

REPUTATION OR GOODWILL AS A FORM OF ONLINE PROPERTY?

by

DAN JERKER B. SVANTESSON*

In writing this brief note, I have managed to commit at least two academic "mortal sins". However, having the opportunity to comment on the developments of the concept of property (particularly due to the influence of technological advancements), it was simply too tempting to write a few paragraphs. My first mortal sin is that I have done virtually no research, which of course means that: (1) it is likely my writing adds little to existing knowledge; (2) I am sure to have expressed ideas and concepts already expressed by others, without due acknowledgements; and (3) my arguments largely lack references to supporting materials. My second mortal sin is that, the limited research I have done has involved both "Googling" and the use of wikipedia - both being regarded as poor methods of reliable legal research.

Having presented those "warnings to the reader", I can move on to the substance of my note - can reputation/goodwill appropriately be viewed as property? And more precisely, can a developing concept of online property encompass reputational property?

A sensible starting point for my note, would be to try to describe the concept of online property. However, I am confident that several other notes in this compilation address that issue, and I will, thus, not do so here. Another sensible point of departure would have been to outline what has been said so far in favour of recognising a category of reputational property. However, for the purpose of this note, it suffices to state that such a category of property is not a novel concept. A Google search for "reputation property" gives 1.700 hits (admittedly, some of which relate to the poor reputation of certain property developers).

The topic of my note is important both on a theoretical and on a practical level. As far as the theoretical level is concerned, it is to be noted that the information society creates a greater emphasis on reputation and goodwill.

* Associate Professor, Faculty of Law Bond University. E-mail: dasvante@bond.edu.au

For example, those trading online are clearly dependant on their reputation to a much greater degree than their offline counterparts - online you simply do not have the same possibilities of building trust through means such as location, shop structure etc. Indeed, the reputational focus is nicely illustrated by e.g. eBay's system for grading traders. Put simply, buyers can rate the conduct of the sellers on eBay, and potential buyers can then use those ratings to assess the credibility/reliability of the various sellers.

Furthermore, with a parallel world in the form of Cyberspace, our reputations are being diversified. A person living in a small village, say 50 years ago, would typically have one single reputation - that held in the village. Today, however, many people have a reputation in the town they live, and a completely different reputation online. Indeed, many people have a range of reputations online. For example, in taking part in online discussion communities, a person can build up a reputation that is totally unrelated to that the same person enjoys in a file swapping community. Similarly, the participation in online games such as *Second Life*, will give a person a reputation unrelated to that person's offline reputation and that person's other online reputations. As people often protect their "real" identity online, e.g. through the use of pseudonyms, there is typically no connection between a person's various reputations.

If we are to change the concept of property so as to attach a property protection to online property such as a sword, chair or magic potion used in an online game, it is arguable that we ought to take the opportunity to also assess the possibility of developing a category of reputational property. After all, reputational property share several key characteristics with recognised forms of property.

Reputational property can be sold and transferred. Where a person lends her/his reputation or goodwill to the promotion of goods or services, e.g. through endorsements, she/he is in a sense selling and transferring her/his reputation and goodwill. The fact that the person typically is not losing anything in transferring the reputation (that is, the endorsing person's reputation remains the same after the endorsement) is no different to how a digital product can be transferred without the owner losing anything - that is, the party selling a digital product, such as a sound or movie file, typically still keep her/his own copy.

Further, like other property, reputational property can be stolen. That occurs e.g. where a company falsely claims that a particular person has endorsed their products. In such a scenario, the company is, in a sense, stealing the goodwill and reputation of that person. The law has recognised a

need to address the theft of reputational property and such actions are regulated e.g. through the tort of passing off.

Finally, like most other forms of property, reputational property can be destroyed. The typical way in which that happens is through defamation. The seriousness of the destruction of reputational property is well recognised. Indeed, in some cases reputational property is held in higher regard than physical integrity is. One such example can be seen when comparing the level of compensation awarded in two reasonably recent cases. At first instance in *Ettingshausen v Australian Consolidated Press*, the plaintiff was awarded \$350,000AUS to compensate for the humiliation of having his penis showing in a grainy picture published in a magazine (with the imputation that he had consented to the publication). In comparison, in a case where a young boy had the head of his penis cut off during a circumcision, the plaintiff was only awarded \$275,000AUS - i.e. \$75,000AUS less than what was awarded in the *Ettingshausen* case. (Paul Reidy, *The correct approach to defamation damages*, Communications Law Bulletin, Vol. 13, No. 2 (<http://www.camla.org.au/clb/CLB%20-%20Volume%2013,%20Issue%202.pdf>)) This bizarre comparison, between reputational property and the type of property most men would value amongst their most treasured, shows the tremendous importance that the law attaches to reputational property. It also begs the question of why the law attaches that level of importance to one's reputation. As far as western cultures are concerned, my Google search revealed one possible reason. On a website dedicated to "the Immaculate Heart of Mary", I found a document stating that: "St. Thomas, in attempting to measure the comparative malice of the sin of detraction, decides that whilst it is less than homicide or adultery it is greater than theft. This, because amongst all our external possessions a good name holds the primacy." (*Reputation (as Property)* <http://www.newadvent.org/cathen/12776c.htm>) Christian morals have strongly influenced western law (a fact that often is overlooked when westerners analyse other legal traditions) and it seems likely that such morals have guided the western approach to defamation law. At the same time, it is to be noted that attaching strong significance to reputational property is not a characteristic solely associated with western legal tradition.

When discussing whether a developing concept of online property can encompass reputational property, it is worthwhile to mention how reputational property can compete, and interact, with more traditional property concepts. In a discussion of the different property rights that are associated with open source software, as opposed to traditional software licensing, it has been noted that in open source: "anyone can see the code, but not every-

one can replicate the coder's influence on the community to which she contributes her code. By virtue of her contribution, she builds influence in her chosen code community, and this influence translates into a new kind of IP: reputation property instead of intellectual property. [...] In this new world of open source, reputation property means as much as or more than traditional intellectual property. [...] As an open source creator, then, my options for deriving profit from my creation are not more limited, but they are different. Instead of a limited monopoly guarded by law, I have a monopoly guarded by common sense: buyers want to buy from the most qualified source of support. They pay to have access to the source: not the source code, but the source of the code." (Danese Cooper et al., *Open Source 2.0* (O'Reilly, 2005) (<http://safari.oreilly.com/0596008023/opensources2-CHP-7-SECT-3>)). These observations are relevant, novel and highly interesting. They make clear that current trends and developments ought to make us "think outside the square" when approaching traditional legal concepts such as the concept of property.

In light of the above, it seems that there are sound conceptual reasons to view reputation and goodwill as property. This is particularly so if we conclude that online property is to be viewed as property. At the same time, we must question whether viewing reputational property as a form of property would be beneficial on a practical level. In other words, we must ask what problems, if any, would be addressed by recognising reputational property as a category of property.

One problem area that arguably would benefit from reputational property being recognised as property is the difficulties associated with identifying a competent court and the applicable law in relation to cross-border defamation. Changing the mindset so as to view reputation as property might serve to make countries treat defamation laws less preciously. For example, while the Member States of the European Union has managed to reach consensus as to how the applicable law should be identified in a wide range of property related disputes (see the *Rome Convention*, the proposed *Rome I Regulation* and the *Rome II Regulation*), they have so far failed to reach consensus in relation to defamation and privacy matters. It is questionable whether the freedom of speech issues associated with such areas of law justify their exclusion from important instruments like the *Rome II Regulation*.

By saying the above, I do not mean to suggest that reputational property necessarily can be fitted within the current concept of property. However, the key argument of this paper is still valid; should there be a point in time at which the concept of property is re-evaluated (perhaps due to the emergence of online property), reputational property must be taken into consideration.