

INTELLECTUAL PROPERTY AND HEGELIAN JUSTIFICATION

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Property is a contingent fact within our world. It is neither ordained by nature nor is necessary for human survival. So the development of virtual worlds gives us an excellent opportunity to experiment with the legal relationships, transactions, and obligations that, in the real world, fall within the category of property. Virtual worlds are places where millions of people come to play, trade, create, and socialize. In this Article, the author examines the most debated legal question raised by virtual world societies. The author makes a modest attempt to explain whether virtual objects might be understood as constituting legal property by taking the Hegelian theory of Intellectual Property as the base of her argument, as according to Hegel, intellectual property need not be justified by analogy to physical property. In fact, the analogy to physical property may distort the very status Hegel ascribes to personality and mental traits in relation to the will. Property is a contingent fact within our world. It is neither ordained by nature nor is necessary for human survival. So the development of virtual worlds gives us an excellent opportunity to experiment with the legal relationships, transactions, and obligations that, in the real world, fall within the category of property. Virtual worlds are places where millions of people come to play, trade, create, and socialize. In this Article, the author examines the most debated legal question raised by virtual world societies. The author makes a modest attempt to explain whether virtual objects might be understood as constituting legal property by taking the Hegelian theory of Intellectual Property as the base of

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her argument, as according to Hegel, intellectual property need not be justified by analogy to physical property. In fact, the analogy to physical property may distort the very status Hegel ascribes to personality and mental traits in relation to the will.

I. INTRODUCTION

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.¹

In Hegel's view, property was an extension of personality. Ownership expanded the natural sphere of freedom for the individual beyond his body as part of the material world. Hegel's conception of property as an extension of personality has been adopted and extended by a number of modern theorists. In essence, these theorists argue that property rights are related either as necessary conditions for, or as connected to human rights such as liberty, identity, and privacy. A simple example is the property interest one has in a wedding ring or a house: rather than being merely property interests, these objects and rights are deeply connected to one's sense of self.

II. HEGELIAN PERSONIFICATION

The fundamental question about property rights concerns the moral justification of any private ownership. In other words, why should we have the institution of property rights at all? Why should anyone own anything? What interests are protected by the institution of property rights? These questions look at the nature of private property rights and what is gained, and possibly lost, by having such a system. Questions of private ownership usher in questions of the justice or injustice of the inequalities that result from systems of private property rights.

Hegel gave a new perspective which no earlier theorists had propounded. Hegel's theory is based on incidents of property and ownership. He looked into the realm of private property rights to substantiate his argument. In this section, I have tried to highlight the same.

¹ William Blackstone.

Like all social institutions, property rights are justified by the benefits they bring to individuals in society. The dominant understanding of this justification for all types of property has been an economic formula property rights are the most efficient means to produce social wealth.²

Property rights, it was observed, are a means to protect the personality interest or “personhood” of individuals; this seemed especially true with intellectual property rights that are draped over creations of the human mind.

The personhood theory of property focuses on the relationship between property and personality. Property, it is argued, is justified because it is conducive, perhaps necessary, to the development of personality.³ Personhood theory has been characterized as an alternative theory of property in the sense that the analysis is, to some extent, outside the mainstream of judicial, if not philosophic, thought.⁴

Individuals in communal societies often have their interest in preservation well cared for as long as they fit the group’s conception of the good. If, however, they want to diverge from the communal program and venture out on their own path, or express their own individuality, private property will facilitate that venture. Kant, and later Hegel, saw this, the notion that respecting private property is important for respecting personhood.⁵

This alternative philosophy of property and its relationship to personality independent of natural rights or utilitarian justifications was developed by Hegel in the early nineteenth century, based on his conceptions of will, freedom, and personhood.⁶ Hegel believed that each person has both an internal and an external existence. One’s internal existence is her will, and one’s external existence is her sphere of freedom. Hegel stressed the importance of self-actualization, or the lack of dependence on another. However, self-actualization and the extension of one’s sphere of freedom are achieved, in Hegel’s view, not by withdrawing from the external world but rather by “overcoming it,” or putting one’s will into external objects - into property. Property, then, is central to Hegel’s theory of the fully self-actualized free person; it is the essence of personality.

² See Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT LJ 81(1998).

³ See STEPHEN R. MUNZER, A THEORY OF PROPERTY 18-19 (1990) ; Richard S. Gruner, *Intangible Inventions: Patentable Subject Matter for an Information Age*, 35 LOY. L.A. L. REV. 355 (2002).

⁴ See Steven Cherenksy, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 597 (1993)

⁵ See Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L.J. 391 (1999).

⁶ See G.W.F. HEGEL, HEGEL’S PHILOSOPHY OF MIND 382 (1971).

The rules of Hegelian property law flow directly from the Hegelian conception of property.⁷ To make a thing one's property, one must be the first to take actual possession of the thing, or the first to mark the thing as one's own Property, in the form of ordinary external things, is alienable, but property which forms an essential element of personality must be inalienable.

Western philosophical discussions about property invariably pay homage to philosophers such as John Locke and George Wilhelm Friedrich Hegel, whose ideas lay a foundation for modern Western views of property theory.

III. INTELLECTUAL PROPERTY FROM HEGELIAN PERSPECTIVE

In this section, I have tried to justify the claim for Intellectual property as a legal property based on the Hegelian theory of invention as a personality extension of the inventor and thus the inventor having the right *in rem*.

Many proponents of intellectual property law seek refuge in a personality theory of property associated with G.W.F. Hegel. This theory seems to protect intellectual property from potential attacks by a utilitarian analysis that would recognize property only contingently insofar as it furthers society's goals of utility or wealth maximization. Personality theory, in contrast, supposedly offers a principled argument that intellectual property right must be recognized by a just state, regardless of efficiency considerations. Personality theory also seems to protect intellectual property from assault by critics who maintain that it is not a form of "true" property at all. Finally, the theory has also been used to support an argument for heightened protection of intellectual property beyond that given to other forms of property - the Continental "moral" right of artists in their creations is an example.⁸

Hegel's view of property, with its foundation on the notion of the individual and the formation of self-identity, "is perhaps most directly applicable to the narrower notion of intellectual property." Also characterized as the "personality theory" of property, Hegel's rationale suggests that the inventor has imbued the invention with his personality or will, making the process of creation an intensely individualistic one. Hegel postulates that property and ownership are important milestones in the journey toward self-development, and are essential to survival as well. These are ideas that should make sense to emerging countries seeking to justify their protection of intellectual property rights. However, this

⁷ *Id.* as cited in McGregor, *supra* note 5.

⁸ See generally Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property* (Cardozo Law, Legal Studies Research Paper No. 80, 2004), http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=216210. See also Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453(2006).

view may not successfully justify intellectual property rights in cultural systems that are less centered on the individual and more focused on the identity of the community and on the protection of community property. The individualistic underpinnings of patent law, expounded by philosophers such as Hegel, may be difficult to incorporate into more community-oriented societies.⁹

It has long been argued that intellectual property is justified on a number of alternative bases. Economic, labour and spiritual theories have been advanced to justify proprietising intellectual creations.

Intellectual property theorists, following Hegel's and Kant's thoughts on the subject, contend that the personhood theory of property is especially true when the property is a work of art. They argue that works of art are created through a person's mental labor and thus embody more of her individual essence of being than works created through routine physical labor. Since artistic works are part of an artist's very identity, she never should be completely separated from the work. The personhood theory of intellectual property thus supports not only the idea of copyright in artistic products, but also the idea of moral rights.

The debate surrounding the correct theory about why intellectual property exists is not purely academic. It can play a decisive role in the outcome of copyright cases. For example, in *Sony v. Universal City Studios (The Betamax Case)*¹⁰, the Supreme Court held the videotaping of televised programs for purposes of "time-shifting" could be considered fair use.

The discussion of reputation and values shows that open-source software can embody and express personality, but it assumes a capacity for software to express personality similar to that of other copyright subject matter. This assumption requires examination, because software has unique attributes as copyrightable subject matter. Despite the differences, in terms of personality expressing capacity, the similarity is sufficiently close to conclude that the open-source approach carries and expresses personality equivalently to moral rights, even if traditional closed software does not, or perhaps cannot, because the source code is not available to be viewed.

The other moral rights also fit the personality theory. The author or artist needs to control the first publication or disclosure of the work in order to ensure that when the work leaves the author's domain, it embodies the personality-view desired. Once released, the right of attribution ensures that the original author

⁹ See Patty Gerestenblith, *Identity and Cultural Property: The Protection of Cultural Property in United States*, 75 B.U. L. REV. (1995)

¹⁰ 464 US 417 (1994).

or artist retains the degree of association with the work under which the author released it. This is often done by name, but could also be under a pseudonym, or be anonymous. The right to withdraw the work upon remuneration also fits the personality theory. If the artist changes the genre or reworks the image, it may be fitting, from a moral rights perspective, for the artist to withdraw from circulation works that clash with a prior era in the artist's development.

The justifications advanced for intellectual property law have been many and varied. It has been suggested that intellectual property is analogous to tangible property and justifications used to support the propertisation of physical creations can be advanced for intellectual ones as well. A common assertion used to justify propertising intellectual works is that intangible creations require property protection because they are economically valuable works worthy of protection in their own right. This is essentially an economic justification, one premised upon overcoming market failure and market imperfections. Economic justification for propertising creative work is premised on the very foundation that without proper protection authors would have insufficient incentives to write new works unless they are compensated with property rights.¹¹

IV. CONCLUSION

In conclusion, I would like to express my willingness to accept the Hegelian justification of Intellectual property as the only theory propounded to have justified the propertisation of Intellectual investment of a person.

The Hegelian justification of private property is very distinct from all the other propounded theories. Hegel was adamant about the importance of a private property regime for human freedom and flourishing. For Hegel, persons become bound up with external objects; they place their will into objects and those activities take the person, as Hegel put it, from the abstract to the actual. Property and property relations are constitutive of personhood. A very important interest that of respecting personhood is, then, tied to the existence of a private property regime.

Hegel argued that the concept of freedom presupposed the idea of a choosing agent. The more choices that an agent has, the freer that agent is; private property regimes provide individuals with a range of choices that are not possible without private property. Hegel's view is that we will not develop our freedom and individuality without private property. Owning property is extremely important to individuals, since it is only through owning and controlling property that the

¹¹ See Tony Ciro, *The Scarcity of Intellectual Property*, 1 J. INFORMATION L. TECH.(2005), at http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005_1/ciro/.

individual can “embody” his or her will in external objects and thereby start the process transcending the subjectivity of his immediate existence. As a result, even absent any other normative justification for having property rights in these objects, the theory of personality would weigh in favor of recognizing property rights, in order for the self to be realized or other human needs secured.

The person develops his or her personality by controlling, using, or working on external objects. Ultimately, the end is to develop into a mature ethical agent and to establish oneself in a community of ethically developed individuals. For Hegel, property is a means to achieving full moral development so that one may take one’s place in the community. Hegel’s theory does not, however, have the strong dichotomy between individuals’ interests and the community’s interests. Individual rights are important, but for example, private property rights are not conceptualized as “trump cards” over the interests of the community. Certainly, the reason for this aspect of Hegel’s philosophy is that one’s ultimate goal or higher self is consistent with the interests of the state.

It is also true that Hegel thought that intellectual property could be analysed as a form of “true” property and not as a *sui generis* right that is merely analogous to property. However, it is not true that Hegel ascribes any special role to intellectual property. As such, Hegel’s theory cannot be used to support the proposition that the state must recognize intellectual property claims, only that it may do so. Moreover, the Continental moral right of artists is inconsistent with Hegelian analysis of property.

The Hegelian justification deals with the meta-physical status of the property created by the author as it is the embodiment of his will and spirit. Therefore the author has property rights “*in rem*”. The moral rights of authors over Intellectual properties can be very well be justified by the Hegel’s theory.

