

Book Review - Christian Gero Stallberg, Urheberrecht und moralische Rechtfertigung (2006)

*By Matthias Leistner**

[Christian Gero Stallberg, *Urheberrecht und moralische Rechtfertigung*, Duncker & Humblot Berlin (2006), ISBN 3-428-12024-8, pp. 356, EUR 98.00]

A. Introduction

The unquestionable development towards an information society has brought about technological, economic and sociological changes which put “traditional” copyright law under pressure. In particular, the protection of new, more mundane subject matter, such as computer programs and databases instead of genuinely creative works on the one hand, and the vast expansion of possibilities to illegally copy protected material in digital form on the other, have led to a critical development. Broad circles of the public nowadays tend to view copyright law as a mere, hardly justifiable restriction on the “brave new world” of freedom of information on the internet.

This development calls for new, more reliable foundations for copyright law.¹ Ideally, such foundations would bridge the gap between the traditional continental European *Droit d’auteur*-system and the Anglo-American copyright tradition. While the former is deeply rooted in an individualistic moral justification which centres around the author and/or his or her relationship to the creative work, the latter follows a more instrumental notion of copyright law, justifying the concept mainly with reference to the collective gain, which allegedly results from setting incentives for creative work by granting an exclusive copyright to their authors/publishers. Intuitively, both these approaches nowadays tend to be unsatisfactory: The author-centred European underpinnings of copyright law seem somewhat outdated in a

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¹ See further the recent attempt to base copyright on a synthesis of individual and utilitarian justifications by Matthias Leistner & Hansen, *Die Begründung des Urheberrechts im digitalen Zeitalter – Grundlagen, Gestaltungsmöglichkeiten und Grenzen*, 62 JURISTENZEITUNG (JZ) (2007) (forthcoming).

world in which mundane subject matter is protected by copyright law and in which the publishers play a more and more central role, as opposed to the individual authors whose interests have to be distinguished thoroughly from the interests of the publishers, which usually hold most or all of the use rights in a published work. The utilitarian underpinnings on their part suffer from substantive doubts underlying the alleged methodical assumptions of these methods, such as the incentive paradigm at the basis of justification of copyright law from a utilitarian point of view.

Stallberg's dissertation from Münster University thus comes at the right moment. He discusses possible foundations of copyright law in moral philosophy (and their respective implications for legal doctrine) in a broad, comprehensive and highly systematic manner. Surprisingly, in Germany the latest academic discussions and developments in this field – in particular from U.S. doctrine – have not been reflected upon yet. Hence, *Stallberg's* work with its comprehensive discussion of the different approaches of moral and political philosophy towards copyright law, and the systematic, critical discussion of all these approaches, is of extremely high value for the German academic landscape.

In fact, *Stallberg's* thesis comprises – very generally – two main parts: In the first part, *Stallberg* impressively de-constructs the existing philosophical foundations of copyright law. In the second part, he presents his own “universal-transcendental” theory, which – as an approach rooted in the theory of speech acts and their illocutionary force by *John Searle* – is at the same time clearly inspired by the “linguistic turn” – a strand of thought of German 20th century philosophy, whose fountainhead was *Jürgen Habermas*. Both parts deserve some further discussion.

B. Stallberg's Deconstruction of Existing Theories

In the de-constructive part, *Stallberg* chooses a highly elaborate systematization of existing moral justifications of copyright law, in order to de-construct the existing approaches one by one. Fundamentally, *Stallberg* distinguishes between individualistic and collective approaches. Within the first group he further classifies a labor-based justification (where *John Lockes* famous theory of property obviously plays the main role²), personality based justifications (where, equally obvious, the central part is based on *Hegel's* theory of property), and work-based justifications

² Remarkably, *Locke* himself never intended to apply his approach to non-physical property, as PASCAL OBERNDÖRFER, *DIE PHILOSOPHISCHE GRUNDLAGE DES URHEBERRECHTS* (2005), has pointed out recently in his study on philosophical foundations of copyright which is essentially limited to an analysis of *Locke's* labour theory.

(where *Kants* author theory is discussed). One by one, these theories are discussed with a focus on their advantages and disadvantages and, one by one, *Stallberg* deconstructs these justifications in an analytical way, thus showing impressively, and *cum grano salis* convincingly that individualistic theories alone are not valid to justify the existence of copyright, let alone to give strong guidance with regards to the “design” and interpretation of modern copyright law.

As for collective justifications, *Stallberg* distinguishes between merely negative approaches (*schränkenbasierte Rechtfertigung*, which cannot justify more than the moral *possibility* of copyright law, not its moral necessity), the notorious efficiency-based arguments of the proponents of the law and economics movement in different facets, and a democracy based justification (oriented along the lines of *Netanel's* Democratic Paradigm). While *Stallberg* criticizes most of the individual justifications for *internal* reasons of inner contradiction, as for the collective justifications – apart from some other reasons focusing on the different goals for the optimization process – he mainly emphasizes that the incentive paradigm underlying all these approaches (notwithstanding certain differences in terminology and methodology) must be regarded as being of rather dubious validity. In particular, since empirical proof supporting the incentive paradigm is lacking, the efficiency based as well as the democracy based justification eventually have to be regarded as arbitrary.

With respect to all of these considerations, which could be discussed here in much more detail and which are of high analytical quality, *Stallberg* all in all deserves praise for a very exact discussion and deconstruction of recent approaches to justify copyright law in moral and political philosophy. The highly systematic approach of *Stallberg* allows for a very precise discussion, and a highly accurate consideration of all recent approaches and their various differences. Sometimes, however, the price which *Stallberg* pays for systematization might be a certain reduction in his view on some of the even more prominent approaches. E.g. the labor theory by *John Locke* might well be regarded (and re-constructed) as a metaphorical and deontological version of a genuinely utilitarian approach;³ *Stallberg* also sees the utilitarian strand of thought in *Locke*, however, only to immediately exclude it from his discussion of the labour theory as an individualistic justification and to refer utilitarian arguments to his discussion of collective approaches. While this approach undoubtedly allows analytical clarity, it might still tear apart *Locke's* theory, thus excluding a (at least discussion-worthy) utilitarian re-construction of the labour theory.

³ See MATTHEW H. KRAMER, JOHN LOCKE AND THE ORIGINS OF PRIVATE PROPERTY: PHILOSOPHICAL EXPLORATIONS OF INDIVIDUALISM, COMMUNITY, AND EQUALITY (1997).

C. Review of Stallberg's Theory

After having essentially discarded the established justifications for copyright law in moral and political philosophy, *Stallberg* presents his own approach which is rooted in linguistic philosophy. Basing his theory on *Searle's* theory of speech acts and their illocutionary force, he tries to construct a universal-transcendental theory which would avoid the necessity of reconciling the two – seemingly irreconcilable – strands of thought, i.e. the individualistic and the collective justification. However, for his own theory which underlines the role of creativity as a source of multifaceted speech acts, he heavily and openly relies upon the incentive paradigm. Consequently, his own theory suffers from the same major flaw as all the discussed utilitarian theories, as *Stallberg* readily admits. However, this flaw makes his theory arbitrary from a moral point of view. This cannot be regarded as a merely cosmetic blemish but inevitably shakes the very basis of his argument.⁴ Moreover, by employing the theory of speech acts to copyright law, *Stallberg* does not, as he claims, avoid the arguable definition of morally contentious optimization goals (which he criticizes in the utilitarian theory), but rather begs the question by lifting the discussion to another level. However, this linguistic turn, while failing as a principled justification of copyright law for the abovementioned external reason, moreover from the reviewers point of view does not really add essential methodological or heuristic value to the application oriented discussions of copyright doctrines in detail. Consequently, the part of *Stallberg's* thesis which is devoted to detailed consequences of his approach remains relatively short. In particular, it might be suspected that a linguistic theory of copyright law – regarding protectable works as “regular irregularities” which contribute to the development of communication – is too narrow to cover the whole spectre of copyright which – for some other (deontic?, utilitarian?) reasons – does not just protect genuinely “new” forms of creativity but also protects rather mundane, commonplace works. Such works, for example in the field of fine arts, do quite often not genuinely contribute to human communication but rather essentially repeat earlier expressive acts on the basis of individually different means, talents and taste. However, there seems to exist a broad “intuitive” consensus that such works, in principle, should be protected if they reach a minimum level of individuality.

All in all, while *Stallberg* has delivered an excellent and outstanding account of established or currently discussed moral justifications of copyright law, and while

⁴ See Thomas Dreier, *Book Review: Christian G. Stallberg, Urheberrecht und Moralische Rechtfertigung*, 109 *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR)* 128, at 129 (2007); however, with a more favorable assessment Hannes Rösler, *Book Review: Christian G. Stallberg, Urheberrecht und Moralische Rechtfertigung*, 62 *JZ* 185, at 186 (2007).

he has successfully and impressively deconstructed all these theories, his own construction regrettably is not entirely convincing either. From the reviewers point of view this is inevitable since the possibility of a valid *moral* justification of copyright law seems highly dubious, while a *political* justification of copyright law and its doctrines would have to be based on both individual *and* collective strands of reasoning in order to be stable and operative.⁵

D. Conclusion

By way of summarizing, it can be held that *Stallberg's* work gives an excellent and broad account of established justifications of copyright law in moral philosophy. Remarkably, democracy based justifications, such as *Netanel's* argument, are comprised and analysed in his study and thus add to the recent European discussion, whose actors have not yet paid sufficient attention to these newer theories. His discussion of all the existing approaches reaches remarkable depth and his deconstruction of all currently discussed approaches to justify copyright seems highly accurate from the reviewer's point of view. Although his alternative and overarching theory is not entirely convincing either, his work thus represents an outstanding piece of legal scholarship which comes at exactly the right time in order to hopefully influence economic and political patterns of argumentation in this highly sensitive field.

⁵ See further Leistner & Hansen, *supra* note 1.