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Reflections on the concept of the work

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- From a **legal perspective**, IP rights (IPRs) are very similar to property rights in movables/immovables (real property – *Sacheigentum*)
  - Subject to the same fundamental right to property
  - Legal structure is the same: exclusive rights in a property (good) that can be owned
    - Rights are transferrable (market/capitalism)
    - Infringements trigger remedies (tort/delict)
- Semantic identification of both types via **property rhetoric**

- But **differences** between IPRs and ownership in real property
  - Limited term of protection (patents, copyrights)
  - More limitations/exceptions to IPRs (e.g. private copying, fair use, fair dealing)
  - Different philosophical justifications (Locke, Kant)
  - Different basic principles
    - All real property is owned by someone or may be lawfully appropriated if relinquished by the former owner
      - Ownership as the basic rule
    - Knowledge and other intangibles are owned by no-one (public domain), unless and as long as IPRs allocate them to someone
      - Non-ownership as the basic rule

- **Conventional explanations** of these differences:
  - Property rights differ according to their subject matter (movables, immovables, intangibles)
  - IP is a public good with strong significance for those who are excluded
    - Use of IP is non-exclusive and non-rival
- But **questions remain**
  - Different justifications and basic principles if IP is a good that can be owned?
  - The notion of public goods in mainstream economics
    - A lighthouse = A poem

- Thus: **What "is" "IP"?** Is it a "good" that can be owned?
  - Analysis limited to the artifact "work" (applicable to invention, design, brand, phonorecord etc.)
  - A question rarely asked in the legal profession, and if answered, then in a realist manner: E.g. U.S. Supreme Court, Microsoft v. AT&T, 2007:

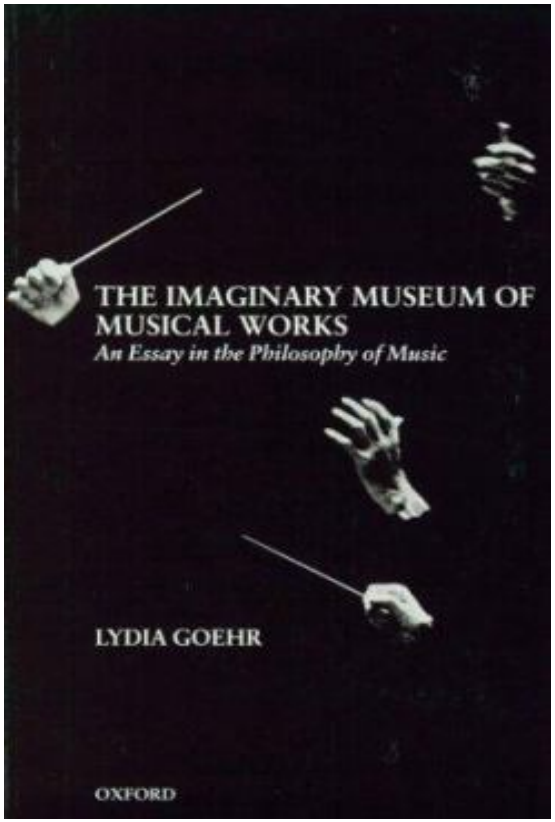
"Software, the set of instructions, known as code, that directs a computer to perform specified functions or operations, can be conceptualized in (at least) two ways. One can speak of **software in the abstract**: the instructions themselves detached from any medium. (An analogy: The notes of Beethoven's Ninth Symphony.) One can alternatively envision **a tangible "copy" of software**, the instructions encoded on a medium such as a CD-ROM. (Sheet music for Beethoven's Ninth.). ...

Abstract software code is an **idea without physical embodiment** like notes of music in the head of a composer. Windows abstracted from a tangible copy no doubt is information - a detailed set of instructions - and thus might be compared to a blueprint (or anything containing design information, e.g., a schematic, template, or prototype). What retailers sell, and consumers buy, are copies of software. ..."

- A **thought experiment**: The lost poem.
- Possible answers
  - (1) The poem in the abstract is still there, it exists distinct from the particulars that instantiate it (Realism).
  - (2) "The" poem "exists" only in its manifestations/fixations (Anti-Realism)
    - In human brains/mental processes
    - On media/devices like paper, canvas, computers
    - If all of these embodiments/instantiations are lost, "the" poem does not exist any more.

- It follows that "the" work is a **common term** for the original and copies that in our sensation share properties *significant enough* to deserve a common denominator
  - The tangible book (concrete artifact)
  - The name for its content (abstract artifact level 1)
  - The work-concept as such (abstract artifact level 2)
- All these **artifacts exist as words in natural languages**
- **Social construction of these words** and their meaning by social/communicative practices
- **Social relevance** of these words and practices
- The work in the abstract exists (only) as a word.

- The historical process of constructing "the" work as a good that can be owned (abstract artifact level 2)



- **Feudal privileges** referred to activities (printing of books, working or making of new manufacture)
- **1709 Statute of Anne:**
  - The »sole right and liberty« of »printing… Books«
- The construction of "the" work in the **second half of the 18th century**
  - Romantic movement in literature and the arts: the »author«
  - The problem of translations and other alterations
    - Since these adaptations were created by third parties, the original author could not claim ownership on the basis of her labor (Locke) or her speech to the public (Kant).
  - The construction of the concept of the work in the abstract as a "structurally integrated whole" that is demanding *Werktreue* (Goehr)
  - The work-concept as a *Kollektivsingular* (Koselleck) of the late 18th century describing both a process (working an invention, to work on a painting) and a work-result on a high level of abstraction, allowing modern societies and capitalist markets to operate
  - **Romantic aesthetics and shifts in cultural production** brought about the owner and the distinct object that any clearly defined property right and market order requires.
- Implemented for the first time in the **French revolutionary acts on patents and authors rights** of **1791 and 1793** (property rights (propriété) in an invention or work)
- **Transplanted** to the rest of Europe in the 19th century (Germany 1809, UK 1851)
- **Globalized** via the »Berne Convention for the Protection of Literary and Artistic Works« 1886

- **Conclusions**
  - Abstract artifacts level 1 and 2 (Goethe's Faust/the work-concept) = terms/signs for reproducible artifacts (e.g. books, digital files, sounds, phonograms etc.)
  - Copyright does neither allocate the reproducible particulars (the book, the digital file) nor their common denominator (Goethe's Faust, abstract artifact level 1) nor the work-concept as such (abstract artifact level 2)
  - Copyright (and other IPRs) prohibit the use of
    - everyone's mental processes and devices/machines
    - for purposes of reproduction/adaptation of books, digital files, sounds, phonograms etc.
  - "Copy-right" comes closer to this truth than Urheberrecht/IPR (let alone "Geistiges Eigentum")

- This understanding helps to explain the differences between IPRs and ownership of real property and a number of fundamental problems with IPRs:
  - The justification problem
    - Contractual (relative) rights to the performance of certain obligations by a certain debtor are acceptable (e.g.: paint that picture!)
    - But exclusive rights to certain generic activities are problematic
  - The conflict problem
    - IPRs prohibit others to freely employ their human capacities and the use of their devices/machines
    - Thus systematic conflict between IPRs and fundamental freedoms
  - The non-rivalry problem
    - There is no distinct good that is used simultaneously by several people
    - Instead, they use their own capabilities as humans and their own machines

- Further explanations:
  - The scarcity problem
    - Human capacity of remembering and devices to store and reproduce information are (less and less) scarce
    - But not the capacity to employ these tools in so far as they are available.
  - The expansion problem
    - There are more and more technologies of reproduction
      - Digital instantiations of any information/data
      - Other reproducable artifacts (human genome, 3d printing)
    - Every reproducible artifact is signified with a common denominator (= abstract artifact level 1 and level 2)
    - The more technologies of reproduction, the more common denominators and thus candidates for IPR protection
    - Technology – Language – Commodification