Writing Practices in Privilege- and Intellectual Property-System

by

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> *I don't doubt you when you say that five dollars is all you can offer. But have you ever thought that there may be other ways of remunerating a writer than by giving cash?*
>
> Henry Miller *Open Letter to Small Magazines*

How is writing influenced by legal systems and the institutions that protect their activity?

Recent studies[1] have examined and discussed in depth the relationship between legal systems and the birth of the concept of the author in various national and cultural contexts. One of the points that has been focused on in these researches is the idea that, as Martha Woodmansee has put it, "one of the most powerful vehicles of the modern authorship construct was provided by the laws which regulate our writing practices"[2]. If we look at the history of the laws which regulate writing practices, we find two fundamental systems that follow each other. The first is "publishing privilege", and then, from the middle of the 1700's in England, "intellectual property".

Here an attempt will be made to draw out the *significance* of the move from the first system to the second, investigating certain consequences and repercussions.

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[1] See generally: M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'", *Eighteenth Century Studies*, 17, 1984 and Id. *The Author, Art and the Market. Rereading the History of Aesthetics*, Columbia University Press, New York 1994; C. Hesse "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793", *Representations*, n. 30, 1990; M. Rose *Authors and Owners. The Invention of Copyright*, Harvard University Press, Cambridge MA- London 1993; R. Chartier, "Figures of the Author" in: B. Sherman and A. Strowel (eds.) *Of Authors and Origins: Essays in Copyright Laws*, Clarendon Press, Oxford 1994; M. Woodmansee and P. Jaszi (eds.) *The Construction of Authorship: Textual Appropriation in Law and Literature*, Duke University Press, Durham 1994; for the italian case, see: M. Borghi, *La manifattura del pensiero. Diritti d'autore e mercato delle lettere in Italia (1801-1865)*, Franco Angeli, Milano 2003.

[2] M. Woodmansee "On the Author Effect: Recovering Collectivity", in M. Woodmansee and P. Jaszi (eds.) *The Construction of Authorship*, *supra* note 1, at 26.

with the name of its most representative legal institution, that is to say: *intellectual property-system*[4].

The idea of intellectual property did not always exist. The assumptions behind it that we have briefly recalled (creativity, authorship, free use, ownership), are not universal and timeless concepts. They are the result of a relatively recent, profound and unprecedented change in the way that people have traditionally related to works of art and thought. This is a "revolution" that we are perhaps still a long way away from completely understanding in all its meaning.

Before trying to describe some of the elements of this "revolution" we should consider one of its consequences. We have said that the author, as the legitimate and unique owner of the work created by him, can make what use of it he thinks best. Although he can never renounce his authorship of a work, he remains free to grant in whole or in part his ownership of the work. In this way the creative work becomes an exchangeable good. It becomes, in the full economic sense of the word, a *commodity*. The relationship between the writer and society thus takes the particular form of an *exchange*. It is an exchange in which the commodity that is exchanged is not just a product, but the *creative* product of an *author* who *freely* sells his *own* property.

From the 1850's onwards, when the fundamental concepts of the intellectual property system took shape in the laws and legal institutions of different countries, the traditional legal doctrine progressively moved towards the concepts and language of political economy[5]. From the point of view of economic theory, the presence of laws that protect intellectual property is justified on the grounds of the particular nature of these goods that are "works of the mind". In defining this nature the economists of the first half of the 1800's sometimes talk about "immaterial products"[6]. The central point,

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[4] In this context we leave out of consideration all the differences, some of them very relevant, that take place in the various juridical traditions. Specifically, we shall distinguish between the Anglo-American copyright system and the European-continental system of author's rights (cf. W. Fisher *Theories of intellectual property*, in S. Munzer (ed.) *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, Cambridge MA 2000).

[5] "While pre-modern law utilised the language, concepts and questions of classical jurisprudence, modern intellectual property law employed the resources of political economy and utilitarianism" (B. Sherman and L. Bently *The Making of Modern Intellectual Property Law*, Cambridge University Press, Cambridge UK 1999, at 4). By "pre-modern [intellectual property] law", Bently and Sherman refer to the UK legislation between 1760 and 1850.

[6] The term was probably introduced by Jean Baptiste Say (1767-1832). Other authors, such as Adam Smith (1723-1790), define the ambit of the fine arts and of thought as "non-productive work'" while Gian

way of establishing the exchangeability of ideas, and thus a way of giving life to the fiction according to which these are full commodities like other goods.

Acknowledging that such a fiction is to some degree necessary, we ask however: is what we have called the "intellectual property-system" the only possible way of establishing it?

II.

From the period of the invention and diffusion of printing – at the end of the 1400's – there was a long pause until the middle of the 1700's before the assumption began to take shape that the work of the mind should be considered in all effects the "property" of its "author". It was only around the middle of the 1800's that this assumption, along with the other ones related to it that we have described above, was translated into a stable legal and institutional framework. If we have to give a name to the way in which, *before* the invention of intellectual property, the exchangeability of intellectual work was established and maintained, we could refer to *book privilege.*

The book-privileges are usually seen as the forerunners of intellectual property, and are thus regarded as primitive legal instruments that were after all inadequate to represent the real "rights" of the author. Their inadequacy would consist in the fact that the privilege (*priva lex* = law-exempt) remained a favour, a concession of the sovereign, almost the recognition of a status outside or above the law. They were not based on the principle that ideas are the property of the individual just like all the other outcomes of his labour. On the occasion of the first meeting of the international association of writers (1878), Victor Hugo, addressing legislators warned that "literary property is *in the right*, and it is up to you now to bring it *in the laws*"[11]. Conversely, privilege is not just outside the law, but is an explicit *exception* to law in favour of an individual or category of individuals.

[11] Quoted in J. Boncompain *La Révolution des auteurs. Naissance de la propriété intellectuelle (1773-1815)*, Fayard, Paris 2001, at 16 (my italics). It should be remembered that author's rights are now included in the Universal Declaration of Human Rights of 1948.

from contingent motives that might encourage a sovereign to grant a privilege, the fundamental reason for the granting of privilege seems to be the need to protect an *economic* interest. The economic considerations were frequently explicitly mentioned in both the requests and the privileges themselves, while considerations of other kinds (social utility, literary excellence, entertainment value, etc.) appear more rarely[15]. Since only few books had a pre-eminent economic interest, the institution of privilege was designed almost exclusively for a restricted category of library production. Of all the books published in Paris in the first quarter of the 1500's, only 5% or a few more contain on the frontispiece the words "*cum privilegio*"[16]. A similar calculation carried out on Venetian publications for the period 1741 to 1757 shows that privileged books amounted to 20% of the total[17]. The use of privilege was thus increased but always involved a small number of publications, and precisely those with a striking commercial character. In the same way, in England, at least until the end of the 1600's, privileges regarded almost exclusively "classes of books such as lawbooks, catechisms, Bibles, ABCs and almanacs"[18], in other words books which represented a considerable investment by printers and were at risk from pirate editions. Still in the 1700's, privilege was an exceptional fact in the kingdom of Savoy, and only regarded editions that were of certain success such as almanacs and scholastic editions[19].

The fact that privilege was designed as an instrument that responded to an economic need finds indirect confirmation in the difference in the *duration* of one privilege and another. Although there is no absolute evidence in this regard, it is certain that, in deciding the duration of the privilege, the authorities above all took account of

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[15] Commenting on one of the first French privileges, granted by Louis XII to the writer Eloi d'Amerval in 1508, Elizabeth Armstrong says: "The economic considerations which Eloi had put forward were to remain uppermost in most request for privileges, whether by authors or publishers." (E. Armstrong *Before Copyright. The French Book-Privilege System 1498-1526*, Cambridge University Press, Cambridge UK 1990, at 79, 84). She writes later: "Publishers who sought privilege naturally tended to put forward economic arguments in support of their request [...] Sometimes however the difficulty and cost of acquiring the manuscript is particularly stressed." (*Ibid.*, at 84). The high costs of production (for paper, characters, for the purchase of the manuscript, etc.) were frequently mentioned in Venetian privileges (cf. R. Fulin *Documenti per servire alla storia della tipografia veneziana*, "Archivio veneto", XXIII, 1882).

[16] E. Armstrong *Before Copyright*, *supra* note 15, at 78.

[17] M. Infelise *L'editoria veneziana nel 700*, Franco Angeli, Milano 1991, at 289.

[18] M. Rose *Authors and Owners. The Invention of Copyright*, Harvard University Press, Cambridge MA – London 1993, at 11.

[19] Lodovica Braida quotes the evidence of Giuseppe Vernazza, the author in 1812 of a history of 18th century publishing in Turin (L. Braida *Il commercio delle idee. Editoria e circolazione del libro nella Torino del Settecento*, Olschki, Firenze 1995, at 336-7). The evidence is confirmed by the collections of Savoy privileges in the 1700's (L. C. Ubertazzi *I Savoia e gli autori*, Giuffré, Milano 2000, at 131 sg.)

celebrated papal privilege obtained by Ludovico Ariosto in 1516 for the first Ferrara edition of his *Orlando furioso* is a case in point. As Mark Rose comments, there were many other episodes where "the actions of [the authorities] are best understood in terms of "honour" and "reward" rather than "property"[24].

The conditions included in the privileges relate above all to economic considerations. The commonest condition concerns the sale price of the book which must not exceed a given sum, while on other occasions a general condition was included that the book had to be sold *justo pretio*, "at a fair price". In Venice, in 1554, the granting of the privilege included an estimate that, among other things, had to establish the sale price[25].

Concerning the authorities which granted privileges, it can be said that every acknowledged power could manage their granting and observance. We find, thus, a plurality of "sources" that reflect the organisation of powers in the States of the *ancien régime*. In France, alongside royal patents, we find a series of privileges accorded by parliament, by other sovereign courts (such as the *Cour des Aides* or the *Grands Jours*) and provincial parliaments as well as ecclesiastical hierarchies (religious orders, bishops) and academies (schools, universities)[26]. In Venice, before the system was reformed in 1603, privileges were granted equally by the *Senato* and by the *Consiglio*[27]. The situation in Germany was clearly more complex, and privileges were granted by a multiplicity of authorities, ranging from the Emperor to the *Reichsregiment*, as well as princes, dukes, and the Senates of different cities[28]. To all these privileges, which had validity over a more or less extensive territory, are to be added papal privileges, which incorporated an implicit moral dissuasion or even the explicit threat of excommunication of transgressors. Papal privileges, and in a different sense imperial

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[23] L. C. Ubertazzi *I Savoia e gli autori*, *supra* note 19, at 19. "The literary privileges of the 18th century in Savoy are still very similar to booksellers' mercantile privileges" (*ibidem*, at 20).
[24] M. Rose *Authors and Owners*, *supra*, note 18, at 17. Later we shall see why the *honorarium* is the suitable method for remunerating the author.
[25] G. B. Salvioni *L'arte della stampa nel Veneto*, *supra* note 21, at 259. The provision was confirmed in the law on printing of 1603. In the judgement in the case *Pezzana e Consorti* (1781) concerning the perpetuity of privileges, the court wrote that "the privilege gives the publisher the necessary security of capital invested in view of the profit" (*ibidem*, at 264).
[26] E. Armstrong *Before Copyright*, *supra* note 15, at 21-62.
[27] R. Fulin *Documenti*, *supra* note 15, at 93.
[28] L. Gieseke *Die geschichtliche Entwicklung*, *supra* note 14, at 24-37.

circulated in the universities could receive privileges directly from the academic authorities.

The book market in the privilege system thus seems like a group of circuits operating independently of each other, each of which had its own rules and purposes with no common denominator. Privilege is a method for establishing the exchangeability of the book-commodity as a function of the market in which this commodity was exchanged (i.e. bought and sold). A book's exchange value, which the privilege creates with a free institutional act, remains determined and defined not just within tempo-spatial limits, but "moral" ones also. The book is not purely and simply "a commodity": it is a commodity *as well as* serving the needs of a buying-selling exchange. Where there is no economic interest, or where economic interest has already been met, and thus where there are no longer buyer-seller relationships, no exchange value needs to be ascribed to the book. A book outside a buyer-seller relationship, and thus outside a commercial circuit, no longer needs to be conceived as a commodity[33].

III.

On one side the privilege system is an alternative method to that of the intellectual property system for establishing the exchangeability of works of the mind. On the other side it is a practice, or series of practices, within which exchangeability is not extended indefinitely but is maintained within certain limits. The questions we now have to raise are: what are these limits? To what extent can a book be considered a commodity? And how can one determine, within these limits, the figure of the author and of authorship?

We will respond to these questions by following in the tracks of a writer who, from the chronological point of view, is found on the borders of the two "paradigms"

[33] The general extension of privileges in the course of the 1800's is an important sign of the collapse of the privilege system. In 1780, the Venetian government established the perpetuity of privileges in order to deal with the grave publishing crisis in the area (G. B. Salvioni *L'arte della stampa nel Veneto*, *supra* note 21, at 210-12). In this way the exchange value of the book (and thus its status as commodity) was extended infinitely, beyond its natural economic cycle. This provision looks similar to that of a government that tries to cope with a stagnant housing market by declaring a permanent opening (24/7) of the Stock Exchange...

publisher and the publisher and the public, and this in turn gives rise to the relationship between the publisher and the printer. This subdivision of relationships is not random – each of the "derived" relationships corresponds to a precise contractual figure[36].

To settle these contractual figures, Kant relies explicitly on the tradition of Roman law. As far as the institutions that regulate working relationships among individuals are concerned, we find in Roman law a difference between the contract of work done (*locatio operarum*) and the contract of attorney or mandate (*mandatum*). Thus, there is a strict distinction between these two contracts on one side and the contract of purchase and sale (*emptio-venditio*) on the other[37]. It is only the purchase-and-sale contract that contains the price equivalent (*pretium*). In a contract for work done, given that the thing (*res*) exchanged is not a piece of work (*opus*) but one's own work (*opera*), the contract does not contain the payment of an equivalent price but a straightforward wage (*merces*) for the work performed. On the contrary, the mandate is a perfect contract in itself which is based on the trust (*fides*) of the two counterparts, and thus has no need to conclude with an act of payment. The contract may – but does not have – to be followed by a grateful reward in the form of an *honorarium*. The main characteristics of the *honorarium* compared to all other forms of payment (such as the *pretium* and the *merces*) are as follows: 1. It is not obligatory; 2. There is no *a priori* relationship of equivalence with the work provided by the mandatary or the task entrusted by the mandator[38].

What Kant argues in the passage quoted is that the author is not a performer of work (including intellectual work) nor a seller (of his own manuscript). The relationship between the author and the publisher is maintained within the precise limits of the *mandate*, with all the results that derive from this legal figure. One of these consequences is illustrated in the article *On the Unlawfulness of Counterfeiting Books*, 1785:

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[36] One can certainly imagine other derived relationships, adding further subjects (the distributor, the bookseller, the translator, etc.). The substance, however, would remain the same. Every other relationship would become part of one of the three mentioned contractual figures.

[37] Cf. A. Berger *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953.

[38] One can read, in the J.-H. Zedler's *Universal-Lexicon* (1735): "*Honorarium* means acknowledgement or reward, recognition, favor, stipend; it is not in proportion to or equivalent to the services performed; differs from pay or wages, which are specifically determined by contracting parties and which express a relationship of equivalence between work and payment" (quoted in: M. Woodmansee *The Author, Art and the Market*, *supra* note 1, at 42).

A power that limits the freedom of communication also prejudices the possibility itself of *thought*. It is frequently thought that thinking is a solitary activity, a sort of individual performance that can remain confined to the individual or may be shared with others at a later date. At most we can imagine a "collective work", meaning that the thought may result from the combined efforts of more individuals. What we cannot see, is that thought is precisely the element that, so to say, "de-individualises" the individual, bringing into play something greater than the individual itself. Thinking puts man *immediately* in relationship with something *other*, which is not merely the dimension of "other individuals". Kant wants to draw our attention to the fact that thought is, in itself, "communication" in a high sense. To be aware of this it is enough to consider what thinking really means. In line with tradition, Kant understands thought as essentially *judging*[43]. Judgement is certainly an operation that involves each individual. But precisely in judging, that is in connecting a "predicate" with a "subject" in a proposition, every individual relies on something other – in the matter in hand: to what *regards which* is accomplished the connection. In Kantian terms, every judgement is based on "the necessary unity" in view of which the judgement is carried out[44]. In this sense, precisely in the individual act of judgement the individual is already de-individualised – he is already beyond himself and heading towards something other. The most immediate form of this "being-by-otherness" is being with other human beings. This is why it is so necessary to have one's own thoughts (judgements) tested by other thinking (judging) beings. Denying or undervaluing the importance of this comparison is for Kant a shifty form of absence of thought, a sort of *egoism*. In his *Anthropology from the Pragmatic Viewpoint* he uses the term "logical egoism" to distinguish this from the commoner form of "moral" one:

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[43] Cf. I. Kant *Kritik der reinen Vernunft*: "we can reduce all acts of the understanding to judgements, so that understanding may be represented as the faculty of judging. For it is, according to what has been said above, a faculty of thought." (A 69, B 84). Judging means connecting a predicate to a subject in the form "S is P". The truth of thought corresponds to the correctness of the judgement. (On these questions, which cannot be explored more deeply here, see generally M. Heidegger *Kant und das Problem der Metaphysik*, 1929, hrsg. Fr.-W. von Herrmann, *Gesamtausgabe*, Bd. 3, Klostermann, Frankfurt a./M. 1991 and Id. *Einleitung in die Philosophie*, 1928/29, hrsg. O. Saame und I. Saame-Speidel, *Gesamtausgabe*, Bd. 27, Klostermann, Frankfurt a./M. 1996, at 267 fw.).

[44] The concept of such unity is the "category". The ways of "connecting", i.e. of unifying, are deduced from the traditional table of judgements (*Kritik der reinen Vernunft*, A 65, B 80 fw.).

IV.

In Kantian thought, the author is not only the "owner" of the "work", but is above all *responsible* for a discourse, that is a thought explicitly offered to be shared with other human beings in order to weigh and test together its own truth. In its turn, the "public", as beneficiary of the author's discourse, is not simply a set of consumers of a good, but is the ambit in which the judgements can be placed for testing, and is thus the ambit in which the possibility of being in the truth is preserved. Consistent with Kant's position are the following words of Vittorio Alfieri, who writes in his clear-sighted treatise *Il principe e le lettere* [*The Prince and Letters*], 1789: "Reading, as I intend it, means profoundly thinking; thinking means hold on and hold on, it means to endure"[50]. The public is then a set of *readers* in the full sense of the word. Readers are not merely "consumers of books" but thinking beings, that is willing to endure and share the author's search for the truth. It is in only in this willingness to endure that the ultimate justification for the Kantian "right of the public to deal with the author" finds itself.

On the basis of these considerations we can now turn to the question with which we started: to what extent are writing practices influenced by the legal systems and institutions that protect their activity? After what we have seen, we can formulate the question in the following terms: Is there a *substantial* difference in the author and public relationship in the privilege and intellectual property systems?

Before attempting to answer this question, it is worthwhile briefly reviewing the points made so far.

We started with a definition of the intellectual property system as a way of establishing the exchangeability of ideas through the recognition of a right of author's ownership. We then considered, as an alternative method for establishing this exchangeability, the privilege system that was used in European States until the 18th century. The main feature of privilege is the fact that it regards exclusively economic relationships in production and exchange, and has no significance outside these relationships. As a result, the establishment of the exchangeability of "works of the mind" is limited to the sphere of exchange only and does not touch other ambits. In the

Among the founding fathers of classical economics, one of the first to concern himself in detail with questions of intellectual property was John Stuart Mill. In his *Principles of Political Economy*, 1848, we read:

> It is generally admitted that the present Patent Laws need much improvement; but in this case, as well as in the closely analogous one of Copyright, it would be a gross immorality in the law to set everybody free to use a person's work without his consent, and without giving him an equivalent[53].

Patent laws and copyright are "analogous cases" but distinct ones that belong to the family of intellectual property. The important point, however, is that no result of human work can be used without asking the permission of the person who has produced it, and without paying the latter *an equivalent*. To go against this principle, according to Mill, is not only unfair but immoral. As we saw earlier, in the traditional legal conception the payment of an equivalent is precisely that which *cannot* take place in the case of a "work of the mind". To this latter belongs a *honorarium*, i.e. a reward that is expressly separate from other kinds of payment (such as the *merces* or the *pretium*) on the grounds that it cannot enclose any "relationship of equivalence between work and payment"[54]. What Mill implicitly assumes, is that the relationship between "everybody" and the "person's work" is wholly resolved through a buyer-seller relationship.

This largely implicit assumption in John Stuart Mill becomes explicit in the work of a contemporary of his, the Italian economist Gerolamo Boccardo. From the point of view of the history of economic thought, Boccardo is not at all a "giant" like his English colleague. His main work, the *Dictionary of political economy and commerce*, was published in four volumes between 1857 and 1861, and is regarded by historians above all as a great explanatory work, a summa in which are brought together various themes of the liberal economic culture of the time. Just for this reason, however, it is interesting for us to read what he says about "Artistic, industrial and literary property".

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[53] J. S. Mill *Principles of Political Economy* (1848), Book V, chap. X.
[54] M. Woodmansee *The Author, Art and the Market*, *supra* note 1, at 42 (see also *supra* note 38).

straightforward fee is a "perfectly regular and fair" contract. Proudhon does not and cannot find any objection that could demonstrate the opposite.

There is therefore an essential difference between the writing practices in privilege- and intellectual property-system: while in the first system the relationship author-public *can* be conceived as a free liaison between thinking beings – a liaison from which some reciprocal obligations originate, like the author's responsibility as regards to the truth, and the public's obligation to truthfully read –, in the second system, this relationship *must*, in some way, be reduced to an "exchange" in which the author's credits are settled by requiting an equivalent. As a matter of fact, the "purchase-and-sale contract" is *concluded* by a payment. Can this contract really fulfil all the needs? Let's hear, in conclusion, the words of an American writer. For him, the author is not a "workman" in society's service nor a "trader". He's rather a "beggar" – and not in the sense that he's begging *for cash*[57]:

Writers, in a way, are like beggars. They are continually begging for a chance to give of their great gifts – which is the most heart-rending begging of all and a disgrace to any civilised community in which it happens. Which is to say, almost the entire civilised world[58].

[57] See *supra* the Miller's quotation in exergue.
[58] H. Miller *Stand Still Like the Hummingbird*, New York 1962, at 75.