

CRC Structural Change of Property, University of Jena
Workshop: The materiality of intangible goods

From privilege to property and back to the privilege?

On the structure and subject matter of IPRs

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IP justifications

Deontological

IPRs are primarily a requirement of natural law and justice.

Utilitarian

IPRs are a form of government regulation.

“Critical”

Allocation of a fictitious commodity

Deontological
justifications

Utilitarian
justifications

Critical
justifications

... all talk about „a“ good that is allocated to an owner

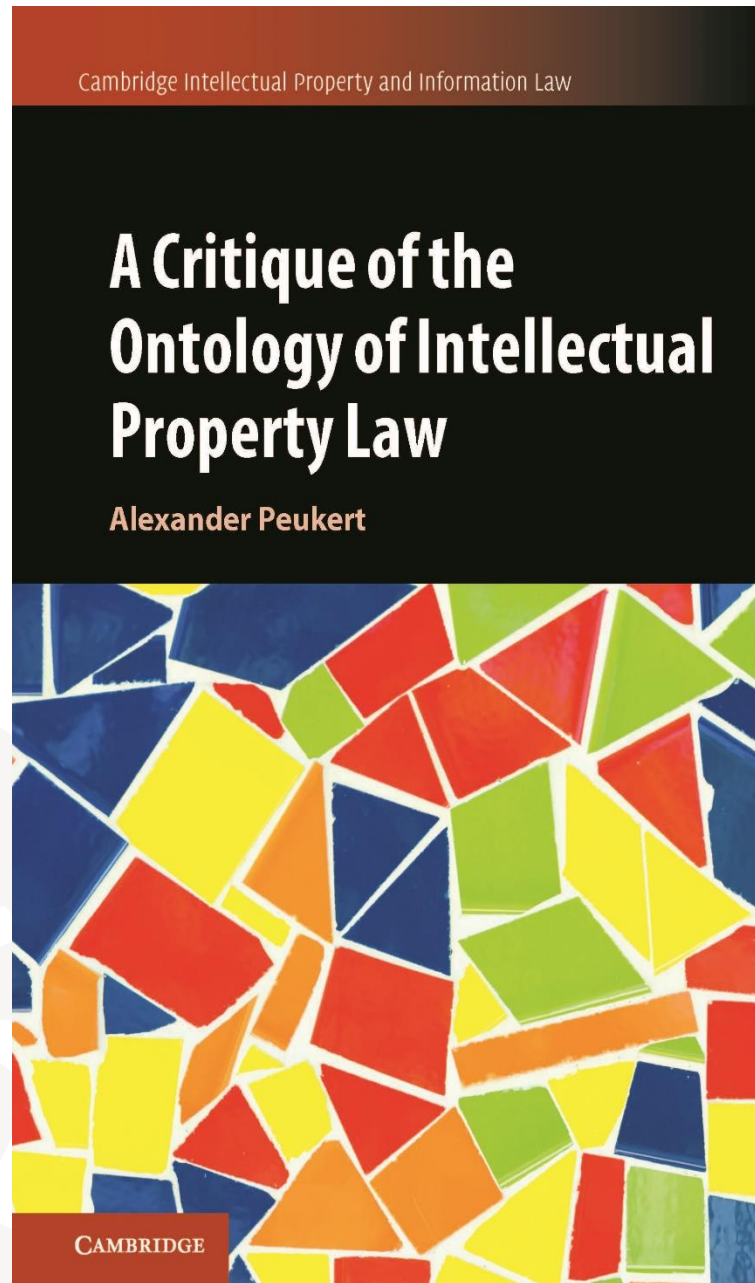
Deontological
justifications

Utilitarian
justifications

Critical
justifications

... all talk about „a“ good that is allocated to an owner

- “The incorporeal property ... is independent from the property in the material object.”
(Art. L. 111-3 French Code de la propriété intellectuelle)
- IPRs “take a public good that is naturally nonrivalrous and make it artificially scarce”
(Lemley)
- “idiotic fiction that intellectual property constitutes property in ideas (patents) or expressions”; but: “in general it does no harm to speak of rights in ideas, or in manuscripts, or in marks, any more than it does to refer to one’s rights in one’s labour”
(Penner)



- Invitation to re-imagine the subject matter of IPRs (the “ontology” of IP law)
 - and thus the justification of IPRs/IP laws
- Is there an alternative to the current paradigm of the IP object?
 - Yes, an action and artefact-based understanding: IPRs are exclusive rights to copy and otherwise use certain, reproducible artefacts.

- Cf. privileges to use reproduction technologies in early modern times
 - Privileges to print books etc.
 - Cf. “copyright”: a right to copy, a right in a copy
 - Sir Joseph Yates in Millar v Taylor 1769:
The proposition of property rights in a “set of ideas” is “very difficult, or rather quite wild.”

- Regulation of technologies to reproduce artefacts in the 21st century
 - Legislative enactment of property rights in a liberal democracy under the rule of law
 - But IPRs still function as a privilege to reproduce certain artefacts
 - The book/copy of the 21st century:
 - **Data**, defined as
 - “**any digital representation** of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording;” (Art. 2(1) EU Data Governance Act, Art. 2(1) EU Data Act Proposal)
 - But see UK National Data Strategy 2020: “Data is notoriously hard to define ... When we refer to data, we mean **information about people, things and systems.**”

Two ontologies of IP



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graph TD; A[Two ontologies of IP] --> B[Abstract IP object (property paradigm)]; A --> C[Actions and artefacts (privilege paradigm)];
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Abstract IP object
(property paradigm)

Actions and
artefacts
(privilege paradigm)

- Implication I: Change of perspective: from the allocation of fictitious objects to the real-world regulation of
 - Innovative/entrepreneurial activity
 - vis-à-vis certain resources and technologies

Implication II: the more abstract the subject matter, the broader the scope of IPRs, e.g. copyright:



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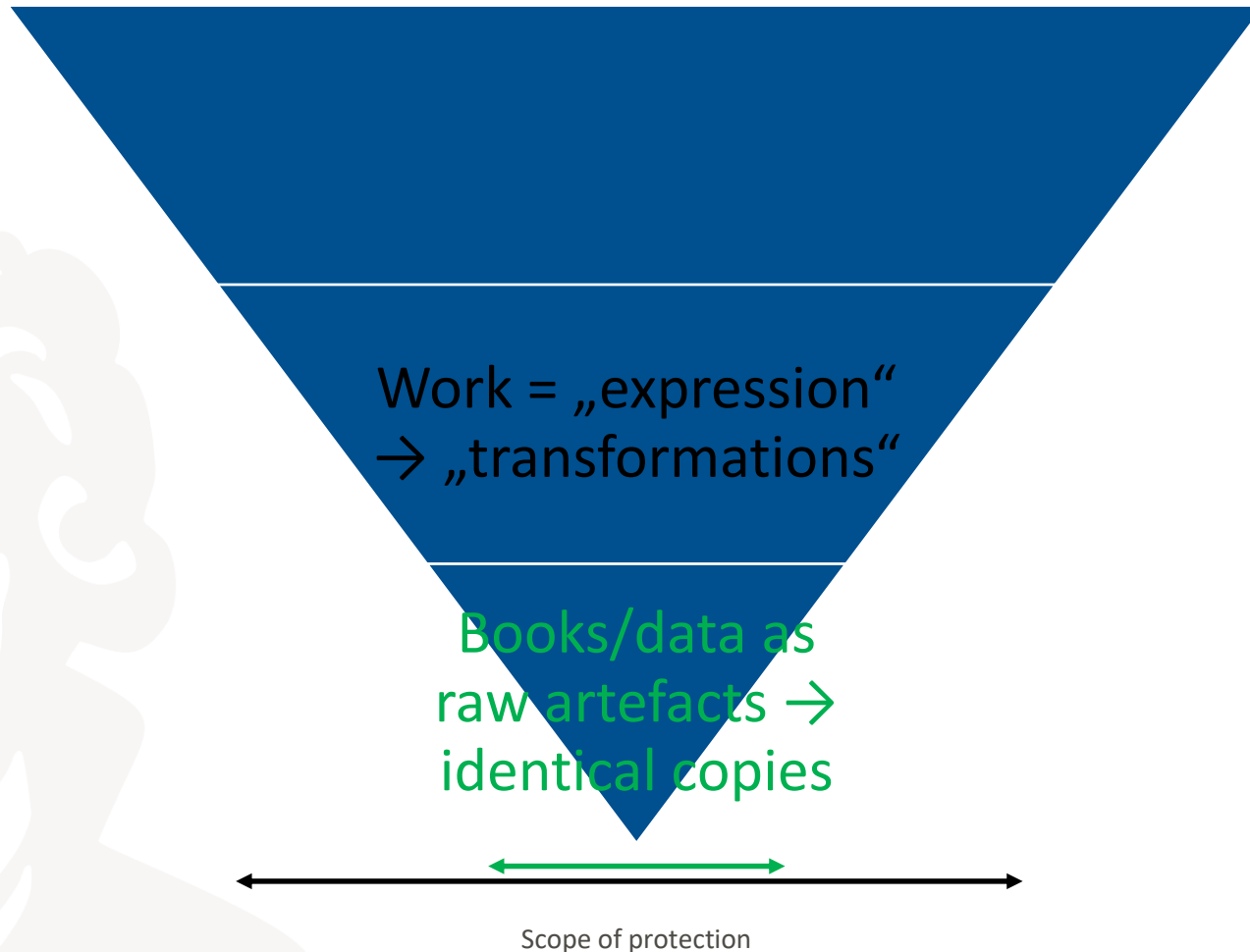


Books/data as
raw artefacts →
identical copies

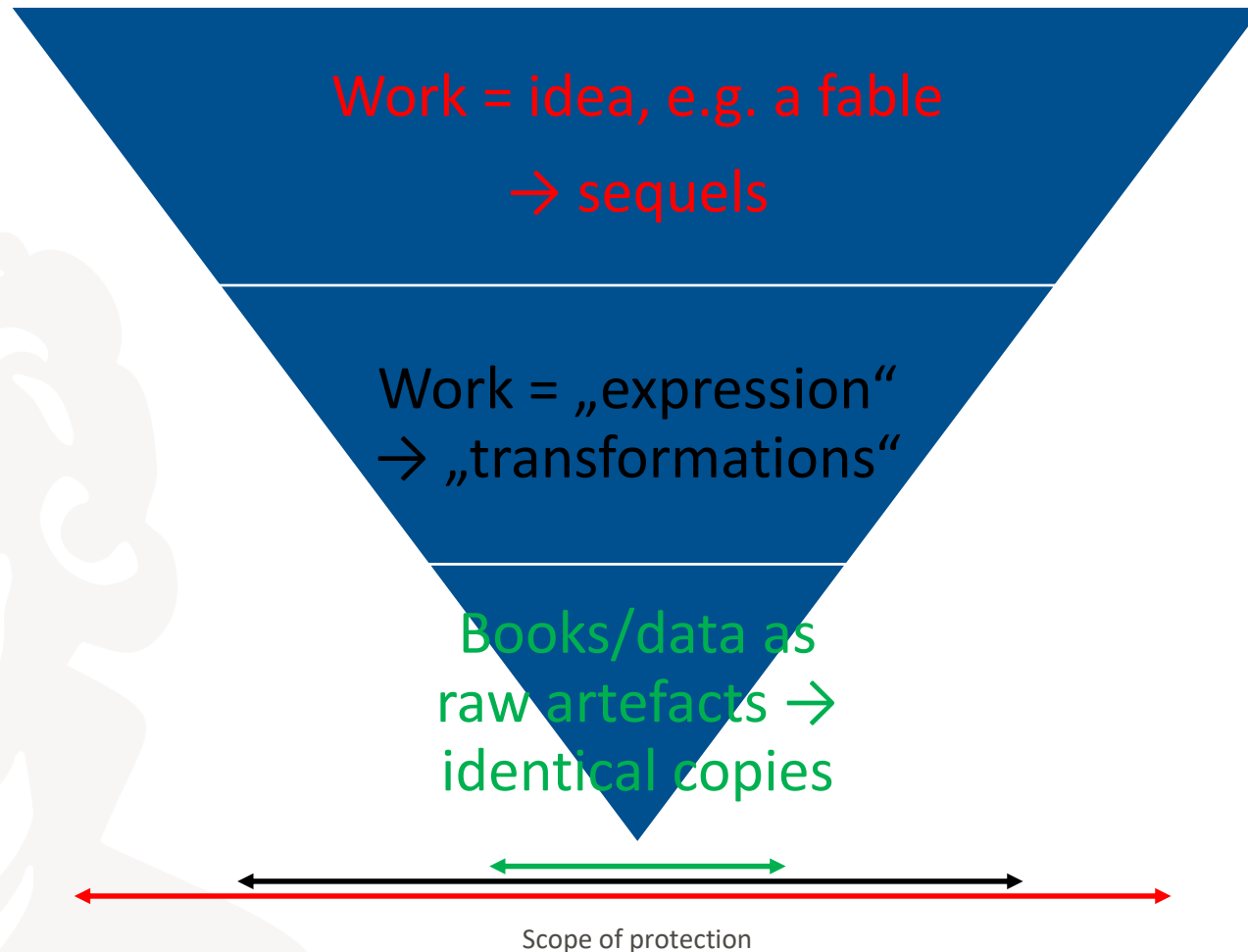


Scope of protection

Implication II: the more abstract the subject matter, the broader the scope of IPRs, e.g. copyright:



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- Implication III: The paradigm of data regulation
 - From the protection of non-personal data ...
 - 1996-2017
 - to data access/sharing regimes:
 - “It is necessary to improve the conditions for data sharing in the internal market” (Data Governance Act)
 - “In order to respond to the needs of the digital economy ..., it is necessary to lay down ... who ... is entitled to access the data generated by products or related services, under which conditions and on what basis.” (Data Act Proposal)

Two ontologies of IP

Abstract IP object
(property paradigm)



Actions and
artefacts
(privilege paradigm)