 7, at 298-300).

property faced a twofold task: providing a clear-cut definition of what is protected under literary property, while, at the same time, retaining the flexibility to extend the author's protection beyond the mere verbatim expression. This task forced the commentators "to move away from the restricted right to print and re-print towards an examination of the nature and scope of the subject matter protected"[15]. Such an examination entailed *inter alia* a sharper definition of the object in relation to which a property right could subsist, and the concept of 'work' went to replace that of 'book'[16]. The distinction between unprotectable ideas and protectable form was both the result and basic strand of this process.

Throughout this process, copyright became something different and something more than simply a trade-regulation system: it increasingly became a policy instrument and – to some extent – of 'social engineering'. From a mere administrative act of trade regulation, copyright turned into an instrument of political and social intervention[17].

It is noteworthy that the saying 'idea/expression distinction' or 'dichotomy' is typical of common law tradition, in particular in the US. Conversely, in civil law doctrine, there is traditionally not a univocal way of drawing a line between protectable and unprotectable elements of an author's work. In continental European jurisprudence of the 19th and early 20th centuries, different terminologies were found: 'form and content'; or 'form of expression' on one side and 'concept' or 'matter' on the other; or again 'shaped thought' and 'expressed thought'[18].

In the 1976 US Copyright Act the distinction is explicitly made in sec. 102 (b): "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodies in such work". Most of the civil law statutes do not determine the criteria of this distinction, but sometimes specify subject matters or elements to which copyright protection is not extended. Such a difference mirrors in some way the gap between the common-law fair dealing or fair use doctrine[19], and the civil law exemptions or exceptions regime, and reflects a different approach in defining the limits of copyright protection. Even international treaties reflect such a different approach: TRIPs Agreement states that copyright protection extends "to expression and not to ideas, procedures, methods of operation or mathematical concepts as

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[15] Brad Sherman and Lionel Bently *The Making of Modern Intellectual Property Law*, Cambridge: University Press, 1999, at 32-3.
[16] Anne Barron made this crucial point when discussing the genesis of the musical work-concept in 18th Century England. See Anne Barron "Copyright Law's Musical Work" 15(1) *Social & Legal Studies*, 2006, at 101.
[17] This point is made in Michael D. Birnhack "The Idea of Progress in Copyright Law", 1 *Buffalo IP. L. J.* 3 (2001).
[18] I found this wording in Antonio Scialoja's preamble of the first Italian Unitarian copyright law of 1865 (*Atti del Senato*, 1864, p. 1136).
[19] Codified in the US Copyright Act, sec. 107.

such"[20], while the Berne Convention specifies that copyright protection should "not apply to news of the day or to miscellaneous facts having the character of mere items of press information"[21].

Principles underlying the dichotomy are usually refer back to two categories: utilitarian argument on one side and natural right (or personhood right) on the other. Although the former is more influential in common law countries and the latter, typically, in continental Europe, a rigid scheme is not wholly tenable. Looking back at the legal history of the 19th and 20th century, we can in fact see that utilitarian arguments are generally used in continental European jurisprudence and, conversely, natural right principles are not completely neglected in common law jurisprudence and doctrine[22].

2. Defining the Subject of Copyright: a Natural-Law Rationale (J.G. Fichte, 1791)

The natural-rights approach to copyright historically played a significant role in both continental-European and English jurisprudence in the 19th Century. In continental Europe, natural-law copyright theorists developed a structured legal discourse in the tradition of the great philosophical heritage of Kant, Fichte and Hegel. In England, natural-law approach to intellectual property is basically rooted in the Lockean principle that property rights result from one's labour. However, during the 19th Century this approach was generally abandoned in favour of a utilitarian and pragmatic one developed according to the economic discourse, and such an approach was also to creep into the 'strongholds' of natural law theory like Germany.

According to the natural-law perspective, works of authorship are seen essentially as expressions of the individuality or the personality of the author[23]. Since thoughts, concepts and ideas, unless ordinary or commonplace (such as sayings, proverbs and the like), are the utmost manifestation of the human personality and individuality, they belong by nature to the author. It is up to the author to share them with other human beings, and to decide in which form and to what extent to share them. However, when someone communicates his or her thoughts to others, by talking in public or publishing a writing, the thoughts also become the property of mankind and therefore everyone is allowed to make free use of them: to understand or misunderstand them, to draw inspiration from them, to judge and criticize them, and so forth and so on. According to this,

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[20] TRIPs Agreement, art. 9 (2).
[21] Berne Convention for the Protection of Literary and Artistic Works, art. 2 (8).
[22] See Jane C. Ginsburg "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", in Brad Sherman and Alain Strowel (eds.) *Of Authors and Origins: Essays in Copyright Law*, Oxford: Clarendon Press, 1994 (challenging the common understanding of civil-law literary property as 'author-centered' and of Anglo-American copyright as more oriented on public welfare).
[23] Fundamental to natural-law discourse is the concept of *persona*, derived from Roman law. *Persona* is the human being considered in his capacity of 'acting' (see A. Berger *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953). The utilitarian approach is no longer based on this concept of *persona*, but rather on that of 'individual', i.e. the human being considered as bearer of 'interests'.

so to say, 'twofold belonging' (author on one side, mankind on the other), a work of authorship must have in itself the principle of a double legal understanding, depending on whether it is considered as belonging to the author or to the public at large. In this need to define the boundaries of the author's and public's ownership is rooted the distinction between form and content.

Since the beginning of the 19th century, civil law jurisprudence had to face the same problems we have seen in common law countries, that is, defining the boundaries of the property right of individuals on their works. The problem was that of drawing a line between 1) author's exclusive rights and public domain, and 2) literary property rights on one side, and other intellectual property rights on the other. However, regardless of the statutory solutions that were found for this twofold problem, in the natural law doctrine this line is generally more shaded. For instance, in the early 20th century civil-law jurisprudence we can find the following argument to justify the statutory limits of copyright duration: "After the author has published his work, thus allowing society at large to share it, his work becomes part of human civilization, and the public appropriates it, so that it can criticize it, use it while creating new works, and so forth and so on; the later the work is published, the more influence the work exerts on civilization, the less it belongs to its author and, o to say, breaks away from him to enter the public domain"[24]. After breaking into public domain thanks to the creative act of its author, the work takes on a life of its own, and the more it moves out into the world, the fainter becomes the echo of its creation. Although a work can never break every liaison with the personality of its author, with the passing of time such a liaison becomes weaker and weaker. For instance, Dante's *Divine Comedy* is today less 'Dante's own work' than it is a part of the common heritage of humanity at large. However this is true for all works, since, once published, they become part of a 'whole' that gradually incorporate them[25].

Even between form and content there is a shaded line rather than a leap. This does not mean, however, that a clear-cut distinction cannot be made. In principle, authors can claim property rights in what can never be shared as such with other human beings, that is, the personal and individual *form* in which thoughts are shaped and connected to each other. In a sense, form – and not content – is the element that identifies *this* work as belonging to *this* personality. A famous French adage says: *le style c'est l'homme* – style is man himself[26]. The concept of 'form' does not mean only the

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[24] Nicola Stolfi, *La proprietà intellettuale*, cit., vol. II, p. 39.

[25] In the Lectures *Concerning the Difference between the Spirit and the Letter in Philosophy*, Fichte says: "One of the principle rules of all philosophizing is this: We should always bear in mind *the whole*. […] This feeling should always accompany us, and we should not make a single step along our path which is not in the spirit of the whole and made with this spirit. It is this which constitutes the distinction between the *true philosopher* and the mere *wool gatherer*" (Fichte *Early Philosophical Writings*, transl. and ed. by Daniel Breazeale, Itaha and London: Cornell University Press, 1988, at 213)

[26] Buffon's sentence is quoted in Karl D.A. Röder's *Grundzüge des Naturrechts*, Heidelberg: C.F. Winter, 1846, at 361, in the chapter devoted to the foundations of author's rights.

verbatim expression, but also the construction of the expression in a broad sense, including the style and everything that contributes to defining the personality of an author.

The earliest and most prominent foundation of the distinction between form and content in terms of personhood rights can be found in a 1791 booklet of the German philosopher Johann Gottlieb Fichte, entitled *Proof of the Illegality of Reprinting: A Reasoning and a Parable*.[27] The point made by Fichte was particularly challenging at the time for at least two reasons: on the one hand, although unauthorized reprinting was commonly perceived as unfair, it was not easy to draw its illegality from the classical principles of Roman and canon law. As mentioned earlier, the idea of a property right based on labour, that is, the concept of a multi-lateral bond between persons with respect to a thing which is based on a mere unilateral act of a person on a thing, cannot be deduced from Roman law. Moreover, property on the expression of thoughts was not codified in traditional sources, such as the Justinian code and the commentaries, where property only refers to physical entities.

On the other hand, in the face of this difficulty of defining literary property within the framework of classic Roman law, a 'utilitarian' counter-argument began to emerge in the European culture regarding the need to prosecute illegal reprinting. In a country like Germany, where unauthorized reprinting had played and still played a significant role in disseminating knowledge (as was the case of Luther's translation of the Bible during the Reformation[28]), it was easy to find arguments supporting a tolerant attitude towards illegal book reprinting[29].

Fichte's proof begins by distinguishing the question of the *legality* of reprinting from the question of its *utility*. According to his reasoning, he treats advisedly only the former, and discusses the latter only in the second part of the booklet, namely, the "parable". Utilitarian matters are explicitly excluded from his reasoning: "it is not a question here of the *damage* thus inflicted by the reprinter on the author, either directly or indirectly"[30]). To the *vexata quaestio* on whether illegal reprinting either damages or benefits authors and public, Fichte answers by asking a further

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[27] Johann G. Fichte *Beweis der Unrechtmäßigkeit der Büchernachdrucks. Ein Räsonnement und eine Parabel* [1791] in *Gesamtausgabe der Bayerischen Akademie der Wissenschaften*, ed. by Reinhard Lauth, Erich Fuchs, and Hans Gliwitzky, Vol. I/1, Stuttgart: Fromman-Holzboog, 1964, at 409-26. For the cultural and intellectual context of this book see the seminal article of Martha Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" 17, *Eighteenth-Century Studies*, 4 (1984) 425-448, now in *The Author, Art, and the Market*, *supra* note 5.

[28] However, it is noteworthy that Luther expressed himself firmly against 'piracy' in the preface of the 1545 edition of the Bible. On the role of printing and unauthorized reprinting in during the German Reformation see Ludwig Gieseke *Die geschichtliche Entwicklung des deutschen Urheberrechts*, Göttingen: Verlag Otto Schwartz & Co., 1957.

[29] These arguments were made in particular by prominent lawyers like Christian S. Krause ("Ueber den Büchernachdruch", *Deutsches Museum*, vol. I, 1783) and intellectuals like Johann A.H. Reimarus (*Der Bücherverlag in Betrachtung der Schriftstelle, der Buchhändler und des Publikums erwogen*, Hamburg, 1773). See Martha Woodmansee *The Author, Art, and the Market*, *supra* note 5 at 47-51.

[30] Fichte, *Beweis…*, *supra* note 27, at 416.

question which does away with utilitarian arguments as such in legal discourse: "When will people ever develop a feeling for the noble concept of rights, without any regard to their utility?"[31]

Fichte's reasoning to prove the legal existence of an author's 'enduring property' (*fortdaurend Eigenthum*) on his or her books involves questioning the very nature of book: "We can distinguish two aspects of a book: its *physical* aspect (*das* körperliche), i.e. the printed paper, and its *ideational* aspect (*das* geistige)"[32]. The ideational aspect, which represents the actual object of purchase (provided people buy a book in order to read it and not "simply to display its paper and printing and cover the walls with it"), can be divided in turn into two elements : the *material* one, i.e. the matter or content, thoughts expounded, and the *form* in which those thoughts are expressed. By acquiring a book one becomes the proprietor of both the physical and ideational elements, but in a different sense. The physical element (the tangible copy of the book) can be completely transferred from hand to hand, whereas the ideational elements (matter and form) can be transferred only partially and only under certain conditions: "Thoughts cannot simply be handed over or bought for cash. They do not become ours just by our picking up a book, carrying it home, and putting it in our bookcase. In order to appropriate the ideas a further activity is necessary. We must read the book, think through its content – insofar as it goes beyond common knowledge – look at it from various points of view, and in this way assimilate it into our own pattern of thought"[33].

Once a book is published, its *matter* can be appropriated by anybody, provided that someone reads the book, i.e. carefully meditate its content in order to incorporate it in his or her own pattern of thoughts. However, under no circumstances can its *form* become the property of anyone other than the author.

A book also displays a threefold perspective regarding the possibility of becoming the object of property rights: 1. the physical aspect, whose property can be normally transferred from hand to hand, 2. the matter constituting the ideational aspect, which can be appropriated by anyone without the author's consent, but whose appropriation requires a specific activity on the part of the 'appropriator' in order to be wholly carried out, and 3. the form constituting the ideational aspect, whose property belongs unequivocally to the author and can under no circumstances be appropriated without the author's consent.

Buying a book has to give the buyer a right that must exceed the mere property right in the physical copy, but which at the same time does not extend to the whole ideational aspect of the book: "since we would not be able to do this without possessing the book, and since we did not

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[31] *Ibidem*. In the *Lectures concerning the Scholar's Vocation*, Fichte stresses the same point: "The *advantage* which someone derives from a particular arrangement does nothing to *justify* it" (Fichte *Early Philosophical Writings*, *supra* note 25, at 161-2).
[32] Fichte, *Beweis…*, *supra* note 27, at 410.
[33] *Ibidem*, at 411.

purchase it just for the sake of the paper it contains, buying it must accordingly also confer on us the right to appropriate its content as well. By purchasing the book, that is, we acquire the possibility of appropriating the author's ideas; but to transform this possibility into reality, we must invest our own effort"[34].

Therefore, when one acquires a book, the real object of purchase is neither the mere physical copy of the book nor its matter or content as such, but rather the *possibility* of appropriating such matter through one's own effort[35]. Translating this possibility into reality means 'learning ', and the activity of learning consists not only in obtaining information, concepts, and ideas from an author, but first of all in giving his ideas a form that is *one's own* form: "for no one can appropriate his thoughts without thereby altering their form"[36]. Therefore, reading a book means, in a sense, repeating the effort originally made by the author to give form to his or her thoughts, and this activity of giving a different form to the same ideas is termed by Fichte *das Mitdenken*: "And, be it said in passing, this thinking-in-common, this chance to share the responsibility of thinking, is the only fitting recompense for instructing the mind, whether oral or written"[37].

It is important to note that the property right deduced by Fichte is not a mere remuneration for the author's work. Rather, it is rooted in the dynamic of learning as such, that is in the very nature of the relationship between author and public. In this sense, such a property right does not simply protect the 'interest' of the 'author', but fosters the pure author-public *relationship* and the related *possibility* that author and public come to share the responsibility of thinking. This approach is consistent with Kant's deduction of the author's rights from the definition of a book as a means of exchanging thoughts – and of the publisher as a mere intermediary between the author and the public –, that the great Königsberger philosopher was developing in the same years[38]. As I have elsewhere observed[39], for Kant, the ultimate purpose of copyright lies not in the interest of authors, but in the need to preserve a public sphere of communication where every man can be free to submit his or her own thinking to the scrutiny of the public, in order to prove its correctness and

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[34] *Ibidem*

[35] "No one has ever acquired the ideas of the *Critique of Pure Reason* in exchange for the money he paid for it. There are some clear-sighted men now who have appropriated these ideas, but most certainly not just by buying the book, but rather through assiduous and rational study." *Ibidem*, at 411.

[36] *Ibidem*, at 412

[37] *Ibidem*, at 411.

[38] See Immanuel Kant *Von der Unrechtmäßigkeit der Büchernachdrucks* (1785) and *Die Metaphysik der Sitten: Rechtslehre § 31/II. Was ist ein Buch?* (1797). Although Kant's article on the illegality of reprinting appeared six years before Fichte's booklet, the latter was apparently unaware of it.

[39] See Maurizio Borghi, "Writing Practices in Privilege- and Copyright-System (On Authorship, Ownership and Freedom)", paper delivered at the 2003 workshop of the Society for Critical Exchange and available at <http://www.cwru.edu/affil/sce/Texts_2003/Borghi.htm>. On Kant's construction of a public sphere of freedom of thinking see also M. Borghi "The Public Use of Reason", *supra* note 4.

truth. In the approach of both Fichte and Kant, copyright is more about everyone's freedom of thought than about rewarding the author's labour.

Thanks to the distinction between form and content, the author's right is defined with respect to its own scope and boundaries and with respect to other similar rights, such as invention patents. As regards form, Fichte can define the object of the contract between author and publisher, as well as the object of the purchase-and-sale relationship between publisher and public: "The publisher, then, does not acquire *ownership of anything at all* through his contract with the writer, but rather, under certain conditions, only the right of a particular *usufruct* of the writer's property, that is to say, of his ideas in their particular form of expression. He is authorized to sell to whomever he can and wants – not the author's ideas and their form, but only the *possibility* of appropriating the former, thanks to their appearance in print. In all respects, then, he acts not in his own name but in the name and by mandate of the author"[40].

This right to appropriate the ideas expressed in a particular form becomes more evident if we compare books with other products of mechanical arts. Within the ideational aspect, the relationship between 'concept' and 'form' here takes on a completely different meaning. The 'form' of a mechanical product as such cannot be considered as a unique expression of its maker's personality, since it must obey the intended purpose of the object: "It cannot be said of this ideational aspect that it has a form unique to the maker, because it is itself a concept that underlies a *particular* form – the form taken by the material, the relationship of the individual parts to the realization of the object's intended purpose – and it can hence be defined in only one way, as is befitting any precisely conceived concept. Here it is rather the physical aspect which, *insofar as it is not determined by the underlying concept*, takes on a particular form"[41]. Unlike a book, a mechanical product can only express its underlying concept in a *particular* form, since its form must be necessarily related to the intended purpose or function of the object itself. The question is whether by buying a mechanical object one also acquires the possibility of appropriating the underlying concept. Certainly, someone having the necessary knowledge can legitimately appropriate such a concept by taking apart the object and analyzing it – thus making, in today's terms, 'reverse engineering'. Furthermore, he can also build it again in the same form or give it an even finer form. He is allowed to do this, "since one has the right to use one's own property

[40] Fichte, *Beweis…*, *supra* note 27, at 415. As to this latter sentence, the same principle is expressed quasi verbatim by Kant: "The publisher speaks […] yet not in his own name, for otherwise he would be himself the author, but in the name of the author; and he is only entitled to do so in virtue of a mandate (*mandatum*) given him to that effect by the author." (I. Kant *Metaphysik der Sitten* [1797] in: *Kants gesammelte Schriften*, ed. Königl. Preuß. Akademie der Wissenschaft, Berlin-Leipzig: De Gruyter, 1907, Bd. 6, at 404).
[41] Fichte, *Beweis…*, *supra* note 27, at 418

however one wishes, undoubtedly one also has the right to make a copy of products of the mechanical arts"[42].

It is however questionable whether the exercise of this right is *fair*. Fichte's answer is that it is *not*: "It is not fair that the man who has invested his money and years of hard work and effort should find himself robbed of the fruits of his labor as soon as he goes public with the results of his extensive work, results which are of such a nature that anyone who sees them can appropriate them"[43]. Therefore, the State is justified in granting special privileges, transforming "what was a question of fairness into one of legality", and lasting only the time needed to achieve "its intention of compensating the original inventor"[44].

This classic labour-deserve argument is therefore used to prove the fairness of a temporary privilege on a product of mechanical art, but it is not a valid rationale for the author's right in his or her book. The divergence with the Lockean discourse on copyright is evident. In Fichte's reasoning, the author's enduring property on his or her work is essentially different from the inventor's claim on his or her mechanical product, and the ultimate reason for such a difference lies in the different meaning of the form-and-concept relationship in a book and in a mechanical product[45].

3. The 'evolutionary paradigm' and the rise of the utilitarian rationale in the 19th Century

The natural or personhood right approach had a great influence in shaping the 19th Century copyright law and doctrine, mainly in continental Europe. For instance, the so-called 'moral rights' – that may be more precisely termed 'personal rights' since they belong to the *persona* of the author – have been statutory defined in France, Germany, and Italy, and were partially included in the 1886 Berne Convention due to the pressure of continental-European doctrine[46].

As we have previously seen, utilitarian-like arguments appear at the same time as the natural right ones, if not before them. Fichte's booklet was in fact written to reply to anti-copyright arguments largely based on considerations regarding utility rather than justice. In England, the 1710 Statute of Anne can be interpreted alternatively as a book-trade regulation act[47] or as a first

[42] *Ibidem*, at 419
[43] *Ibidem*
[44] *Ibidem*
[45] "The right of the buyer to make a copy of what he has bought extends as far as the physical possibility of appropriating it, and this decreases the more a work depends on the form that we can never appropriate." *Ibidem*.
[46] For a comparative analysis of Anglo-Saxon and continental European models on 'moral rights' see Neil Netanel "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law", 12 *Cardozo Arts & Ent. L. J.* 1
[47] So John Feather: "The so-called Copyright Act of 1710 mentions neither copyright nor authors; it was little more than a codification […] of existing book trade practices" (John Feather "From Rights in Copies to Copyright: The Recognition of Author's Rights in English Law and Practice in the Sixteenth and Seventeenth Century", in M. Woodmansee and P. Jaszi (eds.) *The Construction of Authorship: Textual Appropriation in Law and Literature*, Durham: Duke University Press, 1994, at 208-9). Similar position is shared by Lyman R. Patterson *Copyright in Historical Perspective*, Nashville: Vanderbilt University Press, 1968, at 143-44.

fundamental step in order to institute a property law[48], but in both cases it remains a functional instrument of 'encouragement of learning' rather than a right-based view of authorial prerogatives. However, it was only under the growing influence of late 18th – early 19th Century political economy that utilitarian rationales became relevant in copyright jurisprudence and doctrine. Although political economy was not a specifically Anglo-Saxon science, it is in these countries that the economic discourse exerted the greatest influence in law, especially in an emerging subject matter such as intellectual property.

As in the European-continental context, the process of building a content neutral regulation system implied a sharper definition of what is copyrightable and what is not. The principle of non copyrightability of ideas, facts and the like can be seen as having the same twofold purpose as in the other jurisprudence: defining the nature and scope of what is eligible for copyright protection and of what must be left in the public domain, and drawing a line between copyright and other similar rights such as patents and trademarks. However, what is different is the rationale that was developed for this principle.

In American jurisprudence, the interpretation of this principle is strictly related to the constitutional clause "Progress of Science and useful Arts"[49], which in turn recalls the claimed purpose of the 1710 Statute of Anne as "An Act for the Encouragement of Learning". In both cases, emphasis is put on the *effect* of copyright protection, namely, on the social or shared effect, and not on the essence of the right itself. In this sense, attention is focused on elements other than the relationship between author and public: general welfare, literacy, public benefit, and even democratic values, etc. Copyright is therefore less a self-justifying right than a means to achieve further ends.

Many scholars have discussed the origins and ideological foundations of the U.S. constitution's copyright clause[50]. The concept of "progress", as upheld by the Enlightenment, profoundly affected the framing of the American copyright, and the idea/expression dichotomy is certainly one of the most relevant issues of this long process. Unlike Germany and continental Europe, here the distinction between protectable and unprotectable elements of works of authorship was not explicitly formulated in philosophical terms, but was to be gradually defined during a two-century long process of judicial decisions, in which the concepts of 'progress', 'science', and

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[48] This perspective is supported by Mark Rose, who depicts the Statute "the reestablishment of copyright under the rubric of property rather than regulation." (see *supra* note 12).

[49] "The Congress shall have Power […] To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writing and Discoveries" (U.S. Const. art. I, § 8, cl. 8).

[50] See Michael D. Birnhack "The Idea of Progress in Copyright Law", *supra* note 17, and the bibliography therein quoted.

'useful arts' were interpreted in different ways . In other words, these concepts came to be interpreted by courts and lawyers according to different *implicit* underlying understanding.

Before shedding light on this implicit understanding, which in a sense plays the same role as the explicit philosophical foundation in civil-law jurisprudence, we shall briefly look at the main arguments put forward on this matter.

The rationales for limiting copyright protection to 'expressions' have been repeatedly stressed by American courts. A classical formulation is Justice Bradley's opinion in the 1879 case *Baker v. Selden*: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book"[51]. To communicate knowledge by publishing a book means allowing everybody to make *use* of it. Therefore, limitations in copyright protection are imposed in order to permit a further use of the 'useful knowledge' that the book is disseminating. As a matter of fact, the *Baker* case regarded a book that illustrated a peculiar method of book-keeping, thus a typical utility publication. The court therefore stressed the element of the 'use'. However, similar terms were employed to justify the limitation of copyright protection for *every book*, as appears in an earlier federal opinion regarding the originality requirement: "Every book in literature, science and art borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius"[52].

This opinion describes the 'event' of the appearance of a book as belonging to a process: a never-ending process of borrowing and lending. An author borrows what was known and used before, language and thoughts of other men, and lends back all of this after having modified, exalted or improved it through the labour of his or her own genius. Moreover, this process is not only about science and useful knowledge, but refers to human creativeness in general: "Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and

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[51] 101 U.S. 99. On the meaning of this case see Pamela Samuelson "A Turning Point in Copyright: *Baker v. Selden* and its Legacy" *Center for the Study of Law and Society – Jurisprudence and Social Policy Program*, Paper 23, 2004, <http://repositories.cdlib.org/csls/lss/23> (explaining that the reading of *Baker* as a seminal case for the idea/expression distinction emerged only after the middle of 20th Century).

[52] Justice Story in *Emerson v. Davies*, 8 F. Cas. 615 (1845).

proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days"[53].

The argument put forward in *Baker v. Selden* is thus claimed for *every* work of authorship, since creating a work always means being part of a process of 'borrowing and lending', or of 'gathering and spreading', in which every single author represents only a (temporary) step of the process itself.

To be sure, the idea that the author can – and, to some extent, must – take elements from the work of others in order to create his own, is not a peculiarly 19th century thought[54]. However, what is new is the idea that by acting this way the author is part of a bigger process, that is beyond his control.

Restricting copyright protection to the sole 'expressions' means giving free access to the "abundant stores of current knowledge", and such freedom of access prevents the process from becoming stuck due to the lack of 'raw material'.

Both *Baker v. Selden* and *Emerson v. Davies* decisions undoubtedly echo the idea of 'progress' expressed in the constitutional clause. As a consequence of this idea, knowledge is seen as a never-ending enterprise binding past and future generations on the path of a continuous progress. This idea is multi-faceted and not easy to define. In its original Enlightenment understanding, it means above all the improvement of the human condition, the advancement of humankind towards enlightenment, i.e. towards a clear understanding of the essence of all things. In this idea of progress as a human enterprise in the direction of the enlightenment of humankind, knowledge plays a central role as *scientific* knowledge.

However, in the 19th Century, under the growing influence of powerful currents of thought such as Utilitarianism and, later, Positivism, the idea of progress that came out of the 18th Century Enlightenment experienced an unusual change.

First, the 'understanding of the essence of all things', which we have characterized as the final purpose of progress as human enterprise, changed its meaning. Progress came to be increasingly understood as moving towards a clear understanding of all things *in order* to steer them. Intellectual progress became the necessary condition of material progress.

Second, the idea of progress itself became narrower in scope and became fundamentally synonymous with 'evolution'. According to the evolutionary paradigm, every organism evolves from simpler to more complex forms of existence, and this universal law also applies to human

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[53] Ibidem.

[54] See, for instance, the *incipit* of Dante's *De vulgari eloquentia*: "I shall not bring to so large a cup only the water of my own thinking, but shall add to it more potent ingredients, taken or extracted from elsewhere, so that from there I may concoct the sweetest possible mead" (Dante *De vulgari eloquentia*, ed. by Steven Botterill, Cambridge: University Press, 1996, at I/1).

society, insofar as it can be considered an organism. Therefore 'Progress of knowledge' means a one-way transition from a lower (i.e. less-evolved) to a higher (i.e. more-evolved) form of steering. Compared to the classic Enlightenment idea of progress, here the element of empowerment came increasingly to the foreground, while at the same time the element of the enlightenment slipped into the background.

Third, according to the evolutionary paradigm, knowledge was more and more interpreted as a *cumulative* process following the laws of evolution. In this sense, knowing means building on past knowledge, or, according to a popular metaphor, adding a new brick to a building constructed generation after generation[55]. Knowing means building upon an accumulated store of knowledge, and any piece of knowledge divulged by publishing a book is a 'building block' for future works.

Fourth, and lastly, this 'architectural metaphor' became commonly employed to represent the functioning of *every* kind of authorial process, from science to literature, from technology to the fine arts. Starting from the 'paradigm' of scientific, useful knowledge, the idea of progressive, cumulative knowledge rapidly came to embrace the whole realm of human creativity as such.

By then, this 'utilitarian, evolutionary, cumulative' paradigm of creation represents the basic understanding of every work of authorship as such. In this line of thought, the idea/expression distinction is almost a *fictio iuris* to maintain the ultimate purpose and scope of copyright. It is not an intrinsic property of the peculiar right of the author as such.

4. Reviewing the form and content distinction: the sustainability of natural-law argument

Utilitarian rationales for limiting copyright protection leads to a 'functional' dichotomy between form and content, while reasoning based on personhood right results in a more 'substantive' distinction. These two arguments therefore have a different outcome. I shall now proceed to indicate some arguments challenging copyright doctrine, and conclude by considering a more general question regarding the understanding of knowledge underlying the current copyright system.

As I pointed out at the beginning, the principle according to which copyright only gives legal protection on the form in which content is expressed, and does not give any protection on content 'as such', is a fundamental cornerstone of all copyright systems. But this principle is becoming uncertain in the digital environment, where all content is a disembodied sequence of information controlled by a code. As a matter of fact, skeptical opinions about the sustainability of the 'form-and-content distinction' have been repeatedly expressed in the copyright doctrine, also prior to the advent of the 'digital revolution'. But the advent of digital technologies and the

[55] See Michael D. Birnhack "The Idea of Progress in Copyright Law", *supra* note 17, at 46-52 (regarding the meaning of the metaphors of "building" and "dwarfs on giants' shoulders").

emergence of related new subject matters have undoubtedly enhanced an attitude of caution towards this principle.

A first general critique argues that no distinction is feasible between concept and its expression, because no concept can exist without being expressed, and vice versa. From abstract concept to concrete expression, from the pure mental activity to its actual manifestation in a tangible medium, there is an uninterrupted process rather than a 'quantum leap'. Therefore 'form' and 'content', 'idea' and 'expression', are simply labels applied to artificially separate what is protectable and what is not under the positive law. This critique also involves the non-copyrightability of facts, because no fact can exist *per se* without being somehow interpreted. Drawing a line between copyrightable and non-copyrightable elements is an arbitrary and therefore policy decision[56].

A second group of criticisms refers more specifically to the so-called 'postmodern condition', namely to the features of works of authorship in today's situation as characterized by the 'death of the author' and the depletion of classical categories of aesthetics[57]. The form and content distinction is not only an arbitrary one, but it implies a non-neutral assessment of the value on the work itself. As a matter of fact, considering a work of art as having a 'form' and a 'content' is still a decision about *what* a work of art *is*, and such a decision is anything but neutral[58]. For instance, so-called 'conceptual artists' produce works that have no permanent form or no form at all, thus questioning any reading in terms of form and content. The same tension between contemporary 'postmodern' art and the 'classical' ('modern') distinction between idea and expression is illustrated by many current tendencies and practices, based more on 'recycling' of previous materials and contents rather than on authorial creativeness in traditional sense[59].

Finally, some scholars observe that the form/content distinction is doomed to fail with the advent of the new information technologies. In the so-called 'cyberspace' every content is allegedly becoming a flow of information, and the form is a mere vehicle of this flow. In such a context, the

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[56] This position is developed for instance by Richard H. Jones "The Myth of the Idea/Expression Dichotomy in Copyright Law", 10 *Pace L. Rev.* 1990 (arguing that, since no idea can exists apart from its expression, the actual dichotomy in copyright law should be defined as being between unprotectible and protectible expressions). The 'cognitive' argument that there is an insoluble continuity between so-called abstract ideas and tangible expressions, has been used since the 19th Century by the opponents of the intellectual property. I found this argument, for instance, in the writings of the economist Francesco Ferrara (see Maurizio Borghi *La manifattura del pensiero. Diritti d'autore e mercato delle lettere in Italia*, Milano: Franco Angeli, 2003, at 86-8).

[57] See Roland Barthes "La mort de l'Auteur" , in *Le bruissement de la langue*, Paris: Seuil, 1984, at 61-67.

[58] This point is made by Amy B. Cohen "Copyright Law and the Myth of Objectivity: The Idea/Expression Dichotomy and the Inevitability of Artistic Value Judgments" 66 *Ind. L. J.*, 1990-1991 (arguing that the dichotomy is grounded in a classical and non-neutral view of art that is no longer widely accepted, and therefore doomed to fail).

[59] For an overview of these 'cultural practices' see Linda Hutcheon *The Politics of Postmodernism*, New York & London: Routledge, 1989.

distinction loses its 'ontological' validity and cannot be applied and measured as in the tangible space[60].

However, these reservations about the capacity of the form and content distinction to comply with the present features of works of authorship, hold only in the framework of a utilitarian approach to copyright.

In the Fichte approach, the question is not to establish once and for all what a work of authorship is, but rather to understand what actually happens when human beings share their thought through a tangible medium. The author's right that derives from this approach is consistent with this concern, namely, to preserve the dimension in which author and reader can freely share the responsibility of thinking. This means, for the author, *communicating* his or her thinking and, for reader, having the possibility of truly *learning* through reading. But a comparable relationship is in force in every domain of human creativity[61], because the value of an object of creativity – a writing, a book, a work of art – lies not in the materiality of the object itself or in its content as such, but rather, so to say, in the 'sphere of possibilities' it conveys. We buy books in order to have the possibility of learning, and we buy the access to works of art I order to have the possibility of experiencing them. In juridical terms, the real object of purchase when works of creativity are concerned is a mere *possibility*. We can buy a possibility of learning and experiencing – but we cannot buy the 'knowledge' or the 'experience' as such.

The distinction between 'form' and 'content', as developed following the natural right approach, is nothing but the consequence of this situation. It is important to see that this is still *our* situation – despite all the alleged change in cultural practices and meanings. The mere fact of bypassing or facilitating the buying and selling relationship, for instance through a world-wide technological advanced system of file-sharing, does not represent *per se* an advancement of learning and experiencing. These remain pure possibilities. Translating these possibilities into reality implies, more than ever, investing one's own effort.

According to Fichte, to appropriate one's thoughts always implies doing a hard job. The sign of this appropriation is the *form* we necessarily have to give to thoughts, since, now as before, "Thoughts cannot simply be handed over or bought for cash"[62] – or downloaded for free. Sharing thoughts and owning forms are the two sides of the same coin.

But apart from these considerations a more radical question arises regarding *what kind of knowledge* con copyright foster. As we have seen, utilitarian rationales are based on a specific

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[60] See generally David R. Koepsell *The Ontology of the Cyberspace. Law, Philosophy and the Future of Intellectual Property*, Chicago and La Salle: Open Court, 2000, at 14-17.

[61] In the fine arts, for instance, no true relationship between 'artist' and 'public' can be established without the possibility of sharing the weight of the artistic experience.

[62] Fichte *Beweis...*, *supra* note 27, at 411.

concept of knowledge that is closely linked to the 19th century positivistic idea of science as a cumulative process of 'building-up', binding past and future generations on the bright path of progress (i.e. evolution). It must be observed that this idea of science is particularly narrow, also compared, for example, to the 18th century idea of science as a means of advancing humankind towards enlightenment, the idea implicitly included in the U.S. Constitution and the Statute of Anne. But such a narrow positivistic idea of science is subsequently extended to include *all kinds* of human knowledge. It becomes the paradigm of 'creativity' as such. It is not surprising that this idea is affecting today's copyright discourse from end to end, representing, in particular, a benchmark in the discourse of the opponents of the current trends in the intellectual property[63].

This 19th Century positivistic concept is characterized by a twofold restriction: first, 'science' becomes nothing but a cumulative process, where building blocks are added from one generation to the next; second, all kinds of human knowledge are conceived only through the lenses of this narrow concept of science.

5. Conclusions. Towards a critique of the 'knowledge construct' in copyright doctrine

In a seminal book published ten years ago that opened a new and fascinating field of research, Martha Woodmansee and Peter Jaszi proposed a "critique of the notion of authorship", that is, a critique of the largely insufficient "author construct" that dominates our current copyright systems[64]. As Martha Woodmansee has elsewhere observed: "The 'critique of authorship' that has marked Literary Studies has yet to affect the Law – despite the efforts of a growing number of legal scholars"[65]. Isn't it time to address a similar critique to the notion of 'knowledge' that has implicitly guided our copyright system for two centuries?

As a matter of fact, the idea of a progressive, cumulative knowledge is a construct which is only valid, if ever, for a specific kind of knowledge, namely the *scientific* one. Can this construct be straightforwardly extended to all human creative activities as such? Can it be applied, for instance, to poetry, literature, art, and philosophy?

In an essay entitled *On the Nature of the Word* (1922) the Russian poet Osip Mandelstam observed: "The theory of evolution is particularly dangerous for literature, but the theory of progress is nothing short of suicidal. If one listens to the literary historians who defend

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[63] See, for instance, the 'mantra' of Lawrence Lessig's ideology: "Creativity and innovation always builds on the past. / The past always tries to control the creativity that builds upon it. / Free societies enable the future by limiting this power of the past. / Ours is less and less a free society" (*Free Culture*: Lawrence Lessig Keynote from OSCON, Open Source Convention, 2002 <http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html>).

[64] See Martha Woodmansee and Peter Jaszi (eds.) *The Construction of Authorship*, *supra* note 47.

[65] Martha Woodmansee "Copyright Authorship and the Re-users Dilemma", paper delivered at the conference "*Digital Property*: Copyright, New Technologies and Digital Rights Management", Bocconi University, Milan, 18th November 2005.

evolutionism, it would appear that writers think only about how to clear the road for their successors, but never about how to accomplish their own task; or it would appear that they are all participants in an inventors' competition for the improvement of some literary machine, although none of them knows the whereabouts of the judges or what purpose the machine serves". And he concludes: "The theory of progress in literature represents the crudest, most repugnant form of academic ignorance. Literary forms change, one set of forms yielding its place to another. However, each change, each gain, is accompanied by a loss, a forfeit. In literature nothing is ever 'better', no progress can be made, simply because there is no literary machine and no finish line toward which everyone must race as rapidly as possible"[66].

Each gain is accompanied by a loss: this 'law' is probably more suited to the literary creation than the image of 'building blocks' underlying most of the current discourses of copyright. Understanding this 'law', that the painter Georges Braques in his *Cahier* terms "Law of compensations"[67], could be a good proving ground for a productive critique of the dominant 'knowledge construct'.

For this task, philosophy can provide sound elements. A good example can be obtained from Fichte himself. In a lecture given in 1811 about the destination of the scholar, Fichte observed that there are two different kinds of knowledge. The first is only an "image or a copy of something existing outside the knowledge itself", and can be quantitatively measured in terms of increase, since it builds up with the passing of time: "Of this kind of knowledge, everyone who simply lives consciously on this earth has collected in himself a part, without pretending to be called a scholar […]. As to this kind of knowledge, the difference between the scholar and the non-scholar would consist merely in the fact that the first has collected 'more' things than the latter: it would be therefore only a quantitative difference, not a qualitative one". According to this mere 'cumulative' knowledge "a man who today is considered to be ignorant could have been judged a great scholar some centuries ago, and conversely the first of today's learned men would hardly reach the level of a common man in thousand years"[68].

But there is a second kind of knowledge, "on which only we might place a value". It is a knowledge which is not merely a copy of the reality, but that *produces* the reality itself: "It might precede the being to whom it refers, and thus constitute the model and the ground of such being". It is *a priori* and 'practical' knowledge, that is, knowledge that promotes and foresees an action, and

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[66] Osip Mandelstam *Critical Prose and Letters*, ed. by Jane G. Harris, transl, by Jane G. Harris and Constance Link, Ardis Publishers: Woodstock and New York 2003, at 119.
[67] "*À toute acquisition répond une perte équivalente. C'est la loi des compensations*" (Georges Braques, *Cahier* 40).
[68] Fichte *Early Philosophical Writings*, *supra* note 25, at 203-4.

does not simply 'replicate' reality as if it were a mere fact. Only a man who practices this kind of knowledge can be rightly termed a 'scholar'[69].

Today the risk is precisely that knowledge becomes exclusively a 'copy' of the reality, and that that the space for a really original and 'productive' knowledge becomes narrower and narrower. The form of knowledge which is now sometimes celebrated under the name of 'remix culture'[70] risks becoming a mere 'copy-and-paste culture' without a clear understanding of what 'knowing' means. Curiously enough, the verb 'to share' has never been so popular as today, when eventually it denotes the most comfortable and painless exercise[71]. However, the prospect of having all human knowledge at one's disposal by simply acceding to shared-contents[72], may be a great illusion. As to copyright doctrine, applying a made-up construct of knowledge – the cumulative, progressive, evolutionary one – to the whole sphere of human creativity might doom copyright to a structural blindness towards its own subject. The natural-right philosophical foundation of copyright, as I have tried to illustrate, can provide a sound basis for giving a new rigorous sense to the 'sharing of knowledge' in our digital age.

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[69] *Ibidem*, at 205.

[70] See Lawrence Lessig "Freeing Culture for Remix" *Utah L. R.* 2004.

[71] As Jane Ginsburg observed: "Before Napster, sharing meant giving something up so that others could enjoy the object with which the sharer parted. That is why 'sharing' is something children do not like to do. […] But Napster brought a new kind of 'sharing', one in which recipients could enjoy the giver's munificence, while the giver never had to give anything up" (Jane C. Ginsburg "Essay – How Copyright Got a Bad Name For Itself" 26 *Colum. J. L. & the Arts*, 1, 2002).

[72] "Imagine a world in which every single person on the planet is given free access to *the sum of all human knowledge*. That's what we're doing" (Jimmy Wales, founder of Wikipedia and Chair of the Wikimedia Foundation <http://wikimediafoundation.org/wiki/Press_releases/English_Wikipedia_Publishes_Millionth_Article>, emphasis added).