Filesharing And Ownership Of Digital Objects: Intellectual Property According to Kant’s Theory of Possession

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ABSTRACT: One of the most pressing ethical issues of the 21st century concerns how digital media will be distributed in an age where unprecedented connectivity allows unlimited reproduction of copyrighted material. The proliferation of software piracy has raised a serious challenge to the notion of intellectual property that underpins the groundwork of copyright law. In this paper, I provide an alternate framework for understanding intellectual property according to Immanuel Kant’s theory of possession, as found in The Metaphysics of Morals. In so doing, I hope to show that a concept of intellectual property is still a viable means to address ownership in the digital age.

Introduction

With the exponential proliferation of internet access in the past decade, new challenges have emerged for ethical and judicial doctrines that were formulated before information could be transferred with such ease. One of the most contentious issues of the information age has been that of how intellectual property rights should now function in an increasingly interconnected world. Filesharing and software pirating are testing our notions of what constitutes property and what rights and freedoms govern our concept of ownership. It can be argued that the possibilities created by the information age have made the idea of intellectual property obsolete, and that the traditional understanding of the theoretical justification for property has proven itself to be fundamentally flawed. Against this view, I argue that Immanuel Kant’s theory of possession, as he articulates in The Metaphysics of Morals, can be applied to the controversy surrounding intellectual property in order to reassert a notion of intellectual property that is compatible with technological advances that challenge previously established property rights.

As information sharing technology has advanced, it has allowed a massive increase in the ability of individuals to copy recorded media and disseminate it with negligible cost and little to no fear of being caught or reprimanded. In this context, digital music and video has been most commonly disseminated through internet piracy, the illegal sharing and distribution of copyrighted material. Beyond audio and video files, any medium that can be digitized can be replicated infinitely and distributed easily across the world. It seems that there is a direct, causal relationship between the spread of information technology and the capability to copy and distributed copyrighted material. Edwin Hettinger elaborates: “As a result of both vastly improved information-handling technologies and the larger role information is playing in our society, owners of intellectual property are more frequently faced with what they call "piracy" or information theft.”

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person does not preclude others from possessing or using it as well.” As such, traditional notions of possession that account only for corporeal objects that cannot be easily divided and shared seem insufficient to contend with the existence of intellectual objects such as digital music, video and software.

Kant’s Theory of Possession

It is here that a careful analysis and application of Kant’s theory of possession, as found in The Metaphysics of Morals, can be applied. To adequately interrogate Kant’s theory, however, it is necessary to trace it to its origin within his analysis of the Doctrine of Right. With this doctrine, in distinction from the Doctrine of Virtue, Kant seeks to investigate how the freedom of one individual can exist in accordance with the freedom of all other rational individuals. While virtue concerns the moral character of the maxim behind an agent’s actions, Kant’s view of the notion of right is concerned with the relation between the actions taken by rational individuals, and is not concerned about the intention of those actions so much as their ability to coexist with the actions of other individuals. Kant writes, “All duties are either duties of right (officia iuris), that is, duties for which external lawgiving is possible, or duties of virtue (officia virtutis s. ethica), for which external lawgiving is not possible.” Although, according to Kant, morality must be self-legislated, rightness is contingent on the existence of others, and is thus an external lawgiving that limits my freedom in light of the existence of others who are due the same freedom.

As such, Kant formulates the universal principle of right: “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.” This formula seeks to maximize freedom of choice for each individual, insofar as such individual freedom is consistent with an equal distribution of freedom to all rational actors. Superficially, this principle seems to mirror the Categorical Imperative as Kant describes it in the Groundwork of the Metaphysics of Morals. We apply the Categorical Imperative by hypothetically universalizing the maxim behind an action, and determining if such a universalized maxim could be consistent with itself and with other maxims. While the Categorical Imperative determines the moral worth of a given action based on its internal maxim, the universal principle of right legislates purely externally, deriving the limits of individual freedom from the existence of other actors who are due the same freedom. Thus while the Categorical Imperative legislates according to moral law that is founded internally, and is in no way contingent on other individuals, the universal principle of right draws its power to command from the fact that we live in a world populated by other rational agents.

As a result, Kant asserts that coercion of one individual is justified in protecting the freedom of another individual. Because rights are externally derived, they are not limitless claims to absolute freedom; rather, they must be able to provide the same degree of freedom to all other rational individuals. The only way to accomplish this, according to Kant, is to sometimes use coercion. He elaborates:

… if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes on it.

If the use of coercion is justified to protect the freedom of other individuals, then obligations can be placed on other individuals in order to assure that the rights I am due are protected.

This becomes essential not only for the principle of rightful action itself, but later for Kant’s complete theory of possession, which will eventually define possession as an obligation placed on others to not take

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2 Ibid. p. 34
4 Ibid. p. 24-5
what is mine. Kant’s theory of possession begins with a working definition of possession: “That is rightfully mine (meum iuris) with which I am so connected that another’s use of it without my consent would wrong me.”6 The implication of this view of possession is that it demands the existence of an object to be possessed, but does not directly derive that object from experience. Kant writes:

Whoever wants to assert that he has a thing as his own must be in possession of an object, since otherwise he could not be wronged by another’s use of it without his consent. For if something outside this object which is not connected with it by rights affects it, it would not be able to affect himself (the subject) and do him any wrong.7

According to this analysis, there is room in Kant’s theory of possession for a notion of intellectual property as possession of a purely intellectual object that doesn’t derive entirely from empirical existence; this opens up the possibility of forming a coherent theory of possession that can account for non-tangible, digital objects.

Kant continues on this thread, asserting next that there are two possible forms that possession can take: intellectual or empirical. He writes:

… the expression ‘an object is external to me’ can mean either that it is an object merely distinct from me (the subject) or else that it is also to be found in another location (positus) in space or time. Only if it is taken in the first sense can possession be thought of as rational possession; if taken in the second sense it would have to be called empirical possession.8

Empirical possession, as its name implies, is defined as the physical holding of an object, of possession by virtue of an object’s physical presence in relation to my body. Intellectual possession, as a corollary, would be a form of possession that is not contingent on an object’s physical presence in relation to the individual who possesses it. I possess this pen merely empirically when, upon placing it on a desk and leaving the room, any other individual can pick it up and be said to legitimately possess it. I own the same pen intellectually when the fact that I’ve carelessly left it on a desk and exited the room does not confer upon another the right to take it. The distinction between the two concepts stems from what injunction is placed on another individual vis-à-vis my proximity to the object. Once again, intellectual possession opens up the possibility of possession of a purely intellectual object, while a notion of ownership derived from a theory of empirical possession would be unable to contend with an object that can’t be physically held.

From here, Kant next moves to reject empirical possession as a basis for a rigorous theory of ownership. A theory of property can’t be coherent if my act of holding a corporeal object is the only basis I have for declaring that object mine; if I set down an object I possess, it shouldn’t immediately become up for grabs. Furthermore, a theory of possession that limits ownership to simply what I physically hold would be redundant with the universal principle of right. I am already protected from the sort of bodily intrusion that would be involved if someone were to wrest an object from my grasp by the fact that all rational individuals are held to the principle of respecting the freedom of others in light of their own freedom. As such, a coherent theory of the foundations of rightful possession must be derived from a notion of intellectual possession.

An object can be said to mine, therefore, if I can place it down and walk away from it, and still be assured that others would be wrong to take it. Kant writes:

So the concept to which the concept of a right is directly applied is not that of holding (detentio), which is an empirical way of thinking of possession, but rather the concept of having, in which abstraction is made from all spatial and temporal conditions and the object is thought of only as under my control.9
Here, Kant’s theory demonstrates a radical aspect that allows it to operate in novel ways two centuries after he proposed it. Because he establishes that a theory of possession must be premised exclusively on the concept of intellectual possession in order to be coherent, he is positing a metaphysical aspect of possession that presupposes the existence of a property of a given object that is beyond its physical existence, which allows an individual to possess it. This extra-physical character of the object to be possessed is a critical component of a theory of possession that can contend with the possession of digital objects, as it is only possible to possess these objects intellectually; if there is no metaphysically prior character of an object that allows it to be possessed, then it would impossible to posit ownership of any form of recorded media. Once again, Kant’s theory seems to support the possibility of a purely intellectual object that is required for a viable theory of possession that can contend with the notion of intellectual property.

The Book as Recorded Discourse

Kant further affirms the notion that an object doesn’t have to be empirical in order to be possessed later in The Metaphysics of Morals, in his analysis on how the author of a book creates a discourse that is represented to the reader through the physical object of the printed, bound book itself. A book, for Kant, “is a writing … which represents a discourse that someone delivers to the public by visible linguistic signs.”\(^9\) As a representation of a discourse on the part of the author, the book transcends the corporeality of its empirical existence, and demands the existence of an intellectual object that can’t be simplified to mere written words on a page. This mirrors Kant’s earlier analysis that posits an extra-physical character of tangible objects, which allows them to be possessed. In this case, the object has a particular characteristic, as Kant understands a book to have a unique character in that they are the written record of a unique discourse created by the author.

In much the same vein, I would argue that the same analysis can be applied to other recorded media (including recorded music, spoken word, and film) that were not technologically possible in Kant’s time, but function identically to how he understands a book. In all these cases, the author uses the recording medium itself (the words on the page, the grooves on a record, the frames of a film) in order to represent a discourse to an audience, which implies an intellectual object that goes beyond the empirical recording itself. The key distinguishing characteristic that links each of these forms of discourse is the existence of an original discourse that is expressed through the medium of a physical object, and in this way Kant’s understanding of the means by which a discourse is expressed in a book can be modernized in order to include other forms of recorded media.

In light of this understanding of a discourse represented by an author within a book, Kant specifically examines the problem of unauthorized publishing of an

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\(^9\)Ibid. p. 42
\(^{10}\)Ibid. p. 71
Fileshearing And Ownership Of Digital Objects: Intellectual Property According to Kant’s Theory of Possession

The author’s written work that is directly pertinent in connecting his theory to the modern problem of filesharing and media piracy that has come about because of advances in information sharing technologies. He writes, “Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because on the one hand a book is a corporeal artifact (opus mechanicum) that can be reproduced … On the other hand a book is also a mere discourse of the publisher to the public, which the publisher may not repeat publicly without having a mandate from the author to do so.” Kant holds that since a book (or, in this extended analysis, any recorded media) has a dual character as both a corporeal object as well as a represented discourse, it can be unclear how the right of the owner of the physical book to do what he pleases with his property can be reconciled with the author’s claim to possess the discourse represented by the book as the intellectual counterpart to the physical object of the book itself.

Regardless of how this difficulty is resolved, what is essential in this analysis is the that in order for this dilemma to exist, there must be both a physical and non-physical object present within a recorded work, implying the existence of an intellectual object whose ownership must be understood according to a theory of possession that can account for intellectual property. This analysis also serves to overcome the problem of the nonexclusivity of recorded media in an age where digital files can be distributed freely. Even though files can be divided infinitely and copied from computer to computer in mere seconds, the intellectual object that is represented by those individual copies remains unitary, and the exclusive property of the author. While each file is nonexclusive and can be copied virtually without cost, the represented discourse of the author cannot be used by another individual without interfering with the author’s ability to use that object.

The author of a discourse initially possesses a monopoly on the distribution of that discourse; this is the cornerstone of the contemporary understanding of how copyright functions. By selling this work in a marketplace, the author is entered into a kind of tacit contract: a price-equivalence relation relationship is established, wherein the author permits the transfer of a copy of this discourse to others at an agreed-upon price. To distribute a copy of this work without the author having received compensation would then be equivalent to a breach of this contract, in two ways. First, it denies the author profits that they are contractually obligated to receive. Second, and more troubling, unauthorized duplication violates the author’s original monopoly on the distribution of their work, as in this scenario they have not agreed to allow the object’s distribution without cost. Both of these factors constitute a disruption of the author’s use of an object that is rightfully theirs. As Kant explains, “something external is mine if I would be wronged by being disturbed in my use of it even though I am not in possession of it.” As only one person can claim ownership of an intellectual object that is represented by a recording, a conflict in ownership exists when a file is copied without its author’s consent, and a coherent theory of possession must exist that can adjudicate this conflict.

Possession in a Social Context

Kant next develops another essential facet of his theory of possession, namely that possession doesn’t operate exclusively on and through the possessed object itself, but rather as a relationship between myself as the owner and all other rational individuals. He elaborates:

Here practical reason requires us to think of possession apart from possession of this object of my choice in appearance (holding it), to think of it not in terms of empirical concepts but of concepts of the understanding, those that can contain a priori conditions of empirical concepts. Upon this is based the validity of such a concept of possession (possessio noumenon), as a giving of law that holds for everyone; for such lawgiving is involved in the expression ‘this external object is mine,’ since by it an obligation is laid upon all others, which they would not otherwise have, to refrain from using the object.
Here, Kant’s insight situates possession as distinct from traditional notions of ownership in which the imperative against taking others’ possessions derives from the object itself; for Kant, possession is a matter of restricting the actions of others against what is mine, of placing an obligation on others not to take what I declare as my own.

This theory of possession is clearly supported by the universal principle of right, in that it seeks to place an obligation on all individuals in order to maximize their freedom (to own objects) while also ensuring equal freedom for all other individuals. This coercion is justified by the external nature of the protection of rights, since they can only be derived through a relationship with others. Indeed, Kant takes this notion a step forward, and establishes that possession can only take place within a scheme of civil cooperation in which all rational actors are mutually obligated to respect the property of others. Kant argues, “By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common.”

Possession of Intellectual Property

According to Kant, if a person were to inhabit a completely solipsistic reality where there were no other individuals to challenge his possession of the objects of that world, he could not be said to own anything. Only within a social context can possession, understood as a placing of obligation upon others to not use what is mine, exist; I can’t place obligations on people who aren’t there. The implication of this aspect of Kant’s theory of possession on the notion of intellectual property is to displace possession away from an understanding that is founded on the object of possession itself, but rather to an understanding that makes it a function of a social relation within a scheme of cooperation. This opens up yet another avenue for compatibility between Kant’s theory of possession and a notion of intellectual property; if possession isn’t derived from an object itself, then the problem of a purely intellectual object isn’t a viable objection to restrictions on unauthorized copying and distribution of another individual’s work.

Together with Kant’s understanding of the nature of a book (and, by extension, other recorded media), these aspects of his theory of possession may solve the problem, as found in other theories of intellectual property, of the nonexclusivity of intellectual objects. If books and other recorded media can be understood as representations of an original discourse on the part of the author, it is possible that an idea, although it lacks corporeal existence, can be treated as an object for the purposes of a theory of possession. This can then be combined with Kant’s analysis that shows the true character of property as the placing of an obligation on other individuals not to use what is mine, which is derived from a purely intellectual notion of possession, and as such is compatible with having an idea as an object of possession.

Finally, since ownership can only exist within a scheme of cooperation between rational individuals, my claim to my own possessions can only be viable if I also accept the reciprocal obligation to respect the boundaries of the possessions of others. This founds an obligation on my part, deriving directly from the universal principle of right, to treat the intellectual objects of others with the same respect I would have for all other objects that are not mine. As such, the challenges posed for intellectual property jurisprudence by increased information technology to copy and distribute recorded media can perhaps find some relief through Kant’s theory of possession, which is wholly compatible with notions of intellectual property and provides a framework in which individuals are obligated to treat intellectual objects with the same respect they reserve for physical property.

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12 Ibid. p. 39
13 Ibid. p. 43
14 Ibid. p. 49
New technologies allow us to copy and redistribute electronic books, music, and pictures repeatedly, with little effort, and usually with no legal consequence. In his paper, Chris Lucibella worries that this means that we are beginning to lose our grip on what it means to own intellectual property in the digital age. As a bulwark against this, he turns to Immanuel Kant’s practical philosophy, and in particular Kant’s theory of possession, which he claims can explain the theoretical basis of owning non-material things.

In the United States, our conception of property ownership is perhaps most informed by John Locke, who says that unowned things become mine when I mix my labor with them. This theory of original acquisition is most clearly illustrated with regard to material stuff, such as the gathering of apples, plowing a field, or building a house. But there is in principle no reason that we could not use it to account for intellectual property. The originator of an idea would own it because she created it and it would not exist without her.

When we are talking about a physical book, record, or photograph, ownership of these things makes sense according to the traditional model. An author's idea is contained in the book. A person or company has the right to produce it, and no one else can reproduce it without the permission of the copyright holder. But it is unclear what it means to have exclusive rights to something if there never is any physical thing that is owned, but only electronic signals that no longer even have to be stored in a particular place, but can "exist" in cloud storage, with electronic data spanning over multiple servers. There is no persisting object that is shared. In other words, with the advent of media that are entirely electronic, there is nothing with which the author has mixed his or her labor.

Although Lucibella does not mention Locke in his paper, his assumption seems to be that Kant can explain the ownership of intellectual objects in a way that the more traditional, rights-based approach does not. Kant’s key claim is that a person is wronged if her possessions are used without her consent. Lucibella then draws on Kant’s distinction between the book as a physical thing and the discourse that is represented in the book to make the case that property ownership extends not only to the artifact but to the ideas behind it. Lucibella is right to claim that a Kantian framework can justify the ownership of non-objects. It is also true that such a justification is necessary if a theory of intellectual property is to get off the ground.

Ultimately, Lucibella’s paper rests on a distinction between ownership of the medium and ownership of the ideas/discourse behind the medium. He is saying that consumers can own the medium but not the discourse; the discourse is owned by the author or the company with whom the author has contracted. The more difficult question, however, is what counts as discourse, or what kinds of things can be owned.

Lucibella’s distinction is hard to maintain in any case, but an extreme example perhaps best reveals the difficulties of picking out discourse as a discrete object of ownership. Consider John Cage’s famous composition 4’33,” in which the musicians refrain from playing their instruments for the entire four minutes and thirty-three seconds of the piece. Cage
was attempting to show that any sounds, even the sounds we often ignore in our everyday lives, may constitute music. CDs of 4’33” abound. The discs are sold and copied, and not every recording is the same. Partly, this is because when people play one of the CDs, they hear incidental sounds from the audience as they listen.

The question then is what the discourse is in this case. Does Cage own the silence (and occasional coughs from the audience), or does he own the aesthetic purpose of the silence? Is the intent of the artist equivalent to the idea? Philosophers of language and literary theorists alike tend to reject that conception of meaning, as committing what W. K. Wimsatt and Monroe Beardsley call the "intentional fallacy." The idea would be that the words themselves and their meaning in a linguistic community, not the author’s intent, determine what a given work is saying.

But if the public determines what the art is saying, and in the case of 4’33” the audience literally creates the art by doing things like shifting in their chairs and opening their programs, then how could the artist claim exclusive possession of it, especially in performance? It seems clear that there are property rights at issue, but such rights cannot depend on a contrived distinction between discourse and medium. There is no thing called discourse that is somehow behind and separate from the medium, and distinct from its recognition and interpretation in a particular social and historical context. In the end, then, I worry that Lucibella has not gone far enough in dislodging us from the Lockean assumption that there must be some thing out there (the “idea”) with which I have mixed my labor.

That is, Lucibella seems committed to what he calls “the existence of an intellectual object” in order to justify intellectual property rights. Kant’s theory is more innovative than that. Unlike Locke, Kant claims that original acquisition does not establish rightful ownership. Conclusive possession becomes possible only when there is a coercive system established under a law to which citizens have rationally consented. For Kant, ownership is thus a social phenomenon that depends on recognition by others.

Lucibella would I think grant this much. However, if Kant is right, then the ownership of material things and ideas is not supplemented with but replaced by our holding each other to account in certain ways, for example, by blaming someone for copying and distributing a recording of 4’33.” It is difficult to conceive of intellectual property ownership if we assume that only objects, physical or “non-physical,” can be owned.¹ The possibility of easy technological reproduction has shown us that possession can be defined entirely by social expectations. We expect people to act in certain ways in relating to and communicating with others, and violating these expectations is blameworthy.

Although the community may define its standards of behavior with regard to some object, it need not do so, even when it comes to possession. Possession has to do with the conditions under which we can justifiably perform some action. That is, the question becomes whether we need someone's consent to do something (such as copy a digital file), with or without some persisting object. The object, in a conventional sense of that term, may have been lost with the advent of electronic media, and that may reveal that the object never mattered.

Notes

¹Lucibella refers to "non-physical object[s]," "object[s] that cannot be perceived," "non-tangible . . . objects," non-empirical objects, ideas as objects, and (most frequently) "intellectual objects." This language is particularly out of place in the context of a Kantian analysis of possession, given Kant’s definition of Gegenstand. For Kant, an object is a discrete set of sensible intuitions as they appear to us in space and time, and subject to the categories (Critique of Pure Reason, trans. and ed. Paul Guyer and Allen W. Wood [Cambridge: Cambridge University Press, 1998], A92/B124-A93/B126). Objects are what our empirical judgments are about. Therefore, an intellectual, non-physical, or non-empirical object is an oxymoron for Kant.