

PRELIMINARY THOUGHTS ON ONLINE PROPERTY (RIGHTS)

by

LUDWIG GRAMLICH*

1. The concept of “online property (rights)” raises two questions since it stems from the combination of two categories: Is there a single, precise legal definition of “property”, and – if it is – where does it come from? And what is the reason for analysing “online” property more exactly? Is it possible or even necessary to distinguish between property in the real world (i.e. “off-line” property) and property in a virtual world (“cyberspace”)?

2. As a traditional legal concept, property describes a specific relationship called ownership between (at least) two (natural or legal) persons in respect of certain things. There are two essential elements of ownership which are both constituents of an absolute and exclusive right. Only the owner is authorized to dispose – in each way he likes to do - of a thing which belongs to him as his property. Contrariwise, any other person is prohibited to disturb this right of the owner, e.g. by destroying or damaging the thing itself (its substance) or by otherwise infringing upon the legal position of a certain owner.

Ownership must be distinguished from possession although both concepts are interrelated since often a person who owns a thing is also the possessor thereof. Possession focuses upon a factual situation and will exist only in respect of physical goods. But on the other hand, possession resembles ownership insofar as once possession has taken place the possessor is authorized to refrain any other person from disturbing it.

Property is a legal concept used differently within various legal contexts and thus gets its shape and content from a lot of (legal) sources. At a national level, property within the area of private law is often defined rather nar-

* Faculty of Economics and Business Administration, Chemnitz University of Technology. E-mail: prof.gramlich@wirtschaft.tu-chemnitz.de

rowly encompassing only the holder of an absolute right in respect of physical goods. Within the field of national as well as international and European public law, property is a basic or fundamental right guaranteed by constitutional law.

The core of „property“ as a legal category and a right (created and guaranteed by law) should not depend upon the context within which the owner is acting. But there have always been differences between property rights according to the substance these rights are based upon, e.g. physical goods, other (financial or monetary) assets, “industrial” or “intellectual” property.

3. Property rights are based upon two essential elements, i.e. exclusion of any other person than the owner(s) from use and sole right of disposal. Property rights, however, do not necessarily have to be shaped in such a distinct way. Even within the area of private law, there are a lot of “minor” property rights which are only guaranteeing certain restricted rights (of use) towards any other person including the owner of the substance so that the legal position of this person, too, is no longer an absolute and full one. In the words of the German Basic Law: Content and scope of property will be shaped by law. Moreover, each legislative act must look at two sides of any property right trying to harmonize the specific interests of an owner with the general interest of a greater public. Thus the owner has no “natural” right to use his own things just as he likes it. For example, if intellectual property rights are recognized as a specific type of property rights because of the particular substance they are related to, authors or inventors may claim essential rights of ownership but they should not be and are hardly ever treated the same way as owners of physical goods or real estate. The very special way of creating intellectual property as well as the interests of the public in promoting social and economic welfare are sufficient reasons for establishing specific legal regimes which provide for rights of access to information and rights of use of intellectual property owned by other persons. Of course, the legitimate interests of those owners must be taken into account by the legislator. So, these persons must normally first be asked to allow the use of their property by others, and they must be paid for it in a fair and appropriate manner.

4. Online property might be seen as a part of other online (fundamental) rights and thus should have the same (general) structure as these rights.

Eligible holders of online property rights might be any person or only a specific group of legal subjects. There seems to be no convincing argument why the scope of owners should be restricted by requiring additional criteria. Thus, also foreigners and juridical persons should be able to acquire, hold and dispose of property (rights) in the same way as natural persons. On the other hand, once ownership has been established in a lawful manner, private persons as well as public entities should respect the rights attributed to an owner of property. Takings and any other interferences are thus prohibited unless permitted by law and for a public purpose if the owner does not give his consent to such a behaviour of other persons.

Another starting point for elaborating upon a concept of online property rights must be the traditional definition and criteria of property, i.e. the existence of a specific close relationship between a single person and a certain thing to treat the latter as "one's own", i.e. as the owner likes it. This concept is founded on a reciprocal acceptance of private and financial autonomy of each owner in relation to other ones as a legal right. But in fact, there have always been various perspectives how to lay down specific kinds of things (substances) to be owned, and these points of view have been modified in the course of human development, reaching from other human beings (slaves) to livestock (animals) and other, non-living natural resources. But ownership has always been based on the fact that a particular person has a more close relationship to a certain thing than others and should thus also be in a better or stronger legal position than these other persons.

5. For sure, there are no online „goods“ in a strict sense, because persons acting online deal with electronic data which are no corporeal or physical things, at least from a legal point of view. The nature of things to be acquired, owned or disposed is thus (partially) differing from traditional concepts of property rights. But that does not mean that there can be no specific concept of online property (rights). In any case, two categories should be distinguished: Online property rights in a wider sense might include or even focus upon physical assets. Only the mode to acquire, own or dispose of them would be changed, from traditional writing to using means of electronic communication. In fact, this hybrid type might better be called online transaction relating to property rights. In a narrow sense, the substance itself of the property right would consist merely of electronic or digital data. Then, legal provisions were needed to shape the content and scope of this

ownership for example by establishing penal or other sanctions for illegal use. In respect of online property of this kind, national laws would hardly be sufficient for that task because of their restricted personal and territorial scope. Thus, only international or transnational rules might be appropriate to provide for an effective solution.

6. At last, formulating and enacting rules on online property rights at an international level should not be reserved to States or intergovernmental bodies. As long as all persons participating in transactions agree on common rules, there is no need to restrict their autonomy (freedom of behaviour). But since even contracts freely entered into might not be performed in a proper way in a lot of cases and caused by different reasons, States will necessarily have to interfere sooner or later to enforce not only duties enacted by law but also contractual obligations. Thus, in the long run online property rights might better be laid down in international treaties or regional supranational law by completing and modifying existing provisions there.