



Authors and their Tokens: Artefactual History of Copyright Subject Matter

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The underlying idea of this study is to argue that looking deep into the history of copyright development will provide an understanding of contemporary technologies, in particular the latest revolutions in the digital market. Therefore, the subject of this analysis are the events and historical discussions that took place before shaping the contemporary copyright law's institutions and that were related to the first normative acts pertaining to its structure. The first part presents a historical analysis of the institution of copyright, the disputes surrounding the formation and development of thinking about copyright as an independent institution, and then answers the question of the artefactuality of copyright, particularly from the perspective of authorship, the work, and the combination of these two essentials of the copyright's system. This will be contrasted with the recently discussed issue of the legal valuation of tokens and their relevance to copyright.

Keywords: Copyright Law, NFT, Authorship, History of Copyright Law

Introduction

Copyright law is not a modern concept. Although we might dispute the origins of the copyright law and the historical impact of the first copyright statutes on the current shape of the normative framework¹ a common denominator for each and every study remains the same: the concept of a work. It has been the first manuscripts, books, and graphics that sparked historical, and consequently normative, evolution into contemporary model of protection. Despite our greatest efforts, however, it is relatively difficult to describe or to doubtlessly identify what constitutes the subject of such protection. By referring to the originality requirement, we usually look for most neutral phrases or words to paraphrase statutory definitions, at the same time avoiding a clear answer. The task is even more complicated compared to modern technologies, in particular the recent increase in popularity of nonfungible tokens that challenge the description of the subject matter of the copyright as a non-rivalrous good. Moreover, having considered contemporary research in cognitive studies, one should ask if it is even possible to identify the subject matter of copyright. The answer to these doubts and concerns might be hidden in the historical evolution of the subject matter of copyright law: the notion of a work and its artefactual nature. In this paper, I will analyze the events and historical discussions that took

place before shaping the contemporary copyright law's institutions and that were related to the first normative acts pertaining to its structure. The reason I refer to the historical periods before the first normative acts is simple: I assume that at that point of time when a notion of work was identifiable, the very first theoretical concepts and dogmatic constructions have been developed that might be present (or at least easily reachable) today. Moreover, the concept of the study is based on the idea that if we compare the historical origins of a concept of copyright subject matter, we might be able to identify our past solutions that might serve as an answer to modern challenges. For obvious reasons, I decided to limit the scope of presentation to only these periods of time that could provide some guidelines to the question of artefact or tokenization of the subject matter of a copyright. For the sake of an argument I also decided to divide the presentation into four parts: (1) the pre-normative period, i.e. the pre-technological period until the early stages of the development of printing techniques, focused on presenting a pre-legal status of a protection of authors that laid foundations of future copyright law; then (2) the three historical attempts to find an appropriate solution to identify and to describe the subject matter of protection, illustrated by the examples of French, British and Prussian battles of booksellers, falling at the time of intensifying competition in the bookselling market, the common point of which was to derive the philosophical and

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axiological foundations of an independent artefact (a work). The third part (3) focuses on the question of artefactuality, presenting a summary of historical attempts, their philosophical and normative differences and similarities with regard to the subject matter of copyright law. To illustrate the difficulties with the results of the historical development of copyright law, this part also takes into account cognitive science research, identifying the causes for contemporary problems of subjectivism and relativism of the subject matter of copyright. Finally, the study is juxtaposed against the backdrop of (4) the contemporary process of tokenization and serviceization of copyright law and its impact on our contemporary notion of a work.

The aim of this study is to answer the following questions: How shall we define (conceptually) copyright subject matter? How has its notion evolved over centuries? Do the historical assumptions regarding copyright subject matter still influence our contemporary understandings? If we regard the historical definitions of copyright subject matter against the backdrop of cognitive sciences and modern technologies, shall we then reevaluate the whole system or just the concept of a work? This study is subject to two types of risks. Firstly, I assume that the presentation of the discussion, development, and other historical backgrounds that led to the attempt to create the copyright concept may draw attention to the issue of how the intellectual property was classified as the subject matter of the then copyright². In particular, it seems to me that the analysis of what was meant by the concept of a work in the legal system should not differ from the sources of its creation, which, in turn, may refer to the long-lasting legal and cultural legacy, reaching (as I will point out in a moment) to ancient times. However, this assumption is subject to additional risk, as the period of historical development of the concept of a work falls on times technologically, socially, and culturally different from the contemporary times. I will take this risk into account in my subsequent deliberations. Secondly, for the purposes of my discussion, I assume a certain simplification: referring to the discussion of historical figures, I qualify them as referring to the need to introduce a system of copyright law or any other normative model that would guarantee the protection of intellectual property in the form (result) of works, despite the fact that the concept of "copyright law" as such may not have existed at that time. Analyzing the pre-writing

times, in which there was no possibility for the legal and philosophical thoughts to have been created, such a simplification seems justified to me, although it may be subject to the risk of falsifying the meaning of some statements. To eliminate (or at least reduce) this danger, I will exercise some caution for the purposes of proper assessment³.

Pre-Normative Times: Is there any Autonomous Object at all?

Although the roots of the concept of intangible objects date back to the times of Roman law, the concept of a work and the role of an author's figure was initially based on the system of social conventions and cultural conditions rather than normative rules⁴. The early attempts of protection were thus not concentrated on an abstract object, intangible good as such, but rather on a convention, despite the fairly broad social respect shown to the spoken word at those times⁵. For instance, only with the gradual evolution of culture and artistic (entertainment) activities the attention of the ancient Greeks began to focus on the person of an author as a person who seeks exclusive protection, rather than on a result of such an activity as such⁶. A similar approach can be observed in relation to the early Chinese culture and to the beginnings of Confucian ideas that, although we have noticed and identified a concept of creativity, however, did not grant it a separate ontological status⁷. The concept of an intangible object as an autonomous artefact began to emerge at the late stage of the historical development of ancient Greece and in the Roman Empire times. Initially, in relation to plagiarism of someone else's works⁸, then as the author's right to decide on the publication of a work⁹. However, it was still understood as a personal prerogative of the author, and rather not as a positive right that derives from an intangible object¹⁰. Interestingly, the Roman law recognised a distinction between *res corporales* and *res incorporales*, which intuitively might relate to intellectual goods. The *res incorporales* was commonly discussed in Roman literature even before the second century BC, however, only in the Institutes of Gaius it was presented in opposition to tangible objects¹¹. Interestingly, it did not relate to results of human intellect.

Another attempt to address the intellectual good might be found in Ulpian's commentary, which refers to the distinction between possession of inheritance and possession of things. The commentary indicates

that it is one thing to have the right (to inheritance - *iura*), and to have a tangible object (*corpora*) is quite another. Such an approach was dominant later among the Roman jurists, so the definition of the concept of an intangible object was in fact avoided in favour of replacing it with the construction of a right (which is as such intangible as well). In other words, the need for intangibles has already been noticed in antiquity; however, no attempt was made to define it, and even if it somehow emerged, it was not related to the result of the author's activity as well. As far as the study shows, the first emergence of a separate positive rights with regard to an intangible works appeared only at the stage of reception of the Roman law¹².

A similar tendency is shown on an example of the discussion regarding the protection of works in the early Jewish culture. The original assertion was a profound and customary respect for someone else's works; however, even if it somehow addresses the intellectual good, the object of such a 'protection' is not a result of human labour (*cheftza*). Instead, it was based on a paradigm of a desired, ethical behaviour of third parties against a person of interest, author (*gavra*). In case the behavior did not meet the ethical standards, a sanction followed. This is confirmed by the first Talmudic interpretations: Isaiah Ben Avraham Ha-Levi Horowitz (*SheneiLuhot Ha-Brit, 1649*) was to repeat that robbing a man of his ideas is worse than robbing him of money¹³, but the sanction was justified with regard to a person that was robbed but not due to the fact that a work was plagiarised¹⁴. In later stages, regulations were created to protect the publisher from property losses related to the publication of a printed book¹⁵. It seems that the manifestation of this tendency was also the sanction which has normally been applied in the case of publications which did not comply with the orthodox view of religious matters, which was to serve as symbolic or performative protection against unauthorized copying of works in Jewish culture.

In sum, the protection of authorship, according to the research, was reduced to the problem of maintaining an appropriate moral and ethical threshold. Even if there was a reference to - contemporarily understood - authorship, it was still understood as a personal prerogative of the author, and rather not a positive right that derives from an intangible object¹⁶. The reason for that was probably the fact that works as such did not have enough economic significance at that time¹⁷.

This is consistent with a general observation of the historical development of copyright law if compared with technological progress and economic changes. Although the printing technique has been available much earlier¹⁸, it was only the development of culture and market that enabled the creation of the first private publishing houses (in the 13th century), and as a consequence, the importance of securing the reimbursement of printing costs has increased. The very first attempt was based on the concept that public information about sanctions (i.e. pain of prosecution) would be an appropriate measure to fight against reprints and plagiarism¹⁹. The inefficiency of such an approach led to the creation of the first paralegal solutions, however, most of them were focused on the protection of the interests of publishers, and not necessarily on the protection of works as such. For example, in the early Arabic culture, one can find certain institutions that allow for the social condemnation of plagiarism, although neither the Koran nor the Sunnah treats intangibles as the object of the author's private property²⁰. Also, in the Islamic legal doctrine of the 12th century a distinction was made between concepts of an ownership to both physical and ideal objects²¹. None of them, however, evolved into a concept of authorship and disputes about the possibility of introducing private protection of intellectual property under Islamic law are still present today²².

An interesting example is from the early Jewish legal doctrine is an attempt to protect intangibles in the form of musical works²³. It was, however, rooted in social and religious conventions, rather than in legal institutions²⁴. In case of a plagiarism, a specific sanction was applied (a particular performance required)²⁵ however, under the condition that a plagiarised musical work caused an infringement of financial interests of author²⁶. The then model was thus similar rather to a contemporary protection against unfair competition than to an ownership of an intellectual work.

Three Attempts to Find Them all: How shall we Identify an Autonomous Object?

The discussion of intangibles arose again in the modern era. The invention of printing is generally indicated as a turning point, although the possibility of mechanical reproduction of text existed much earlier. This is also confirmed by Konrad Gliściński, who analysed the historical legal development of Central Europe. He noted that only the development

of the publishing market and competition in terms of consumer networks resulted in requesting the rulers to issue appropriate privileges of exclusive right to print a work²⁷. Although the first such acts were created, they still, however, circumvented the question of subject matter (as a result of human intellect) and focused on a different artifacts or interests. For instance, in the territory of the then Venetian Republic, where the first such acts were issued, the monopoly granted to publishers referred to the printing techniques used by rightholders, thus the monopolies were rather a manifestation of contemporary understood industrial property law, and not copyright law²⁸. Moreover, the issue of privileges focused on determining the manner, territory, and validity of such a decree, but did not necessarily address the problem of defining the subject matter of protection (an intellectual good).

The abstraction process has started with the first booksellers disputes, well known in the British, French and German literature. The adopted Statutes of Anne did not reduce the tensions between British, Irish and Scottish publishers at that time: in the case of publications printed in England, they were almost immediately copied in the north of the country and published under a slightly changed title by another publisher²⁹. In two cases: *Tonson v. Collins* and *Millar v Taylor* the tendency appears for the evolution of the discourse from recognizing that there is such an issue as a work, to a discussion of whether it is different from the material medium on which it was made available. For example, in the *Tonson* case, lawyers representing both parties (Blackstone and Yates) took opposite views as to whether intellectual property could be distinguished from the medium on which it was recorded. One of them argued that treating the subject matter of copyright as an intangible subject to protection would, in fact, mean protecting the "sentiment of the author"³⁰. Also, the demarcating elements for any object belonging to the reality that would justify granting it a separate legal status may be the following: the possibility of *possession* and the ability to distinguish oneself (*indicia*). None of them refers to a work³¹. His opponent claimed that the physical medium on which an intangible object is made available is only a side effect of the dissemination of the work. The requirement that the work should be capable of being perceived by the sense of touch or sight indicates that the concept of intangible good and physical object that makes it available to the public are confused;

however, both of them may be the object of ownership of two different persons. In comparison to the pre-normative period, at this stage of historical development it is not the ontological status of an intellectual goods that is challenged, but the criteria that shall be applied to identify it as autonomous artifact and to distinguish it from the already existing ones. In the *Millar v Taylor* case, the parties argued with regard to the possibility of recognising monopoly rights regardless of the validity of royal privileges. In the final decision, the court held that the subject matter of copyright takes on an intangible form (as an ideal object, being a set of intellectual concepts which are communicated through words, sentences and forms of expression) and is detached from the medium on which it is made available. It was also emphasised that such an intangible form of the work cannot be physically violated, but in the case of unauthorized reproduction of its essence, i.e. the intangible form, its content.

As Niels van Dijk and Konrad Gliściński point out, a similar discussion to the one that took place in Great Britain was carried out between the publishers of the Paris Guild of Publishers and some authors, independent Paris publishers and publishers from outside Paris. The successively introduced legal regulations based on a system of privileges and exclusivity granted to certain booksellers for an appropriate period of time did not reduce the growing tension³².

However, contrary to the situation in Great Britain, France was dominated by a slightly different approach towards who the author is, what is his work, and what is the relationship between him and the audience. According to Laurent Pfister, as early as 1583, in judicial proceedings that questioned the printing privilege granted in relation to the code of canon law "*Corpus iuriscanonicum*", Simon Marion, the representative of booksellers in Paris, argued that the work cannot be conceptually reduced to a physical object, because it is at the same time a "spiritual object" and, consequently, it cannot be the subject matter of an exclusive privilege. The Royal Council deciding in this case supported this opinion. The distinction between a physical object and an intangible object was also repeated in the comments on legal acts from that period³³. Pfister, in his analysis, points to the views expressed at that time, according to which the rights to the result of the author's creative work belong to the author, but she should return the value of the materials used to

present her work to the owners. According to this approach, the author of the book is fully entitled to decide on the future of the manuscript³⁴. Therefore, such an approach focuses in particular on the person of the creator.

Opponents of the copyright monopoly in France argued, on the other hand, that since the development of the printing press, there has been no natural right that would justify the individual to make exclusive independent decisions on behalf of the whole society³⁵. In this approach, the concept of a work is understood not as a result of creative activity or a result of an effort made by the author, but as a common good, to which both the author and the society should have equal access and decision-making powers³⁶. The idea that guides the author is the act of creation understood as the need to educate, promote creator's concepts, set certain trends in the society, and not the financial interests. Since the aim of the author is to spread her own views, participate in discourse, or educate the society, therefore, at the time of communicating the author's thoughts, she pays her debt to the community whose cultural goods she took advantage of. Only in exchange for this "contribution" does she obtain an exclusive right, and the role of the legislative is to reduce the monopoly granted³⁷, which will balance this temporarily granted privilege³⁸.

What distinguished the British and French dispute is thus not only the matter of identification of autonomous good (as intellectual creation), but also the role of author and the society. When the British jurisprudence mostly focused on distinguishing between two artifacts (which alone may have evolved into a construction of infringement based on a concept of substantial similarity), the French debates circulated towards a question of personal privileges of the author and the function of an intellectual good for the society. Two relevant conclusions might be drawn from this analysis. Firstly, having adopted the French approach with author's key-role, a work might be regarded as a derived from the person of creator. It not only justifies a complex system of moral rights, but also may serve as a justification for identification strategy: a work is an artifact that derives from the person of its creator. There is no need to describe or investigate the structure or internal features of a work itself, whenever it is authorized by its author. Secondly, should we, however, consider a key-role of the society, like French opponents of monopolies argued, a work might be considered as a result of a social contract: the society allows for a certain scope

of a monopoly in exchange for a certain amount of access to work. Such an approach has already been debated in the contemporary literature of copyright law³⁹.

Although the tendencies related to the judicial enforcement of printing prerogatives were not absent in other European countries⁴⁰, the discussion which took place in Prussia draws attention due to the particular focus on the normative structure of such rights. It is worth noting that in the case of Prussia, the effectiveness of the legal enforcement depended on the province in which the protection was sought, the point in time (unfavorable time for the effectiveness of the rights was supposed to be the Thirty Years' War), as well as on whether specific regulations concerning printing privileges were in force in a particular region. All these historical differences of the Kingdom of Prussia, together with the deeply rooted tradition of Roman law reception, led to the emergence of some distinctive discourses of copyright law regarding the normativisation of intellectual property.

The difference of the Prussian discourse can also be explained in such a way that in the initial phase of historical development there was no need to "extract" intellectual property as autonomous concept; it was enough to refer to ownership structures, and these, in turn, required the existence of a physical object⁴¹. The comparison of reprint to "spiritual theft" appears only when mentioned by Augustin von Leyser, who, interestingly, argued that the reprint of the book is plagiarism and as such should be subject to criminal liability as fraud or misrepresentation by creating a counterfeit of a real work⁴².

Over time, more and more extensive attempts were undertaken to interpret ("deduct")⁴³ the exclusive right of the publisher in relation to the book edition ("*derivatives Verlagseigentum*"), using a known construction for the property right⁴⁴. It forced the adoption of the physical object as the subject of an exclusive right: The source of the publisher's right was derived from the acquisition of the first work's manuscript by the author. At this point, according to the assumption, the publisher bears the first investment expenditures aimed at publication of a work and it should therefore be justified to guarantee a certain possibility of obtaining reimbursement of these costs⁴⁵. In this case, it was not about "intellectual property" (*geistiges Eigentum*), but about "author's property" strictly identified with the right to a tangible object, and not to an intellectual good⁴⁶.

The "dependence" of this particular form of the publisher's property seems therefore only a certain rhetorical device, because it does not affect the legal situation of the author herself or the scope of the right granted to the publisher; it is used only as an argument for the "legitimacy" or "compliance with natural law" of the right thus transferred (or rather: granted) to the publisher. It emphasizes the continuity of transactions, according to supporters of this theory⁴⁷. From a dogmatic and legal point of view, this concept does not seem to confront the contemporary doubts that can be raised in relation to it⁴⁸. One of the critics of this concept, Johann Stephan Pütter, questioned the reasonableness of implementing an additional "derivative right" that excludes an author⁴⁹. Similarly, to our contemporary understanding, Pütter claimed that the work should be treated as a result of human effort and this should be the basis for creating an appropriate legal structure⁵⁰, however, his opinion was not popular at that time. To justify the sanctions in cases of illegal reprinting, he argued that reprinting of published works is unacceptable from the point of view of the "nature of things" and the general principles of law, in particular, due to the reception of Roman law and canon law, and this applies only to newly published works because in this case the publishers bear a particularly high risk associated with the first public distribution of the work⁵¹.

The period of dominance of the publisher's derivative right ended with the dispute concerning the writer Christoph M. Wieland's works between the publisher of the artist's initial works and the publisher with whom the writer concluded a contract for the publication of "collected works"⁵². The original contractor claimed that a publication of collection of works series infringes his exclusive rights to a physical object as a "subject matter of law" to which the publisher should have an unlimited and eternal right of ownership⁵³. His opponent claimed that collective works should be treated as completely different objects to which the author has all rights, not the publishing house⁵⁴. In the final decision, the new publisher was supported, as it was pointed out that the collected works constitute a completely different object not covered by the original publishing agreement. In the Court's opinion, the author is originally entitled to decide about such a work, and the original publisher may only be entitled to certain claims for damages against the author if the conclusion of a second contract with a competitive entity was expressly prohibited in the original

agreement⁵⁵. Since the decision, the subsequent Prussian literature supported the view that it is the author who shall be originally entitled to decide about the work and any rights of the publisher to the work result merely from explicit contractual provisions⁵⁶. Over time, a theoretical concept has been developed, recognizing the subject matter of intellectual property as a separate subject matter of law⁵⁷. According to this approach, granting exclusive rights is justified if a work results from the personal nature of man; it was created as a result of the action of human's own forces; there was no property over a physical object that implements the intellectual good (fixation); or there was a transfer of ownership of such an object, in accordance with the principles of the law of obligations⁵⁸. Therefore, the dominant theory in Prussia (after the Gräff-Götschen dispute over Wieland's works) was strongly influenced by Locke's philosophy⁵⁹ and included the possibility of recognizing an intangible object as an autonomous object⁶⁰. Interestingly, with regard to the contractual relationship between the author and the publisher, it was argued that it should not be permissible to completely transfer ownership of "thoughts", because "the thoughts of one man will never belong to another; he can only use them and benefit from them"⁶¹. This example shows the proposal of a normative construction discussed at that time, in which the subject matter of the law is the subject matter of intellectual property, understood as broadly as possible (as a "product of thought"), and in relation to which the content of the law is limited to the possibility of deciding on the exploitation of the work, including the type, form and scope of possible publication, and is subject to individual protection against reprinting⁶².

Finally, there is one more interesting development in copyright history in Prussia that is worth mentioning in the contemporary context. Unlike other authors, Friedrich G. Klopstock published his work '*Die deutsche Gelehrtenrepublik*' himself, without the publisher as intermediary, and this project served as an example of his suggestion of an 'author subscription' model⁶³. As an author, Klopstock published subsequent parts of his work independently, sending them directly to his subscribers, for a specified fee due periodically⁶⁴. As he stated, his aim would be to check whether it was possible for the author to remain the actual owner of his work, avoiding entrusting the publication to the publisher. The idea behind Klopstock's subscription model was

to ensure that authors would be rewarded for their work and the audience interested in a particular work would receive it directly from its author⁶⁵. Initially, the model achieved a huge financial success, which was followed by more and more renowned authors, but over time, the increasing market prices, the popularity of reprinting, and the growing criticism from publishers led to its gradual withdrawal from the market. However, above all, Klopstock's concept was one of the first steps toward author emancipation, an interesting opposite to previous publishing policies that completely ignored the role of authors. The subscription model completely reversed this situation, depriving publishers of their role as intermediaries. Irrespectively of the outcome, it ought to be noted, however, that one of the reasons why the subscription model failed at that time was the unresolved issue of the subject matter. The Klopstock concept ignored the issue, due to the focus on building up and maintaining the relationship between the author and the audience (alone it could be considered as a the then form of patronage). Embedding the concept of subscription in a context in which the dominant and lobbied solution were publishers' property rights, it should be remembered, however, that it pointed out a different party as a rightholder but it did not solve the problems of plagiarism, piracy, or unauthorized distribution of published books. The insufficient specification of the subject matter of the law did not allow to fight against unauthorized reprinting nor did it address the problem of plagiarism or counterfeits. In summary, compared to the concept of the publisher's derivative right, which had a certain established status and allowed the foreseeable application of certain (although unstable) protective rules, the subscription model turned out to be paradoxically less satisfactory and safe for the authors themselves.

The Question of Artefactuality

The above-mentioned tendencies led to a contemporary known petrification of the copyright's subject matter aimed at, firstly, recognizing the intellectual good as a separate artefact, and, secondly, granting specific exclusive rights in relation to it. Three conclusions may be drawn from the historical analysis above. First, the concepts justifying the recognition of the subject matter of copyright oscillate around Locke's theory as well as in the context of intensifying competition and strengthening technological business models. Irrespectively of jurisdiction and historic legal traditions, at some

point, the debates finalized in an identification of a protected subject matter as an intangible artifact. It is noteworthy, however, that even if at the same time Locke's theory and capitalist approaches gradually dominated the discourses, arguments in favor of society's extensive access to intellectual goods were also present in the debates.

Secondly, there has been a multiplicity of legal attempts to protect the interests of the authors. Starting from the first social and religious conventions, or the search for justification in a certain moral system (ancient Greece, Rome), through the protection over a specific group of interests or situations (Jewish law), protection on the basis of issued edicts and privileges (modern era), to the introduction of statutory regulations, the development of basic concepts of copyright evolved depending on how social awareness changed, what degree of economic and technological development was achieved and in what system the protection of the author was applied. Also, the more economically developed region was and the more competition in the publishing market intensified, the more pressure was applied by the publishing community to make certain changes and to implement regulations that allow effective enforcement of sanctions for "infringements"⁶⁶. On one hand, we may argue that the early development of copyright law was a consequence of a split of economic and legal evolution; on the other, however, without a normative protection there had already been a multitude of attempts to protect authors, but certainly not publishers. Interestingly, the early 'copyright' protection also took a form far different from what it has in our contemporary system (e.g. as a protection of interests or situations), and even avoided defining its subject matter. The subject matter question appears much later than the first attempts to systematize the normative protection of works. Furthermore, the creativity and creation of exceptional works also took place regardless of whether the appropriate protective framework was introduced by the legislator. Therefore, it seems that the concept of a work as an autonomous artefact requiring some normative protection does not have to be associated with both: the ontological creation of such objects and the creation of normative institutions of their protection. Also, the liability regime has been implemented at a much later stage due to the intensification of competition. The conclusion about ontological independence of works of legal foundations may also be strengthened by reference to British and French disputes about the justification of natural law for exclusive rights after the expiration of royal privileges⁶⁷.

The third and final conclusion refers to the structure of the subject matter of copyright. According to the research, we may distinguish between three main strategies applied in British, French, and Prussian jurisprudence and literature to identify what constitutes a subject matter of protection. The initial attempt, particularly evident in early British case law, was based on a simple comparison between the works in question⁶⁸. Such a distinction requires undertaking certain measures, in particular by indicating the criteria allowing such a comparison⁶⁹. Another approach presented an attempt to define the relationship between the fixation, the physical basis of existence, and an intangible good, spiritual value, or the content of the work. The second strategy illustrated the Prussian doctrine which for many years has based the model on the concept of the publisher's derivative property right. The third option was a French approach that focused on the author: in France, initially author-centric, understanding of the autonomous intellectual property was dominated by the individualistic approach; while in a similar period in Prussia the author was not taken into account at all.

The common denominator of the first two historic attempts to identify the subject matter of copyright is an artifactual understanding of a work. Both approaches oscillate around a distinguishable object, an ontological manifestation of certain criteria: different from its material fixation but also different from other, already existing artifacts. It is its internal properties (construction, features, structure) that differ one subject matter from other objects or from their physical carrier of existence. The artifactual approach, although historically justified and present until today in modern copyright models, excludes from the scope of protection a number of manifestations of artistic creation, such as performance or conceptual art. It does not correspond with current technological development, in particular, such intangible goods as computer programs or databases are protected in a selective way, not reflecting their economic significance. Having regarded the potential directions of IT-revolution, it will not answer any questions in near future either. The determination of the unambiguous boundary between the protected artefact and its fixation also did not ensure a satisfactory outcome.

Moreover, such an artifactual approach to defining the subject matter of copyright is not consistent with the latest research in the field of cognitive sciences as well. These studies suggest a far-reaching relativism in identification of a work of art: on the one hand, it

may be the result of a specific visual stimulus caused either by the property of the artefact itself or by the context of its presentation (e.g. the recipient is aware that is experiencing the work of art), and on the other hand, it is caused by external circumstances, such as information about qualifications or the result of the previous experience with art by a specific recipient. For example, the research by S. Zeki indicates that a person makes an assessment of a work of art primarily on the basis of visual perception, especially if such a work contains certain visually perceptible elements that are unstable, dynamic and surprising, which the recipient is not accustomed to⁷⁰. As far as works considered original and beautiful were concerned, the recipient's orbital cortex area associated with the reward system was activated, while as far as images considered ugly were concerned, the motor cortex area, probably associated with the need to reject the negative emotions of the recipient, was activated⁷¹. In turn, in the case of cognitive sciences, it is assumed that the work of art is understood with regard to the social context as the effect of human social evolution, while the recipient's reaction to art is a form of social communication⁷². In order to qualify an object as a work of art, it is necessary to take into account the experience of the person making the decision, as well as to indicate their cultural position⁷³. In other words, empirical sciences indicate a far-reaching relativism in the qualification of intangible objects: Although we recognize a work as an artefact, autonomous object, the dominant tendency is to identify it with the medium on which it was recorded⁷⁴ (and even if the recognition is based on most 'objective' criteria). Other studies suggest that we overestimate the required qualitative threshold for recognition as a work of art⁷⁵, as well as recipients usually allow for the assessment based on subjective feelings and emotional reaction to a particular artefact⁷⁶. Having that stated, if we then combine the contemporary allegations about non-compliance of the concept of the work with modern technologies, the low threshold of originality, or problems related to the protection of digital works, a conclusion should be justified that an artifactual approach to the subject matter provides only appearances of objectivism. In practice, it usually leads to intuitive decision of courts⁷⁷.

The Token-Centric (or: author-centric) Concept of a Work?

The third historic attempt to recognize and describe a subject matter of copyright law was visible in the

French debates, circulating around the question of authorship and individuality. Both French jurisprudence and the doctrine of law emphasized the importance of the creator's role which until today - to some extent - is present in the contemporary understanding of the originality requirement.

The reason to come back to this concept was an increasingly popular debate about the NFT (*non-fungible token*) market that supposedly answers the contemporary problems of copyright law⁷⁸. To put it simply, an NFT is a unit of data stored on a blockchain that certifies a digital asset to be unique and therefore, not interchangeable, while offering a unique digital certificate of ownership for the NFT⁷⁹. In general, the solution is based on technology that allows to establish the "provenance" of the assigned digital object, offering indisputable answers to such questions as who owns, previously owned, and created the NFT, as well as which of the many copies is the original⁸⁰. By the application of a distributive ledger technology⁸¹, the NFT can thus be the subject of transfer and acquisition, making it one of the most interesting assets to trade within the financial security sector⁸². Typically, the NFT contains references to digital files (such as photos or videos)⁸³, which alone raises the question whether such a solution might be helpful for modern copyright's struggles with a digital environment. One of the reasons why current legal institutions do not necessarily fulfil the expectations is thus the intangible nature of a work, which enables it circulating worldwide without prior authorization of the rightholders. The NFT certificate remains trustworthy, enabling a trade over digital works as if they were of a tangible nature⁸⁴: despite the possibility of creating many copies without costs and particular obstacles, there is virtually no probability that any of the copies bears a certificate issued by the author using the NFT technology. Moreover, such a solution is more and more often used successfully in relation to works of art or works created by well-known celebrities or influencers⁸⁵. Interestingly, such tokenization of a work brings it even closer to the artifactual approach since most of disadvantages of an intangible nature of such a copy is overcome and a NFT-issued digital work remains original in most broader sense.

Despite a quite interesting return of a work to its tangible nature, the case of tokenization is based on a recognition (or: legitimization) of an author. From the cryptographic and, at the same time, economic, point

of view, a NFT obtains a value only if it derives from a particular person⁸⁶. The growing interest in NFTs associated with works of art or digital media is mainly based on the economic value and recognition of their first owners⁸⁷. It is thus the provenance of the assigned digital object to a particular person, and not particularly the work in question, that constitutes the economic value and recognition over the NFT market. The data stored on a blockchain do not determine the status of such an artefact as a subject matter of copyright law (it ultimately depends on legal subsumption), but only certifies the truthfulness of the statement submitted by the person who issued such a certificate. Having considered the very first NFTs that referred to images representing virtual cats, we should note that even such a sophisticated solution would not solve the contemporary problems of recognizing a subject matter of copyright law: vagueness, intuitiveness, and inefficiently low threshold of originality.

On the other hand, the growing popularity of NFTs and debates about possibility of their adoption into copyright's trade show also an interesting return to the historic attempt to author-centric recognition of a protected work. Similarly to the French approach, known from the battle of booksellers, the value of a token seems to rely on the legitimacy of the author. In this perspective, a work might be regarded as derived from the author, and it is this person who justifies a complex system of exclusive rights. The token-centric approach to a work is based on a similar, if not the same, strategy: it does not focus on internal features or specific construction of a work but on the certificate issued by author. What makes it even more interesting is the fact that this approach omits problems indicated by the cognitive science as well: There is no place in subjectivism in identification of a work if the process is based on a verification of a token and the legitimacy of a person who issued it. In aesthetics the same tendency was observed by Frank Sibley who investigated several definitions of originality⁸⁸. One of them was identified by Sibley as most objective (and thus tempting to adapt in aesthetics) as personal originality: An original work may differ from other artifacts little or insignificantly but is also new for the person who created it. Sibley uses an example of a student's essay — it usually does not differ much from works written by other students, but in a colloquial sense it is 'original' because it comes from the author⁸⁹. A similar

approach might be also found in some early decision by US courts (pre-Feist decisions) pointing out the interpretation of originality meaning only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity⁹⁰.

However, an alternative proposal for the revaluation of copyright may be to identify the next period of historical development of this structure as a progressive servicing. In the subscription model, more and more often present in our homes and everyday life, we very often attribute economic value to the access to intellectual goods (whether in the form of entertainment or in the form of software in the cloud), and not to "possession" and physical power over the medium of a work. In this model, one moves away from the incomprehensible concept of a work, with all the legal uncertainty related to the recognition of certain artefacts as protected, towards a solution under which we provide ourselves only with access to digital content. Interestingly, this model is not very different from the historical attempt made by Klopstock at the turn of the 17th and 18th centuries in the Duchy of Prussia. When using such services, we agree to the processing of personal data, analysis of such data, or a number of behavioral analyses, generating a "behavioral surplus", then - even as an object unprotected by copyright - disposed of in commercial trading between the operator and partner companies. It seems to me that unless there are rapid technological changes, such a model will ultimately lead to a change in the paradigm of copyright and abandoning the artefactual understanding of its subject matter. We will no longer need it.

Acknowledgment

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References

- 1 see e.g. Woodmansee M, The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author', *Eighteenth-Century Studies* 17 (1984) 425; Rose M, Technology and Copyright in 1735: The Engraver's Act, *The Information Society* 17 (2005) 63.
- 2 I am applying the modern nomenclature of "copyright" or "copyright law" as a kind of indicator for further considerations.
- 3 The original paper has been presented during the 13th ISHTIP conference and gained positive feedback from the audience. All critical comments and feedback mentioned during the conference have been gathered and taken into

account in the submitted version of this paper. All errors or omissions are the authors' own.

- 4 Górnicki L, *Rozwój ideipraw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012 ("Authorship was not completely left unprotected in any developed ancient society, but its sources should be sought in cultural conditions, in ideas of aesthetics and in standards defining the concept of social morality and individual honour").
- 5 Pouillet E, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation* (Paris), 1908; Górnicki L, *Rozwój ideipraw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), (2012) 19, 21.
- 6 Pouillet E, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation* (Paris), 1908; McGill S, Plagiarism in Latin Literature, 74-112 (2012); VerSteege R, The Roman Law Roots of Copyright, *Maryland Law Review*, 522 (2000); Dajczak W, *Rzymska res incorporalis a kształtowaniu się pojęć rzeczy przedmiotów praw rzeczowych w Europejskiej nauce praw prywatnego*, 70 (Wolters Kluwer, Warszawa) 2007.
- 7 Górnicki L, *Rozwój ideipraw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012 at 33: "Therefore, repeating and processing of someone else's ideas did not have a negative connotation. Because, as it has sometimes been pointed out, everything comes from a nature that people can only imitate, it is impossible to exclude others from using what belongs to the common past."
- 8 The first use of this term is attributed to the poet Marcus Valerius Martialis (about 38–41 to about 102–104 AD), who in his "Epigrams" accused other people of claiming to be authors of other people's poems (see McGill (2012), 74-112, Górnicki L, *Rozwój ideipraw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012, 67.
- 9 This is attributed to Quintilian, who in his work, in the *Institutionis oratoriae libri XII* (Education of the speaker), described his views on authorship; in later literature J. Logie found here the sources of the concept of romantic authorship, see Logie J, *Rhetoric Review*, 22 (2003) 353.
- 10 On the other hand, as Russ VerSteege points out, in Roman law one can encounter an attempt to present structures that do not relate to tangible objects at all. According to the author, an example of Roman jurists' interest in objects not reflected in the physical medium is today recognized as easements relating to someone else's property: passage (*iter*), cattle drive (*actus*), passage (*via*), and water supply through someone else's real property (*aqueductus*). Over time, easements started to refer to personal activities performed by one person for the benefit of another (*operae servorum*); VerSteege R, *Maryland Law Review* 522 (2000) at 532.
- 11 Dajczak W, *Rzymska res incorporalis a kształtowaniu się pojęć rzeczy i przedmiotu praw rzeczowych w Europejskiej nauce prawa prywatnego*, 70 (Wolters Kluwer, Warszawa) 2007 at 23-24. The distinction of intangible things as a separate existence was not an innovative activity of Gaius, but it was inspired by the philosophy of Cicero (he was to use the criterion of "tangibility" as a distinction between tangible and intangible things, giving as an example of the latter things, those which can be known only by reason) and

- Seneca (the division into tangible and intangible entities was emphasized by Seneca in a letter to Lycilius from the first century BC). In the work *De Platone et eius dogmate* by Apulejus of Madaura in the 2nd century AD, we can find a division into visible things and perceptible by mind, which were called *res intellegibiles* (as opposed to *incorporales*, which according to the author should be used to describe God and ideas).
- 12 Platt R, *Journal Copyright Society of the U.S.A.*, 57 (2009) 951; Olwan RM, *PIJIP Research Paper*, (2012)24.
 - 13 Górnicki L, *Rozwój idei praw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012, 45.
 - 14 Netanel NW, *Houston Law Review*, 44 (4) (2007)852.
 - 15 Górnicki L, *Rozwój idei praw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012 at 47 ("The protection granted to the publisher was aimed at protecting it against financial losses. The development of copyright was therefore clearly connected here, as in other legal systems of that time, with the dissemination of printing and the need to protect the rights of printers.").
 - 16 On the other hand, as Russ VerSteege points out, in Roman law one can encounter an attempt to present structures that do not relate to tangible objects at all. According to the author, an example of Roman jurists' interest in objects not reflected in the physical medium is today recognized as easements relating to someone else's property: passage (*iter*), cattle drive (*actus*), passage (*via*), and water supply through someone else's real property (*aquaeductus*). Over time, easements began to refer to personal activities performed by one person for the benefit of another (*operaeservorum*); VerSteege R, *Maryland Law Review* 522 (2000) 532.
 - 17 Another question might be raised with that regard: should there be an appropriate moral or conventional consequence raised in case of plagiarism, should it mean that the economic significance of a work plays not a crucial role?
 - 18 As Górnicki describes, since the 11th century in ancient China the technique of mechanical copying of printing was available; Górnicki L, *Rozwój idei praw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012 at 39 ("During this period Bi Sheng made a breakthrough in Chinese printing. Between 1041 and 1048, he invented the mobile font, which was the world's first mobile printing technology, although still not practical for large-scale printing, because the signs were cut out in soft burnt clay").
 - 19 Górnicki L, *Rozwój idei praw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012, 41.
 - 20 Lawal-Arowolo A, *European Intellectual Property Law Review*,40 (11)(2018) 736; Rabbat N, *Islamic art and the museum: approaches to art and archeology of the Muslim world in the twenty-first century* (2012) 57; Kwall R, *Diversity in Intellectual Property: Identities, Interests, and Intersections*, 2015, 193. <https://doi.org/10.1017/CBO9781107588479.011>.
 - 21 Lawal-Arowolo A, *European Intellectual Property Law Review*,40 (11) (2018) 736; Elmahjub E, *Copyright Perspectives: Past, Present and Prospects* edited by Brian Fitzgerald and John Gilchrist (Switzerland: Springer International Publishing) 2015, 52.
 - 22 Elmahjub E, *Copyright Perspectives: Past, Present and Prospects* edited by Brian Fitzgerald and John Gilchrist (Switzerland: Springer International Publishing) 2015, 52.
 - 23 Górnicki L, *Rozwój idei praw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012 at 53 ("A notable example of the protection of a musical work of art is the famous collection of works "Songs of Solomon" (Ha-Shirim Asher li-Shelomo), created by an outstanding Italian composer, violinist and singer of Jewish origin Salamone de Rossi (Heb. Shelomo Min-ha-Adummim), which was published in Venice in the years 1622–1623 by Pietro and Lorenzo Bragadini. In the introduction to this edition of Rossi's works, Rabbi Leon of Modena, together with three other rabbis, granted him – at his request – protection, referring to the power of the prohibition and the curse.)
 - 24 Wilkowski M, *Historia Wynagradzania twórczości* (Fundacja Wolne Lektury), 201.
 - 25 Wilkowski notes that the sanction played a role of a symbolic and performative protection against plagiarism.
 - 26 Nimmer D, *The Torah U-Madda Journal* 15 (2008) 24, <http://www.jstor.org/stable/40914727>; Górnicki L, *Rozwój idei praw autorskich: od starożytności do II wojny światowej* (Wolters Kluwer, Warszawa), 2012, 51.
 - 27 Gliściński K, *Wszystkie prawa zastrzeżone: historia sporów o autorskie prawa majątkowe, 1469* (Fundacja Nowoczesna Polska), 2016.
 - 28 Rose M, *Authors and Owners* (Harvard University Press) 1993; Jakubowiak M, *Nieuchronny plagiat: prawo autorskie w nowoczesnym dyskursie literackim*. (Instytut Badań Literackich PAN Wydawnictwo), 2017
 - 29 Rose M, *Authors and Owners* (Harvard University Press) 1993.
 - 30 which, as such, should have no legal relevance after the publication of his book - until its publication, he remains in the author's exclusive dominion, after which he fell into the public domain; Yates used the phrase: "thrown into a state of universal communion".
 - 31 "mental property is incapable of separate and exclusive enjoyment" – quoted by Van Dijk N, *Grounds of the Immaterial: A Conflict-based Approach to Intellectual Rights* (Edward Elgar Publishing) 2017; Thus, for Yates, the ownership had a physical rather than a metaphysical value, Deazley R, *Commentary on Tonson v. Collins* (1762), in *Primary Sources on Copyright (1450-1900)*, edited by L. Bently & M. Kretschmer, online source, 2008, source: http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1762.
 - 32 detailed description: Gliściński K, *Wszystkie prawa zastrzeżone: historia sporów o autorskie prawa majątkowe, 1469-1928* (Fundacja Nowoczesna Polska), 2016 at 155; however, as indicated by Pfister, the first legislative acts referring to the concept of the "author" have already appeared in the 16th century in France, see Pfister L, *Author and Work in the French Print Privileges System: Some Milestones in Privilege and Property. Essays on the History of Copyright* edited by L. Bently, R. Deazley & M. Kretschmer (Open Book Publishers) 2010 at 120.
 - 33 Pfister refers to the example of comments on the Roman law from the 16th and 17th centuries; supra note 32, at 124-125; Rideau F, *Commentary on Simon Marion's plea before the*

- Parlement of Paris (1586) in *Primary Sources on Copyright (1450-1900)*, edited by L. Bently & M. Kretschmer, online source, 2008, source: http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_f_1586
- 34 Pfister L, Author and Work in the French Print Privileges System: Some Milestones in: *Privilege and Property. Essays on the History of Copyright* edited by L. Bently, R. Deazley & M. Kretschmer (Open Book Publishers) 2010 at 124
- 35 e.g. Mémoire sur la contestation qui est entre les libraires de Paris et ceux de Lyon au sujet des privilèges et des continuations que le Roy accorde, Bibliothèque nationale de France, Manus. Fçs. 22071, nr 177; Rideau F, Memorandum on the Opposition between the Parisian and the Provincial Booksellers (1690s) and Rideau F, Commentary on Simon Marion's plea before the Parlement of Paris (1586), in *Primary Sources on Copyright (1450-1900)*, edited by L. Bently & M. Kretschmer, online source, 2008, source: http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_f_1586
- 36 Mémoire de Louis d'Héricourt à Monseigneur le Garde des Sceaux, Paris (1725-1726), in *Primary Sources on Copyright (1450-1900)*, edited by L. Bently & M. Kretschmer, online source, 2008, (transl. Andrew Counter), available at: http://www.copyrighthistory.org/record/f_1725b
- 37 Denis Diderot, Lettre historique et politique adressée à un magistrat sur le commerce de la librairie, son état ancien et actuel, ses réglemens, ses privilèges, les permissions tacites, les censeurs, les colporteurs, le passage des ponts et autres objets relatifs à la police, Paris (1763), in *Primary Sources on Copyright (1450-1900)*, edited by L. Bently & M. Kretschmer, online source, 2008 (transl. Lydia Mulholland), available at: http://www.copyrighthistory.org/record/f_1763
- 38 Pfister L, Author and Work in the French Print Privileges System: Some Milestones in: *Privilege and Property. Essays on the History of Copyright* edited by L. Bently, R. Deazley & M. Kretschmer (Open Book Publishers) 2010 at 129
- 39 e.g. Drassinower A, *What's Wrong with Copying*. (Harvard University Press) 2015
- 40 Gliściński K, *Wszystkie prawa zastrzeżone: historia sporów o autorskie prawa majątkowe, 1469-1928* (Fundacja Nowoczesna Polska), 2016
- 41 This is especially evident in the statements of Johann A. Birnbaum (from 1732), quoted in this context, in which the author assumed that it is a legal and natural obligation to respect "someone else's property", and the reprint is nothing more than a theft (Diebstahl). In this context, however, the use of this wording is interesting, because it does not refer to the appropriation of someone else's intellectual property, but the first physical copy of the book. As Birnbaum pointed out in his essay reprinting falls within the meaning of theft, because the reprinter uses the first purchased copy of the book and, by introducing its cheaper substitutes to the market, deprives the first publisher of the benefits due to him in connection with the investment made, see ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018, at 73-4. As Andersch adds in his analysis, in order to support the opinion of the unlawfulness of reprinting, biblical arguments (in the context of the interpretation made in the Lutheran trend), canonical arguments and reference to historical institutions of Roman law were also invoked. - cf. Andersch at 75-77
- 42 "Nempesolentsaepelibrarii, velaliihomineslucricupidi, scriptadoctorumvirorum, his, veletiamheredibuseorum, invitit, in lucemprotudere, aliquando perfecta, saepehiulca, immatura, & abortui, quam legitimo partui, similiora. Dicit non potest, quantopere hoc vel existimationem auctoris imminuat" - cit. by ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 77 (footnote 39); see also Bappert W, *Wege Zum Urheberrecht: Die Geschichtliche Entwicklung Des Urheberrechtsgedankens* (V. Klostermann), 1962. By reprinting, the publisher violates the dignity of the author himself by placing on the market works of imperfect quality, unfinished, that cannot match the works originally prepared and developed by the original publisher. Bappert noted that there is gradual emancipation of the author as the only entity authorized to decide about the work - although not yet to the extent similar to contemporary reality; cf. Bappert at 238
- 43 "Es lag daher nahe, das Nachdruckverbot nicht mehr als einer in der Person des Verlegers entstehenden, sondern aus einer auf den Verleger übertragenen Berechtigung des Autors zu deduzieren (...)" - Rigamonti C, *Geistiges Eigentum als Begriff und Theorie des Urheberrechts*. (Nomos Verlagsgesellschaft, Baden-Baden) 2007.
- 44 Rigamonti C, *Geistiges Eigentum als Begriff und Theorie des Urheberrechts*. (Nomos Verlagsgesellschaft, Baden-Baden) 2007 at 18; Schwab D, Das Geistige Eigentum zwischen Naturrecht und Positivierung. in *Grundlagen und Grundfragen des geistigen Eigentums: Diethelm Klippel zum 65. Geburtstag* edited by D. Klippel, J. Eisfeld, & L. Pahlow (Mohr Siebeck) 2008; compare also Schwab's definition of "Eigentum" in encyclopedia ed. by Q. Brunner, W. Conze, R. Koselleck *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Band 2* (Mohr Siebeck), 1975, p. 65-112.
- 45 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 112: "Im Rahmen der Theorie des Verlageigentums" was ein Erwerb des Buchmanuskriptes ein Kostenpunkt unter vielen gewesen, der in der Gesamtschau dazu führte, dass der Verleger aufgrund des erbrachten Verlagsaufwandes das Eigentum am verlegten Werk erlangte".
- 46 Rigamonti C, *Geistiges Eigentum als Begriff und Theorie des Urheberrechts*. (Nomos Verlagsgesellschaft, Baden-Baden) 2007 at 18-22.
- 47 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018; Vogel M, Die Geschichte des Urheberrechts im Kaiserreich. in *Archiv für Geschichte des Buchwesens, Band 31* edited by M. Estermann, R. Wittmann, & M. Kleiss (Buchhändler-Vereinigung, Berlin), 1988, p. 203-219; Rigamonti C, *Geistiges Eigentum als Begriff und Theorie des Urheberrechts*. (Nomos Verlagsgesellschaft, Baden-Baden) 2007 at 43; For example, one of the leading representatives of this concept, Gundling, pointed out in his letters that with the acquisition of the physical manuscript of the work and placing it on the market, the first derivative proprietary right was created, unlimited in time and scope, and granted to the

- publisher. At the time of purchase of the publication by the customer, he acquires the right to use it in the form of reading, and any other activities in relation to the work should be qualified as contrary to the nature of the relationship of obligation that has arisen between the seller and the buyer of the book; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 118
- 48 e.g. whether, at the time of concluding the agreement, any type of entitlement remains with the author or whether it is a full and constructive transfer; or whether the scope of entitlements of the publisher is greater than the author himself, who created the work, which in turn may contradict the Roman law's principle: *nemo plus iuris alium transfere potest*; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 113-114
- 49 Kohler J, Der Büchernachdruck nach ächten Grundsätzen des Rechts geprüft, Urheberrecht an Schriftwerken und Verlagsrecht (Berlin Verlag) 1906.
- 50 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 195-196; Bappert W, *Wege Zum Urheberrecht: Die Geschichtliche Entwicklung Des Urheberrechtsgedankens* (V. Klostermann), 1962 at 268
- 51 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 198; Andersch noted also that Wieland added that placing of a published copy of the book on the market is always subject to the tacit condition that the buyer will not harm the legal interests of the seller (footnote 179)
- 52 Vogel M, Urhebervertragsrechtsprobleme am Ende des 18. Jahrhunderts. In *Festschrift für Georg Roeber zum 10. Dezember 1981* edited by G. Roeber, W. Herschel, H. Hubmann, & M. Rehbinder (Hochschulverlag) 1982; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 354. I would like to point out that although the Gräff-Götschen dispute is considered to be the first one so important in the history of the "emancipation" of the creator and the "extraction" of the subject matter of copyright, as a matter of fact, Johann Feder was the first one who clearly supported the autonomous concept of intellectual property in the copyright. He expressed a similar opinion as the supporters of the concept of derivative proprietary right of the publisher, but emphasized that the creator of the "spiritual product" ("*Urheber des Geistesproduktes*") is the original beneficiary of the property, which is created at the moment of creation of the work. He has also clearly separated a tangible object - a book - which the purchaser buys and has the right to use, but no entitlements are granted to him in relation to its possible reprinting. However, as Andersch concludes, these considerations, although different from the then dominant interpretative influences, were still far from the contemporary understanding of the copyright. - See: ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 322, 325 (quoting J.G.H. Feder and his work "*Neuer Versuch*" from 1780).
- 53 exact quotation provided by ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 356 It is interesting to note that, in this case Gräff referred to the expert opinion issued by the aforementioned Pütter, according to which Wieland was not entitled to conclude a contract with Götschen. It is also interesting that, in this opinion, a certain correction was made to the previous statement of the academician: he claimed that the original contract concluded between Wieland and Wiedemann, the direct successor of which is Gräff, extends not to physical copies of the work, but to a spiritual product ("*Geistesprodukt*"), the value of which increased significantly after a certain period of time as a result of the publisher's activities and investments made to increase its market significance. Since the agreement does not contain any other provisions authorizing the author to decide on the work as well as on its further and possible publications, such a right belongs to the original publisher, and any subsequent arrangements between the author and other entities are illegal; see ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 359; Vogel M, Urhebervertragsrechtsprobleme am Ende des 18. Jahrhunderts. In *Festschrift für Georg Roeber zum 10. Dezember 1981* edited by G. Roeber, W. Herschel, H. Hubmann, & M. Rehbinder (Hochschulverlag) 1982 at 443.
- 54 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 362
- 55 Vogel M, Urhebervertragsrechtsprobleme am Ende des 18. Jahrhunderts. In *Festschrift für Georg Roeber zum 10. Dezember 1981* edited by G. Roeber, W. Herschel, H. Hubmann, & M. Rehbinder (Hochschulverlag) 1982 at 434-435; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 364
- 56 Vogel M, Urhebervertragsrechtsprobleme am Ende des 18. Jahrhunderts. In *Festschrift für Georg Roeber zum 10. Dezember 1981* edited by G. Roeber, W. Herschel, H. Hubmann, & M. Rehbinder (Hochschulverlag) 1982 at 435; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 364
- 57 Ehlers M, *Ueber die Unzulässigkeit des Büchernachdrucks nach dem natürlichen Zwangsrecht* (Leipzig; Dessau) 1784; cit. by ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 370 (footnote 21)
- 58 Ehlers M, *Ueber die Unzulässigkeit des Büchernachdrucks nach dem natürlichen Zwangsrecht* (Leipzig; Dessau) 1784, cit. by ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 370
- 59 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 370
- 60 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 371: "Zu dem, was ein Mensch durch seine Kräfte schafft, zählten nach Ehlers insbesondere die Gedanken, die der Geist hervorbringt" (footnote omitted).

- 61 Ehlers M, *Ueber die Unzulässigkeit des Büchernachdrucks nach dem natürlichen Zwangsrecht* (Leipzig; Dessau) 1784 quoted by ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 371, footnote 31: "Mein Gedankeneigenthum kann unmöglich je einem Andern gehören. Die Nutzung desselben kann nur eines Andern erworbenes oder erhaltenes eigenthümliches Gut werden".
- 62 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 372-373; Bappert W, *Wege Zum Urheberrecht: Die Geschichtliche Entwicklung Des Urheberrechtsgedankens* (V. Klostermann), 1962 at 269. Interestingly, according to the presented proposal, it would also be unacceptable to borrow the purchased copy of the book - as an immanent condition included into the sales contract, under which the buyer obtains only the right to one form of exploitation, which is reading, while other forms of using the work should be classified as inconsistent with the nature of the thing. ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 373 was also the first to propose the lack of time limitation of the rights granted and in particular the possibility of including them in the inheritance of the deceased writer - Ehlers, supra note 57 at 87; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 374
- 63 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 170-171 and from the perspective of the literary studies see also Dzwonek, U., Ritterhof, C., & Zimmermann, H. (1974). "Bürgerliche Oppositionsliteratur zwischen Revolution und Reformismus"- F. G. Klopstocks "Deutsche Gelehrtenrepublik" und Bardendichtung als Dokumente der bürgerlichen Emanzipationsbewegung in der zweiten Hälfte des 18. Jahrhunderts. In , *Deutsches Bürgertum und literarische Intelligenz 1750 - 1800* edited by B. Lutz & U. Dzwonek (Metzler), 277.
- 64 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 171 quoting Klopstock's works and letters.
- 65 Klopstock's idea was that the author remains an only proprietor of the work: "...ob es möglich sey, daß die Gelehrten durch so eingerichtete Subscriptionen Eigenthümer ihrer Schriften werden.... Es wird sich bey diesem Anlasse zeigen, ob man darauf hoffen könne, dass das Publicum den Gelehrten, und diese sich untereinander (von dem letzten weiß ich schon jetzt nicht wenig) dazu beförderlichseyen werden, daß sie zu dem wirklichen Besitze ihres Eigenthums gelangen" - quote provided by Pape, supra note 64 at 222 and also by ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 171; Thus, Klopstock focused his model on the author's legal position which had become more important, eliminating publishers as intermediaries in communication between the creator and the audience; ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018 at 171-2.
- 66 ANDERSCH U, DIE DISKUSSION ÜBER DEN BÜCHERNACHDRUCK IN DEUTSCHLAND UM 1700 BIS 1815, (MOHR SIEBECK), 2018.
- 67 Mansfield on the case *Tonson v Collins*; *Millar v Taylor*. Similar questions were asked by Marionand d'Héricourt. In Prussia, a similar argumentation appeared in the statements of academicians from Jena, a comprehensive analysis of the course and development of the (particularly cautious) autonomous concept of intellectual property.
- 68 For example, in the case *Tonson v Collins*, Judge Aston argued that distinguishing the intellectual property from others already in trading becomes certain at a time when such an object (referred to as ideal) is communicated through the press and perceived visually and intellectually by each person; at that moment, an ideal object "transforms" into a distinctive subject matter of ownership rights, and it is not completely devoid of physical characteristics.
- 69 It is noticeable that such attempts have been made in the statements of some of the cited lawyers and philosophers, although in an indirect manner. For example, in the case *Tonson v Collins*, it was pointed out that a distinction should be made not only between the tangible object that incorporates the work and the abstract idea itself, but it would also be necessary to take into account the 'indirect' form, which may not be recorded as a physical copy but has already been communicated at least externally (it has been established). Deazley R, Commentary on *Millar v Taylor* (1769) in *Primary Sources on Copyright (1450-1900)*, edited by BentlyL&KretschmerM, online source, 2008, available at: http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1769
- 70 Zeki S, *The Brain*,127(2)(2001) 71; Zeki S, *Science*, 293(5527)(1998)51.
- 71 Cela-Conde CJ, Garcfa-Prieto J, Ramasco JJ, Mirasso CR, Bajo R, Munara E, Flexasa A, Del-Pozo F, &Maestu F, *Proceedings of the National Academy of Sciences of the United States of America*, 110(SUPPL2)(2013) 10454. <https://doi.org/10.1073/pnas.1302855110>; George JM & Zhou J, *Journal of Applied Psychology*, 87 (4)(2002)687.
- 72 Donald M, *The artful mind: Cognitive science and the riddle of human creativity*,(2006) 3; George JM & Zhou J, *Journal of Applied Psychology*, 87 (4)(2002)692; Oldham GR & Cummings A, *The Academy of Management Journal*, 39 (3) (1996) 607, <https://doi.org/10.2307/256657> .
- 73 Amabile TM, The social psychology of creativity: A componential conceptualization. *Journal of personality and social psychology*, (1983)45 (2) at 357; Bonnardel N, Piolat A, & Le Bigot L, The impact of colour on Website appeal and users' cognitive processes. *Displays* (2011),32 (2), p. 69-80. <https://doi.org/10.1016/j.displa.2010.12.002>; Van Eechoud M, The work of authorship, online source, available at: https://doi.org/10.26530/OAPEN_503030 recently confirmed also by Folgerø P, Johansson Ch & Stokkedal LH, The Superior Visual Perception Hypothesis: Neuroaesthetics of Cave Art, *Behavioral Sciences* (2021) 18 (3).
- 74 Locher PJ, *The Cambridge Handbook of the Psychology of Aesthetics and the Arts* (Cambridge University Press), 2014, 221, <https://doi.org/10.1017/cbo9781139207058.013>; Nalbantian S, *Interdisciplinary Science Review*, 33 (2008) 357; Hughes J, *Cardozo Law Review*,36(2015) 1227, noting the role of cognitive and psychological functionality in trademark law.
- 75 in the case of a layperson - below, in the case of an expert - above the questioned threshold

- 76 Ramachandran VS &Hirstein W, *Journal of Consciousness Studies*, 6(1999) 15.
- 77 Brožek B, *The Legal Mind: A New Introduction to Legal Epistemology*, (Cambridge University Press) 2019.
- 78 Evans TM, *American Intellectual Property Law Association Quarterly Journal*, 47(2) (2019)219.
- 79 Evans TM, *American Intellectual Property Law Association Quarterly Journal*, 47(2) (2019)219.
- 80 Nadini M, *Scientific Reports*, 11 (2021)20902.
- 81 Sunyaev A, In *Internet Computing* (Springer) 2020, 265.
- 82 KoH, Son B, Lee Y, Jang H, & Lee J, *Finance Research Letters*, 47(2022) 102784.
- 83 e.g. the very first popular example of NFTs is CryptoKitties, a collection of artistic images representing virtual cats that are used in a game on Ethereum; Nadini M, Mapping the NFT revolution: market trends, trade networks, and visual features, *Scientific Reports* (2021) 11 at 80.
- 84 Okonkwo IE, *International Journal of Law and Information Technology*,29 (4) (2021) 296; Dolganin AA, *Law Journal*,2(3) (2021) 46.
- 85 As noted by Nadini M, Mapping the NFT revolution: market trends, trade networks, and visual features, *Scientific Reports* (2021) 11; in July 2020, the NFT market started to grow and attracted a great deal of attention in March 2021, when the artist known as Beeple sold an NFT of his work for \$69.3 million at Christie's — presenting it as the third-highest auction price achieved for a living artist, after Jeff Koons and David Hockney.
- 86 Devlin J, (2021), <https://www.bbc.co.uk/news/business-56413186>, (accessed on 20 May 2024).
- 87 although the study and data so far are scarce at the moment: Pinto-Gutiérrez Ch, The NFT Hype: What Draws Attention to Non-Fungible Tokens?, *Mathematics*, 10 (335)(2022).
- 88 Sibley F, Originality and value, *The British Journal of Aesthetics*,25(2)(1985) 169.
- 89 Sibley F, Originality and value, *The British Journal of Aesthetics*,25(2) (1985) 169.
- 90 Liu D, *European Intellectual Property Review* (2014) 1; see also *Feist Publications, Inc v Rural Telephone Service Co, Inc* 499 U.S. 340; 111 S. Ct 1282; 113 L. Ed. 2d 358 (1991).