

THE FUTURE OF ONLINE PROPERTY... AND MS ATAMIRZAYEVA

by

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The future of online property is also the future of property. The line between the tangible and the online world, between the first real life and the second virtual life will be much less perceptible; people move in and out of these spaces constantly as a matter of course, in all spheres of life, quite oblivious to the here or there. As the real significance of the differences between these worlds diminishes, law will have to follow suit - whether it likes it or not. There will be legal change; legal adjustments, half-heartedly conceded, after protracted negotiations between the power brokers of the two world orders; the old sluggish, territorial order heavy with real things, traditions and habits of long standing and the new fast-moving touch typing global order driven by the now and tomorrow, unburdened by physicality and embedded rituals.

Property of the old order. Ms Atamirzayeva was unlucky; her cafeteria happened to be next to the US embassy in Tashkent in Uzbekistan. The cafeteria made embassy officials nervous; it compromised the security of the embassy, they said. So in December 1999 they asked Uzbek authorities to erase the cafeteria, and that was done on the very next day. US officials from the embassy watched the demolition. Ms Atamirzaya later asked Uzbek authorities for compensation. But none was forthcoming. Then she went to the US and asked a court there to compensate her for the loss of the property. Again none was forthcoming.¹ The US Constitution may say that 'No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' (5th Amendment) but that did not apply to Ms Atamirzayeva, a foreigner, and her little cafeteria in far away Uzbekistan – never

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¹ Atamirzayeva v. United States 524 F3d 1320 (Fed Cir, 7 May 2008)

mind the fact that the US was instrumental in her loss. Poor Ms Atamirzayeva. She lost her livelihood and she lost property.

In law 'property' is a bundle of rights in relation to a tangible or intangible thing the owner enjoys as against *the rest of the world*, but note the 'rest of the world' bit is legal hocus-pocus. Certainly, if Ms Atamirzayeva could not get any legal decency from her own country, the 'rest of the world' would not be much good to her. The traditional notion of property – i.e. to meaningfully assert 'this is mine' - is inextricably linked to the State, to a State, but not to the world. The State creates 'property' and protects it (or not, as in Ms Atamirzayeva's case). Ownership stops at the State's border, although generally it suits other States to respect the foreign property of foreigners (but, as Ms Atamirzayeva knows, sometimes it does not). There can be no doubt, there is no such thing as 'property' on a world stage. Similarly, notions of property being an inalienable right or natural right of every human being is again a case of legal pomposity; those inalienable, natural, human rights count for nothing if you are a human being from abroad. From Ms Atamirzayeva's perspective there is room for improvement.

Property of the new order. Online valuables – online content, email addresses, domain names, avatars, personal data, not all of which 'property' in the 'proper' sense - have already given the traditional world of property a good shake up from which it will never quite recover. Being intangible, disembodied, like ideas, online valuables can spread like a raging fire with room for plenty of misuse: they can be copied, stolen, distributed, altered, rejuvenated, discarded, sold. Many writers have commented on the impossibility of effectively protecting them. Others have commented on the potential and danger of over-protecting these valuables, leaving no room for the traditional communal sharing of valuables and participating in private property. Fundamental questions on which online valuables ought to be given legal protection in the form of proprietary rights and how far that protection should go, are being asked and that debate is good. Offline property will not go away from this debate entirely intact.

Is there hope for Ms Atamirzayeva whose property proved so vulnerable? It would be too much to hope that the rule of law will in the future never be compromised and abused by politics and by the stronger opponent's self-interest (Ms Atamirzayeva's was up against both Uzbek and US interests). Nevertheless, the legal evolution of online property provides some light on the horizon for the likes of Ms Atamirzayeva. The 'property' concept will for the most part not function online unless recognised at a global level. Unless the owner's rights are truly held 'against the rest of the

world', they might as well not be held at all. In the old world, the authority of the State in respect of property derives from the physical control it enjoys over the valuables on its territory. In respect of online valuables, most have no fixed seat or at best that seat is unreliable and can be changed without much ado and without making the property less useful to its owners or possessors. That makes States rather powerless in respect of much online valuables and the burden of protection, as is the case currently, shifts to private initiatives. More importantly, States will not retain or regain their hold on property absent globalised mechanisms ensuring global recognition of private property. An online cafeteria might – in the future – prove a less vulnerable property than the cafeterias of the old order. What about the coffee...