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The High Road which Everyone Follows

Theft: An Ongoing Success Story

"Property is theft" *(la propriete c'est le vol)* asserted Pierre-Joseph Proudhon in his 1840 work *What is Property? Or, an Inquiry into the Principle of Right of Government*.[1] This line has become famous, perhaps because, among other reasons, it comes across upon initial inspection as a tautology. It seems to be saying: the concept of theft is dependent upon the concept of property, since only where there is property can there be theft. On a superficial level, the hypothesis is trivial, but its apparent triviality breaks down as soon as the sequence is reversed. The concept of property is also dependent upon the concept of theft. In other words: the evidence documenting cases of theft can engender legally relevant forms of property. An example from the history of our species: private property was, in fact, unknown to hunter-gatherers. When, more than ten thousand years ago, groups of human beings began to establish the first cities, to irrigate the soil and to cultivate grain, they frequently encountered resistance. Why should someone possess the fruits of the land? According to prehistoric logic, the earth and its yield belong to all creatures—not only to human beings but to the animals too. Nevertheless, to the first farmers, the forcible appropriation of their harvests must have seemed like theft, larceny they wanted to prevent by all means. They proceeded to take possession of the land and declared it their property.

Later, the conflict resumed—for instance, in the form of a demand that the land must belong to those who work it, or in Kant's differentiation between possessing and occupying: "All human beings are originally (i.e. prior to some arbitrary legal act) in legal possession of some piece of land; that is, they have a right to be there where nature or happenstance (without their will) deposited them. This possession *(possessio)*—which differs from occupation of some piece of land *(sedes)* as arbitrary, therefore acquired, ongoing possession—is communal possession due to the unity of all places on the surface of the Earth, the surface of a spheroid."[2] What Kant brings out here (with all due caution) could be acknowledged as the first chapter in the long success story of theft: exclusive and enduring possession of land is originally attributable to an arbitrary and frequently violent act of occupation, and during a succession of wars, this act was repeated numerous times. This right originates literally from an act of occupation, an "act of establishment" as "establishing into law." These and similar arguments put forth since Fall 1979 have been used to justify squatting or "illegal occupation and renovation." In the meantime, no small number of squats have been contractually legalized. And in some European countries such as the Netherlands, occupying empty buildings was never even prohibited in the first place, as long as the presence of a bed, a table and a chair attested to the fact that the space was being inhabited.

Concisely formulated: in the beginning, there was theft; property followed. This sequence has also characterized the history of copyright. Plagiarism preceded the author. The recognition of copyright is the result of the gradual meshing of two disparate processes: on one hand, the emergence of literary personalities; on the other, the formation of a mass audience capable of reading and writing, willing to purchase books and avid to read them. Philosopher Ernest Gellner frequently stressed that the development of modern societies and their integration potential—from the founding of nation-states in the 19th century to the current dynamics of globalization—depended not only on economic preconditions but also on the success of the educa-

tional system and widespread literacy. In the late 18th and early 19th centuries, various arguments were put forth to justify the necessity of copyright. Kant, for example, derived the illegitimacy of reprinting books from the personal right of free speech: "A book is a text (whether printed with a pen or with type, on few pages or many is a matter of no importance here) that presents a discourse that someone delivers to an audience by means of visible linguistic signs. – The one who thus speaks in his own name is referred to as the writer (author). The one who addresses the public with a text in the name of another (of the author) is the publisher."[3]

The argument was crystal clear: if the publisher had permission, the author's mandate, then he acted lawfully; if, however, he had no permission, then he was operating as a "reprinter." Nevertheless, the argument derived from free speech remained a tenuous position since it could just as easily be used to defend the right to reprint. In 1792, Adolph Freiherr von Knigge emphasized: "Printing is no more than a public retelling. I may publicly retell anything that has been said in public."[4] Writing is simply the "public communication of thoughts; printed conversation; disseminated speech directed at any member of the public who cares to listen; a communiqué to the world of readers."[5] Due precisely to this ambiguity, the personal rights line of argumentation (that also Hegel concurred with) was replaced by 1830 at the very latest by a conception based on property rights and a theory of labor that applied labor theory to "intellectual work." Friedrich Julius Stahl, who was appointed to a chair in the philosophy of law at the Berlin University in 1840 (succeeding Hegel's student Eduard Gans), maintained that property is not primarily a part of a person but rather the "material for the revelation of a human being's individuality." Moreover, talent and work are also parts of this individuality: "One person is active, the other lethargic; one amasses reserves, the other depletes them. One is a capable hunter, fisherman, shepherd, farmer, tradesman; another does the same without a gift for it."[6]

Person or thing? Author or work? A decisive role in the formation of the concept of "intellectual property" was played by a legal position that could concentrate on a materialization, on a "thing" that endows "intellectual property" with duration over time so that it can also remain intact when it changes hands—for example, at the moment an author sells his/her book to a publisher. This argument did indeed make it possible to prohibit reprinting but not revised borrowing such as the creation of an excerpt from an opera as a work for piano, a translation, or a didactic "popular edition" (for instance, of a philosophical work like *Critique of Pure Reason).* On this basis, Fichte postulated a concept of "form" to which every author was said to possess an inalienable property right. In 1839 in *Philosophy of Rights,* Leopold August Warnkönig in turn developed the model of the "work" as a "non-physical," as it were immaterial "thing." In going about this, he became the first to take leave of the personal rights and property rights arguments, and instead took a totally modern approach by citing economic utility: "Among people of literary cultivation, a work of the intellect has a pecuniary value in that individuals are wont to pay money in return for the opportunity to encounter such a work—that is, to read the book. Thus, what the author of such a work possesses is a productive, nonphysical asset; a means by which to obtain money, a means that is at his arbitrary disposal."[7]

The connection to an author or to a material medium thus took a back seat to the criterion of added economic value. Debates in the field of jurisprudence paved the way for a remarkable process of abstraction that, on one hand, made possible the cult of genius and perhaps even the emergence of a sort of "genius religion"[8]; on the other hand, however, it contributed to a production and work aesthetic that could dispense with not only the connection to an individual

author (in the sense of approaches on the basis of personal rights) but also the connection to things like books and musical scores (in the sense of property rights models). Since then, the imaginary nature of the work has corresponded to the imaginary nature of the creative spirit, of the "genius" which, of course, ceased to be the "protective spirit" as had been the case among the Romans or to function as contingent "inspiration" as it still had done in the Renaissance, and, instead, triumphed as a legal abstraction. In the context of the innovations in media technology and in the reproduction of creative works over the last 150 years, the weight accorded to this imaginary nature of the work has increased extraordinarily. Photography, film, sound recording systems and computers have made production criteria (such as protected free speech) as well as appeals to a residual materiality of created works matters of secondary importance. Thus, paradoxically, the history of media has done more to foster the differentiation process of copyright (and its abstraction potential) than to prevent it.

In other words: theft produces property. The relevance of this observation can be grasped by considering examples from the history of the cinema, since film started out as if there had never been any sort of copyright. Producers and studios hired their directors like princes had once engaged the services of court painters and musicians. The films themselves belonged to those who financed them; they were often censored, subsequently re-edited, abridged and sometimes positively mutilated. In a conversation with Peter Bogdanovich, Fritz Lang told of seeing *Dillinger,* which he had missed as a first-run film in the theaters and didn't see until years later at a studio screening. "So, I was watching this film and all the while I'm thinking: 'Man, you've seen this somewhere before. But that can't be.' The film continued, and again I saw something that seemed familiar. 'Wait a minute, I sure do recognize that ...' Then came a whole scene, one or two hundred meters of footage, and I suddenly realized: 'That's from one of my films!' In *You Only Live Once,* there's a bank robbery in which the robbers use teargas and wear gasmasks, and thus the audience doesn't recognize the actors. The producers of *Dillinger* had purchased the whole scene from Walter Wanger and simply spliced it into their own film. [...] And the discussions about this motion picture repeatedly went into that scene but not once was mention made of the fact that it had been my work."[9]

Lang summed it up by saying that there simply was "no copyright for directors."[10] Even world-famous, highly regarded directors were affected by this—for instance, Orson Welles (in his 1958 film *Touch of Evil)* and Alfred Hitchcock, the man who made what is perhaps the most famous scene in film history, the murder in the shower in *Psycho* (1960). This work had to be repeatedly defended before the Hays Office, Hollywood's censorship authority. Almost 20 years before, after having completed the filming of *Suspicion* (1941), Hitchcock was lucky that he only had to shoot a new ending for the film. After the editing work was done, he spent a couple of weeks on the East Coast, only to receive a "big surprise" upon his return: a "producer from RKO had screened the film and come to the conclusion that numerous scenes gave the impression that Cary Grant was a murderer. He then had all such scenes cut out, and what remained was only 55 minutes long."[11] No doubt due to such experiences, Hitchcock fought successfully over the following decades to achieve a closer association of his films with his name as a director, creative artist and author, whereby no film of his appeared without the prefix "Alfred Hitchcock's" or "Alfred Hitchcock presents." With such strategies, Hitchcock advanced to the status of foremost precursor of *auteur* filmmaking, which also contributed to his preeminent importance for the French *Nouvelle Vague* of Claude Chabrol, Eric Rohmer, Jean-Luc Godard and François Truffaut.

Jean-Luc Godard delivered a multifaceted portrait of the conflict between studio filmmaking and *auteur* filmmaking in *Il Disprezzo,* his 1954 work based on a novel by Alberto Moravia. And *Le Mépris* (1963) doesn't only deal with the great artistic themes of love, fidelity, betrayal and a love triangle involving two men and a woman; from start to finish, it also has to do with filmmaking itself. Paul (Michel Piccoli) betrays his wife Camille (played by the incomparable Brigitte Bardot) in his dealings with American film producer Jeremy Prokosch (Jack Palance's role) and, at the same time, betrays Fritz Lang who, in his final film, is honored as the consummate artist and the likeable foil to the arrogant financial backer from California. In Godard's film, the émigré filmmaker plays himself: a director by the name of Fritz Lang who wants to shoot a film about Odysseus' return home to Ithaca. Of course, Lang himself never returned home. Having fled from Hitler's dictatorship—in concrete terms: the propaganda minister's offer to take over as head of the UFA studio—he went to Hollywood, only to encounter another form of fascism: that of financial capital. "When I hear the word culture, I reach for my checkbook," says Prokosch in an allusion to the line made famous by Joseph Goebbels, who was in turn quoting dialog from Hanns Johst's 1932 play *Schlageter:* "When I hear the word culture, I release the safety catch on my revolver."

It was also the case in the history of film that more precise regulation of copyright in *auteur* cinema was anticipated by numerous cases of theft, interference and plagiarism: first came the poaching and robbery (aided and abetted by the checkbook too); the booty was declared to be property afterwards. Here, we can profitably juxtapose two success stories of theft: the first has to do with the thief who steals and nevertheless doesn't do so; the second stars the property owner who gradually learns to acquire a new piece of material or intellectual property and to possess it. The same dynamics can be observed in the plagiarism debates of the Internet Age. After all, it has never been so easy to find just the right text or image and, via copy & paste, to insert it into ones own work; on the other hand, it has also never been so easy to track down and incriminate a plagiarist using exactly the same techniques. Never before in the history of culture has it been possible to so quickly take possession of so many cultural manifestations; and never before in the history of culture has there been so much intellectual property to which counterclaims can be staked. And the list of paradoxes could go on and on: never before has it been possible to defraud so many authors of legitimate income from their work; and never before have so many authors been able to earn so much money from their work. However you twist and turn it: theft generates property.

Those going about this occasionally reach a limit and sometimes even transgress it, whereby this boundary can be identified with the question of what, indeed, can legitimately be possessed. I have already alluded to this in differentiating between *possessio* and *sedes.* In European jurisprudence in connection with the legal protection accorded to designs, patterns and models, there have been heated controversies since the early 1990s about the right to possess particular colors, forms and symbols. Under what circumstances can a company that uses a particular color value as its trademark identify itself with this color value and thus protect it as its "intellectual property" and, accordingly, actually prohibit other companies from using it? After all, European mail boxes weren't the first to be painted that distinctive yellow; it began with the stage coaches of the aristocratic Thurn und Taxis family, originators of the postal system during the early modern period. The mauve-colored Milka cow has belonged to Suchard/Kraft Foods for many years now. And who could now use the color magenta in their ad campaign without evoking associations to Deutsche Telekom and being slapped with a costly lawsuit to cease and desist? What sorts of property rights to means of communication—from computer operating

systems to cellphone frequencies—are sensible and feasible? How much of nature—for example, certain gene sequences—should be permitted to be patented? How much pharmaceutical knowledge—for instance, means of combating deadly diseases—can be maintained as an exclusive trade secret? What am I not permitted to possess?

At this point (at the very latest), these little success stories of theft don't sound so very jolly anymore. A well-known example involves the Xerox Co. and the now-world-famous founders of Microsoft and Apple. In the early 1970s, Xerox—at the time absolutely synonymous with photocopy technology—lost its patent protection. In order to come up with new inventions, the company founded Xerox PARC, the Palo Alto Research Center. This legendary research facility was the birthplace of the laser printer and the Ethernet, computer-supported video processing, computer games, programming languages (such as the forerunner of PostScript) and the initial concept of the laptop. The first graphical user interface was developed at PARC, as was a word processing system by the name of Xerox Star. Nevertheless, with the exception of the laser printer, Xerox didn't successfully market a single one of these inventions. Prominent PARC scientists like Robert Metcalfe and John Warnock left the center and founded their own companies to commercially exploit their research. PARC, on the other hand, continued to maintain an open-door policy even in its in-house R&D departments. Steve Jobs and Bill Gates are said to have had a look at Xerox Star, and we're all familiar with what came of that. PARC embodied the principle that Hegel, in his philosophy of rights, expressed in the following terms: "The rational is the high road which everyone follows and where no one stands out from the rest."[12]

Translated from German by Mel Greenwald.

1 Cf. Pierre Joseph Proudhon: *Was ist das Eigentum? Erste Denkschrift. Untersuchungen über den Ursprung und die Grundlagen des Rechts und der Herrschaft*. Translated from French by Alfons Fedor Cohn. Berlin: Bernhard Zack 1896.

2 Immanuel Kant: *"Die Metaphysik der Sitten" [AB 84f.]. (The Metaphysics of Morals)* In: *Werkausgabe* Vol. VIII. Published by Wilhelm Weischedel. Frankfurt am Main: Suhrkamp

3 1978. Seite 373.

4 Ibid. [AB 127]. p. 404.

5 Adolph Freiherr von Knigge: *Ueber den Bücher-Nachdruck. (On the Reprinting of Books) An den Herrn Johann Gottwerth Mueller, Doctor der Weltweisheit in Itzehoe*.* Hamburg: Hoffmann 1792. Cited in: Friedemann Kawohl: *Urheberrecht der Musik in Preußen (1820 – 1840).* [Quellen und Abhandlungen zur Geschichte des Musikverlagswesens. Vol. 2]. Tutzing: Hans Schneider 2002. p. 75.

5 Adolph Freiherr von Knigge: *Ueber Schriftsteller und Schriftstellerey (Of Writers and Writing).* Hannover: Christian Ritscher 1793. Cited in: Heinrich Bosse: *Autorschaft ist Werkherrschaft. Über die Entstehung des Urheberrechts aus dem Geist der Goethezeit.* Paderborn/Munich/Vienna/Zurich: Ferdinand Schöningh 1981. pp. 17 f.

6 Friedrich Julius Stahl: *Die Philosophie des Rechts.* Vol. 2, Part 1, Book 3: Das Privatrecht. Tübingen: Mohr 1878. Cited in: Friedemann Kawohl: *Urheberrecht der Musik in Preußen (1820 – 1840).* p. 79.

7 Leopold August Warnkönig: *Rechtsphilosophie als Naturlehre des Rechts.* Freiburg im Breisgau: Wagner 1839. Cited in: Friedemann Kawohl: *Urheberrecht der Musik in Preußen (1820 – 1840).* p. 99.

8 Cf. Edgar Zilsel: *Die Geniereligion. Ein kritischer Versuch über das moderne Persönlichkeitsideal mit einer historischen Begründung*. Vienna/Leipzig: Wilhelm Braumüller 1918.

9 Peter Bogdanovich: *Wer hat denn den gedreht?* (Who The Devil Made It: Conversations with Legendary Film Directors) Translated from English by Daniel Amman, Jürgen Bürger, Ruth Keen, Kathrin Razum, Martin Richter and Thomas Stegers. Zurich: Haffmans 2000. p. 270.

10 Ibid., p. 257.

11 François Truffaut: *Mr. Hitchcock, wie haben Sie das gemacht?* Translated by Frieda Grafe and Enno Patalas. Munich: Wilhelm Heyne 2003. p. 132.

12 Georg Wilhelm Friedrich Hegel: *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatsrecht im Grundrisse.* ("Elements of the Philosophy of Right„) Mit Hegels eigenhändigen Notizen und den mündlichen Zusätzen. Theorie Werkausgabe. Published by Eva Moldenhauer and Karl Markus Michel. Vol. VII. Frankfurt am Main: Suhrkamp 1970. p. 67.