Theoretical Perspectives of a One Right System – A Kantian Approach

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Helsinki – 2 October 2008

I. Introduction

To find a unitary ground on which a One Right System may be founded seems to be an extraordinary difficult task. Not only the different rationales, which underlie each single right, but also the fast legal, economic and technical developments during the last decades led to a more and more specialized and complicated system of intellectual property.

By applying the theory of property of the German philosopher Immanuel Kant (1724-1804), the presentation discusses an approach that could serve as a common theoretical and conceptional framework for a One Right System.

Although the Kantian philosophy is very famous and received international scholarly attention over centuries, his foundation of property was predominantly neglected for a long time – what counts even more for intellectual property. The basic question of the presentation is, whether the different intellectual property rights can be founded and explained by interpreting them as being an emergence of the Kantian notion of the internal and external Mine and Thine. If so, the principle of autonomy and freedom could serve as a unitary ground for intellectual property and therefore as a base for a One Right System. The presentation will investigate this question. It therefore has to verify whether the Kantian theory actually works in the context of intellectual property and its constituent rights, whether there remain particular difficulties that need further attention and what the advantages and deficiencies compared to other, more common approaches are.

II. Requirements for a common theoretical framework

a. Formal requirements

- On the one hand: To comprise the different rights within a unitary framework a theory has to be sufficiently abstract.
- On the other hand: There's a need for applicability, so theories should reside on the middle level of abstraction.
- A total incompatibility with constitutional conditions is to be avoided.

b. Content requirements

- Should there be any intellectual property rights?
- If so, how should these rights be designed?
- Who shall be the owner? Mode of acquisition?
- Boundaries and provisos?
- Detailed theoretical determination of law?

III. Problems and deficiencies in the current theoretical discussion

a. Need for further theoretical foundation

b. <u>Economic Theory</u>

- Economy and its “Bundle of Rights” picture of property are for the most part responsible for the disaggregation of property rights, so it is questionable, whether and how an economic approach actually is able to reunify IP.
- Normative economic theory conflicts the separation of powers.
- Difficulties with personality rights and moral rights.
- …

c. <u>Labour Theory</u>

- Unilateral automatism of (over-)propertization.
- Problems with Locke’s notion of labour and property.
- *Kant* on labour (Doctrine of Rights, § 15): "When it is a question of the first acquisition of a thing, the *cultivation or modification of it by labour forms nothing more than an external sign of the fact that it has been taken into possession,* and this can be indicated by many other signs that cost less trouble.
- Though almost all adherents of the Labour Theory accept limitations of acquisition (“enough and as good” and “waste condition”) the fellows of the one acquiring find themselves on the level of supplicants.
- …

IV. Textual Sources: Immanuel Kant (1724-1804)

- “Of the Injustice of Counterfeiting Books” (1785): An essay within which Kant justifies the protection of the author.
- “The Doctrine of Rights” (1796): The Exposition of Kant’s philosophy of law, including his theory of property.

V. General property theory according to Kant *–some aspects–*

- *Kant* (Doctrine of Rights § 1): “Anything is ‘Mine’ by right, or is rightfully mine, when I am so connected with it, that if any other person should make use of it without my consent, he would do me a lesion or injury.”
- Central notion: Freedom – which is the independence of the will from the will of others in respect of that which one possesses.
- Precondition of use: possession.
- Without possession – no lesion. Therefore the conception of possession is the crucial point:

a. <u>Unproblematic: Empiric possession – the innate rights to what is physically possessed.</u>

Kant (Doctrine of Rights, § 6): “[…] namely, that if I am the holder of a thing in the way of being physically connected with it, any one interfering with it without my consent (as, for instance, in wrenching an apple out of my hand) affects and detracts from my freedom as that which is internally mine; and consequently the maxim of his action is in direct contradiction to the axiom of right. The proposition expressing the principle of an empirical rightful possession does not therefore go beyond the right of a person in reference to himself.”

b. Problematic: Intelligible possession – an acquired right to something that is not physically possessed.

→ How can there be possession without detention?
→ How can I be so connected with something, that if any other person should make use of it without my consent, he would do me a lesion or injury, although there is no physical relationship between me and the thing? (see the definition of the "Mine" above)
→ Yet, there must be such a possession, because otherwise one would be depending on the things themselves. Freedom would be conditioned by empiric circumstances in space and time, which contradicts the notion of right.
→ Without intelligible possession men's freedom would be very restricted. Complex plans, that exceed the range of merely physical possession, would hardly be viable.
→ *Kant* (Doctrine of Rights, § 5): "The external Mine is anything outside of myself, such that any prevention of my use of it would be a wrong, although I may not be in possession of it so as to be actually holding it as an object. I must be in some kind of possession of an external object, if the object is to be regarded as Mine; for, otherwise, anyone interfering with this object would not, in doing so, affect me; nor, consequently, would he thereby do me any wrong. Hence, according to § 4, a rational possession (possessio noumenon) must be assumed as possible, if there is to be rightly an external Mine and Thine."

VI. Intellectual Property theory according to Kant: the unitary ground

a) Analogy for intellectual property?

- Comparability of intellectual and physical property?
- Are differences irrelevant?
- Are the arguments transferable?

b) Contra

- Kant (1785): Of the Injustice of Counterfeiting Books.
- Kant seems to have a narrow notion of intellectual property rights.
- Kant's notion of property.
- "Thingification" of Intellectual property.

c) Interpretation – based on Kant:

- Empiric possession of intellectual objects:

It's not only the physical connection between an object and a person, which justifies the protection of the empiric possession, it's rather the importance of the relationship for the person's free will.

So if the relationship to the apple in my hand is nothing else than my innate freedom, why shouldn't I have a similar, or even equal, relationship to my expressed thoughts.

- Intelligible possession of intellectual objects:

The justification for an intelligible possession concerning intellectual objects follows basically the same arguments:

→ *Kant* (Doctrine of Rights, § 6): "It is a juridical duty so to act towards others that what is external and useable may come into the possession or become the property of someone."
→ To pursue complex ends, the possession of intellectual objects, e.g. an innovation, may be necessary.

VII. Application of the Kantian framework on Intellectual Property Rights

a) Empiric Possession

What kinds of Intellectual Property Rights can be understood as empiric possession and therefore as belonging to a person's innate right?

[possible examples]

b) Intelligible Possession

What kinds of Intellectual Property Rights can be understood and justified as intelligible possession and therefore as acquired rights?

[possible examples]

VIII. Conclusion

The examination of the Kantian theory of property shows, that it is possible to found a system of intellectual property upon the notion of freedom. Although it's questionable whether such an attempt can be traced back to the original Kant, there are good arguments to apply the Kantian framework of property on intellectual goods. In this case, the Kantian approach entails some preferable benefits, which distinguish it from other, more common theories of intellectual property.
First of all the Kantian approach actually justifies the institution of intellectual property, yet without ignoring the general will. By differentiating between the innate physical possession and the acquired intelligible possession it's possible to state clearly how far natural law claims actually reach – which seems to be especially a problem within the IP-debate. Furthermore, it provides an abstract framework that unifies and systematizes different rights under one commensurable element: Freedom. In doing so, it avoids labour-mysticism, as well as difficult empiric questions like utility, need or welfare.[1]
Yet, there are also problems and deficiencies. To mention here just two: If one hopes to receive detailed normative guidelines from the theory, he might be disappointed. Beyond the institutional justification Kant refers to the public legislative power not only to secure property, but also to determine its contents.[2] Furthermore, the preceding interpretation of the original Kantian theory of property could lead to a "thingification" of intellectual property, which might obscure the modern conception of property rights. Although Kant doesn't need the empiric "thing" to justify his theory (concept of reason) his concept of law refers to real items in order to concretize its area of application.[3] That provokes the questions, whether there a r e intellectual objects, or whether this problem doesn't matter within a free interpretation of Kant.

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[1] In my conclusion I agree predominately with *M. Schefczyk* (2004), who exposes the chances of applying Kant on intellectual property from a philosophical point of view. In doing so, I disagree with *D. Stengel* (2004), who states, that a theory based on Kant doesn't include the whole range of modern intellectual property law.

[2] See *Kant* (Doctrine of Rights, § 8): „§ 8. To Have Anything External as One's Own is only Possible in a Juridical or Civil State of Society under the Regulation of a Public Legislative Power. [= title of the chapter, M. G.] […] Consequence: It follows, as a corollary, that, if it is juridically possible to have an external object as one's own, the individual subject of possession must be allowed to compel or constrain every person with whom a dispute as to the Mine or Thine of such a possession may arise, to enter along with himself into the relations of a civil constitution."

[3] See *I. Kant* (Doctrine of Rights, Preamble). Furthermore *O. Höffe* (1996) p. 211.

IX. Literature

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