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Hegel: The Spirit of Intellectual Property

Introduction

Like Locke, Hegel wrote on property. To a far greater extent than Locke, Hegel's analysis of property and his political philosophy are integrated parts of a dense metaphysical system. No attempt is made here to develop an account of the complex interlinkages between the various parts of Hegel's philosophical system. This is a matter for Hegel's interpreters.

This said, Hegel is too important to ignore when it comes to a treatment of property. Hegel is a philosopher of 'big' ideas. His idealist metaphysic is aimed at an explanation of the world and its major phenomena, such as being, freedom, consciousness and the state. It is precisely because Hegel was dedicated to the task of building a philosophical system that would confer an understanding of major existential, metaphysical and social issues that his philosophy continues to be an important source of ideas and influence for contemporary theorists.¹ This chapter, then, is part of a tradition which looks to Hegel's work in order to acquire

1 A good example of this is the influence of Hegel's work on modern communitarians such as Michael Sandel, Michael Walzer and Charles Taylor. For an excellent account of the modern relevance of Hegel's philosophy, see C. Taylor, *Hegel and Modern Society* (Cambridge, 1979) chapter 2, sections 6, 7, 8 and chapter 3.

a distinctive explanatory perspective on the particular object of analysis – in the present case the institution of property in the form of intellectual property.

Unlike Locke, Hegel is not primarily interested in defending a particular normative structure of community (for example, positive inclusive community). Instead his aim is to reveal the role that community plays in the evolution of individual freedom. The challenge in this chapter is to try to identify the distinctive role and effects that property in abstract objects might have in that epic historical journey. To this end we concentrate on Hegel's explanation of the role of property in those systems that he identifies as being active in the development of the individual will and the state. There is in Hegel a full-blooded analysis of property as a phenomenon of system. The question we ask is whether this analysis offers any insights into the phenomenon of intellectual property in the context of modern societies. Our reading of Hegel suggests that intellectual property may have negative effects on community.

Philosophy, says Hegel, is 'the exploration of the rational'.² But knowledge of the rational requires the identification and elaboration of forms: he rails against those who are preoccupied with the substantive and ignore the fact that philosophical knowledge is based on a unity of form and context.³ The reference to form does not signal the adoption by Hegel of Plato's theory of Forms, a theory which claims that knowledge is based on eternal objective forms of which earthly reality is but a poor imitation. Hegel's problem with Plato's metaphysical scheme is that it leads political philosophy into stasis. Greek ethical life is portrayed as static and one-dimensional. There is no room for the subjective, personal impulse that would inevitably bring change to Plato's objective, rigidly ordered, ethical and political world.⁴ Hegel confronts what he implicitly claims that Plato does not – the brute fact that there is change in the world. The construction of any philosophical system must stay open to that fact.

2 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press, 1952, 1st edn, 1967 reprint), 10. References in square brackets are to the Knox translation. References without brackets are to page numbers.

3 Id., 2.

4 Id., 10.

In Hegel's *Philosophy of Right*, change takes the form of a series of transitions: personality to morality, morality to ethical life, family to civil society, civil society to state. Personality, morality and so on are concepts, but for Hegel concept has a special strong sense; concept includes its actualisation. A concept is fit for philosophical science when it is combined with its determinate expression in the world.

Hence Hegel's claim that philosophy has no truck with 'mere concepts'.⁵ A sociological reading of Hegel is possible because he is concerned with the manifestation of concepts in the world.⁶ In the *Philosophy of Right* these concepts take on the form of systems which, critically, undergo a process of evolution and transformation. Hegel, through his speculative method of philosophy, outlines the forms of those systems important to the 'idea of right' and then maps the direction of their evolution.⁷ The family goes through dissolution and merges with civil society while civil society is made up of independent and interacting systems such as the system of need.⁸ In short, concepts are concretely embodied in the world in the form of social systems.

Within legal philosophy, Hegel's arguments concerning property do not enjoy a great following. There are occasional explorations of his philosophical system, carried out mainly for the purpose of showing how his arguments relate to the justification for property.⁹ Hegel is sometimes said to be offering a distinctive personality theory of property, one which can be contrasted with a Lockean labour theory of property.¹⁰ In the case of certain intellectual property rights such as

5 Id., [1].

6 The perceptive observation that Hegel's political philosophy has some affinity with modern sociology comes from Z.A. Pelczynski, 'Hegel's Political Philosophy: Some Thoughts on its Contemporary Relevance', in Z.A. Pelczynski (ed.), *Hegel's Political Philosophy: Problems and Perspectives* (London, 1971), 230, 238. Ryan makes the observation that Hegel's analysis of property and politics can be read sociologically. See A. Ryan, *Property and Political Theory* (Oxford, New York, 1984), 118–119.

7 For an account of how Hegel's propositions are to be read speculatively, see G. Rose, *Hegel Contra Sociology* (London, 1981), 48–49.

8 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press 1952, 1st edn, 1967 reprint), [181] and [187].

9 See, for example, J. Hughes, 'The Philosophy of Intellectual Property', 77 *Georgetown Law Journal*, 287 (1988); M.J. Radin, 'Property and Personhood', 34 *Stanford Law Review*, 957 (1982); M. Salter, 'Justifying Private Property Rights: A Message from Hegel's Jurisprudential Writings', 7 *Legal Studies*, 245 (1987). On Hegel's recent influence on legal theory, see D. Cornell, M. Rosenfeld and D.G. Carlson (eds), *Hegel and Legal Theory* (New York, London, 1991).

10 J. Hughes, 'The Philosophy of Intellectual Property', 77 *Georgetown Law Journal*, 287, 330 (1988).

copyright, which deals with artistic works, dramatic works or literary works, the link between property rights and personality intuitively seems strong. Thus one tempting strategy is to make Hegel's personality theory serve the task of justifying at least those intellectual property rights in which personality is creatively involved.

There are two reasons why this approach is not adopted here. First, there is a serious question whether the contrast between Locke's theory of property and Hegel's theory ought to be framed in terms of labour versus personality.¹¹ For the theological Locke, the whole point of the connection between labour and property is that it allows individuals to fulfil God's purposes. Property for Locke serves personality. For Hegel, 'property is the *embodiment* of personality'.¹² That embodiment begins with the taking of something not in the possession of others, or, in Locke's terms, taking from the commons. The difference between the two theories perhaps lies less in the specifics of their respective accounts of property and more in the different metaphysical schemes that property is made to serve. Secondly, discussions of Hegel's work which utilise his theory for justificatory purposes also tend to overlook the critical nature of his philosophy, especially with respect to property. Hegel does see a contradiction in individual property ownership (using individual subjective will, which makes something mine, depends on participation with others in a common will that it be mine).¹³ Gillian Rose puts it this way:

The fundamental paradox of Hegel's thought is that he was a critic of all property forms, but his central notion of a free and equal political relationship is inexplicable without concepts of property ... and hence incomplete without the elaboration of an alternative property relation.¹⁴

The rest of this chapter is divided into two sections. The first delivers a general discussion of Hegel's work on property, including some remarks he makes on intellectual property. Property theorists tend to concentrate heavily on what he said in the *Philosophy of Right*. We shall

11 Reeve observes that Hegel's theory is sometimes linked to the Lockean family. See A. Reeve, *Property* (London, 1986), 136–143.

12 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press 1952, 1st edn, 1967 reprint), [51].

13 Id., [71] and [72].

14 G. Rose, *Hegel Contra Sociology* (London, 1981), 80–81.

follow this practice. The second section links the general discussion of property to Hegel's theory of state and examines the implications of this analysis for the phenomenon of intellectual property.

Hegel's Property

Central to the *Philosophy of Right* is the concept of a will which undergoes a series of evolutionary transitions. These transitions begin with a will unmediated by social relations and culminate in the generalised will that has located itself in the context of the state and world history. Will is defined in terms of the unity of two moments of the ego, one 'the pure thought of oneself' and the other 'the finitude or particularisation of the ego'.¹⁵ Hegel completes the definition by saying that will is

the *self*-determination of the ego, which means that at one and the same time the ego posits itself as its own negative, i.e. as restricted and determinate, and yet remains by itself, i.e. in its self-identity and universality. It determines itself and yet at the same time binds itself with itself.¹⁶

In essence, will is thought made articulate in one of two contrasting dimensions. The contrast is between thought in an abstract, universal mode and thought in a particularistic, determinate mode of operation. Operating in these modes, both of which presuppose self-consciousness, the task of the will is to achieve absolute freedom.¹⁷ Freedom is not used by Hegel in the liberal sense of lack of constraints on the volitional agent, but rather is a realised state of being of the agent, a state of being which is situated in a given historical context. Freedom is not, on Hegel's account, just a suitable institutional arrangement for individuals. It also involves their participation in a historical process, a process which shapes their perception and realisation of freedom. The task of the will is carried out in several stages. In the first stage will is conscious of itself as personality, and seeks to impose itself on the external world.¹⁸ Will must also exist in

15 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press 1952, 1st edn, 1967 reprint), [5] and [6].

16 Id., [7].

17 Id., [27].

18 Id., [39].

the form of particular, subjective morality before it finds its ultimate liberation in the state. Hegel's main account of property is to be found in the first stage of the will's development when will manifests itself as personality.

The mind for Hegel is free and its personality begins when it has self-knowledge unhindered by any restriction.¹⁹ This universal but bare form of freedom is not enough, for personality has to achieve some more concrete form of existence in the world. This is where property makes its entrance. The more concrete form happens through the appropriation of things, there being an 'absolute right' to the appropriation of things.²⁰ Included in the category of things are 'mental aptitudes, erudition, artistic skill'.²¹ These 'inner possessions', once externalised, become things capable of legal possession. These statements on property may easily be interpreted as an argument for the existence of private property. Hegel does, after all, talk of an absolute right of appropriation, and argues that will becomes objective in private property. But this interpretation loses sight of Hegel's explanatory, evolutionary perspective. He is concerned with the beginnings of mind or will in the external, physical world. Persons inescapably have to make decisions about the external world. This is a situation that has the character of both immediacy and confrontation.²² Personality begins to lift itself out of this situation by claiming the 'external world as its own'.²³ Property represents the first stage of this actualising process. It is one of the first acts of free will in which the will as personality takes on a concrete, free form. However property, for Hegel, does not primarily exist to satisfy ordinary needs, desires or cravings, although he concedes that it can easily appear so.²⁴ The underlying reality is that 'property is the first embodiment of freedom'.²⁵

Why Hegel says this is more readily understandable when his concept of will is exposed a little more. Hegel does not reject private property. He is critical of Plato for doing so in the Republic. To reject property is

19 Id., [35].

20 Id., [44].

21 Id., [43].

22 Id., [34] and [39].

23 Id., [39].

24 Id., [45].

25 Ibid.

to misunderstand the true nature of freedom. Freedom has a subjective element, an element which Plato's state denies its citizens. Their freedom is the objective freedom that comes from conformity to a set of rules cognised and promulgated by those possessing moral wisdom and objective knowledge – the Philosopher Kings. Hegel's constant claim is that the modern state must recognise subjective freedom.

What is the role of property in the attainment of subjective freedom? One suggestion has been that private property is the institution which allows the exercise of subjective freedom, where subjective freedom means the satisfaction of individual wants and desires.²⁶ Another is that the making of property claims contributes to the development of personality. It invites recognition by others which, if given, helps to foster a moral and social dimension in the personality of the property claimer.²⁷ There is more to add here, however. It is certainly true that, for Hegel, property plays a crucial role in defining an arena of social life in which desires rather than law are the prime determinants of choice and activity. But property also has a more fundamental role. Hegel's argument, although encased in complex language, carries a simple message: property is essential to individual survival in the world where survival refers not just to biological survival but also to the ability to cope with life in the context of one's given social system. Living in the world, the exercise of our abilities in life, requires certain things of us if we are to survive and one of these is the accumulation of property. Mine and thine is not only a division that personality needs to make, in order to take its place in the world as a moral free-willing individual entity or particularity, but it is also an institutional form which individuals need in order to make their way in the world.

Hegel's absolute right of appropriation does not entail rights of absolute appropriation. Like others before him, Hegel posits the case of the extremely needy individual and the 'rightful property of someone else'. There is in this situation a 'right of distress'.²⁸ The needy individual is entitled to take those resources he requires for survival. Hegel's argument is simply that, where the denial of property involves

26 See M.B. Foster, *The Political Philosophies of Plato and Hegel* (Oxford at the Clarendon Press, 1935, reprinted 1968), 84.

27 See J. Plamenatz, 'History as the Realization of Freedom', in Z.A. Pelczynski (ed.), *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge, London, 1971), 40–41.

28 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press, 1952, 1st edn, 1967 reprint), [127].

the denial of life, a person is truly being deprived of his freedom of will.²⁹ Property, essentially, retains for Hegel a deeply instrumental character. Good for Hegel is 'freedom realised, the absolute end and aim of the world'.³⁰ The abstract right of property is subordinate to this end; it has no independent validity.³¹

This first part of Hegel's explanation of property focuses on its importance for the individual personality. Although it resembles a psychological account of personality and property, it is closer to a teaching of an understanding of property and personality. It is an account of the way the free-willing mind, imagining itself to be infinite and universal, confronts an external reality that restricts it. The beginnings of coping with that restriction are the beginnings of property.

As Hegel's philosophical description of right unfolds, a crucial shift takes place in the presentation of property. His perspective shifts from that of the individual looking into the world to that of the philosophical scientist looking at the patterned manifestations of objective spirit in the world.³² Property from this perspective appears differently. It becomes systemic in character and is now to be understood through its functional links with state and civil society. Hegel's analysis of property shifts into what in modern terms we might call a sociological mode of analysis. Personality requires the concept of property; the presence of others means that the concept of property has to assume a role in addition to the one it has in individual psychology. Property ceases to be just the extension of personality and becomes the subject-matter of contract.³³ Contract law necessarily draws in the state. Property becomes the subject-matter of interaction between personalities and the state.

29 Id., Additions, 252–253.

30 Id., [129].

31 Id., [130].

32 The concept of objective spirit is central in Hegel's philosophy. Reidel identifies a number of meanings for the term, one of which is the supra-individual, transsubjective spirit common to a unified class of subjects. See M. Reidel, *Between Tradition and Revolution* (W. Right trs., Cambridge, 1984), 3. Another way of thinking about it is to say that objective spirit represents the vital practices and institutions in which individuals recognise their community. See C. Taylor, *Hegel and Modern Society* (Cambridge, 1979), 89.

33 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press, 1952, 1st edn, 1967 reprint), [217].

Hegel envisages that the free mind may place almost anything into the category of thing. There is no prior determination of what can and cannot be the subject of property. Personality is left free to range over the world. Thus the patenting of animal life forms, or DNA segments, or plant varieties involves things that are all potentially capable of appropriation. There is no obvious normative argument in Hegel against such developments, merely an explanation of their nature. Property is whatever the will chooses to occupy, although the nature of the thing in question can determine the effectiveness of the occupation. Some things, such as food, can be completely appropriated. Others, such as the elements, cannot be. Mastery of things in the sense of occupying them, Hegel thinks, is always likely to be incomplete.³⁴ Our equipment, cunning and dexterity also condition the activity of occupation.³⁵ For highly scientific/technological societies guided by cunning, very little is likely to remain free from appropriation.

Property, because it is the product of will, can be abandoned or alienated through an act of will.³⁶ However, there is a proviso: the thing must be 'external by nature'.³⁷ The proviso serves to support Hegel's immediately succeeding proposition that 'those goods, or rather substantive characteristics which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible. Such characteristics are my personality as such, my universal freedom of will, my ethical life, my religion.'³⁸ There is a rough parallel with Locke's wide use of property to include life and liberty. For Hegel, personality is something that belongs to oneself. Taking possession of oneself occurs through a process of self-development.³⁹ The concept (here used to refer to potentiality) of oneself as free and self-determining is made actual through conscious self-development. Self-ownership is not, however, inevitable. Mind, because it is free, may fail to live up to its potential. There is also the possibility of the alienation of personality.⁴⁰ (It seems, for Hegel, that something which by nature is not external can be made so.) Similarly for Hegel intelligence, morality and rationality can also

34 Id., [52].

35 Ibid.

36 Id., [64] and [65].

37 Id., [65].

38 Id., [66].

39 Id., [57].

40 Id., [66].

be alienated by giving somebody else power over one's conduct. The regaining of personality and its characteristics involves negating just those actions which make it external and therefore capable of possession by somebody else.

Hegel's discussion of this is based around individual will and the capacity to retrieve personality. For Hegel, personality can either be alienated volitionally or presumably through force, slavery being an example. In both cases individuals have knowledge of the externalising process. High-technology societies raise another possibility. Through computer technology, information about individuals can be pooled to create a personality profile of a given individual, a kind of electronic doppelgänger which can be put to a large range of uses. This electronic doppelgänger is an externalisation of which the individual to whom it relates may have very little knowledge or control. The implication of this in Hegelian terms is straightforward: it represents a loss of freedom. Potentially at least, if this electronic doppelgänger comes to mediate relations between ourselves and the institutions within our social system, our personality has been appropriated – it is no longer ours to control. Once again the clear implication of Hegel's argument is that property functions as a survival or defence mechanism. The free-willing mind occupies things in the world, including personality, so that others will not do so and rob it of its powers of determination and self-development.

Hegel's claim that 'property is the embodiment of personality' has led some to forge a link between his theory and artistic objects. It is a tempting path to go down. Hughes, for example, argues that poems, stories, novels and musical works are 'natural receptacles for personality' while other objects such as 'patents, microchip masks and engineering trade secrets' are not obviously manifestations of individual personality.⁴¹ This argument interprets personality as some sort of essence which in varying degrees is 'poured' into objects.

One problem with this argument is that it assumes that justification rather than explanation is Hegel's primary aim. We have seen, however, that property – all property – is part of the explanation for the way personality begins to actualise itself in the world. In order to

41 J. Hughes, 'The Philosophy of Intellectual Property', 77 *Georgetown Law Journal*, 287, 340–341 (1988).

achieve this end individuals have the right of placing their 'will into any and everything'.⁴² Hegel's explanation of this process is a highly functional one. Will finds itself in the world, subject to restrictions, and has to make decisions. Property at first instance becomes a survival mechanism. Artistic forms and objects have no privileged status in this respect. The imposition of artistic form is simply one means by which we can take possession of something.⁴³ Personality is not a springboard, at least for Hegel, for special rights for artists and other creators. Thus Hegel's analysis of property offers the possibility of a potent critique of authors' rights systems.

Copyright is a term which, historically speaking, refers to legislative systems which were premised on the assumption that the interests that authors had in the protection of their works were economic interests – the interests of *owners*. European civil systems over time evolved legislative systems that operated with a broader conception of the interests of *authors*. Authors were thought to relate to their work *qua* creators as well as *qua* owners. The practical effect of this was that European systems began to develop rights such as the right of the author 'to claim authorship of the work, and to object to any distortion, mutilation or other modification, or other derogatory action' in relation to their works.⁴⁴ One major philosophical source of this distinctive juristic turn in authors' rights is said to be Kant.⁴⁵ Kant's specific suggestion in relation to authors was that they enjoyed rights over their work by virtue of their personality. In his words, an author's right is 'an innate right, inherent in his own person'.⁴⁶

42 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press, 1952, 1st edn, 1967 reprint), [44].

43 Id., [4], [56].

44 These are the words of article 6 *bis* of the Berne Convention. They form the essential core of moral rights. For a discussion of their history and place in the Convention, see S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London, 1987), 455–476.

45 See S. Strömholm, 'Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint', 14 *International Review of Industrial Property and Copyright Law*, 1, 11 (1983).

46 See Kant, 'Von der Unrechtmäßigkeit des Büchernachdruckes' cited in Stig Strömholm, 'Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint', 14 *International Review of Industrial Property and Copyright Law*, 1, 11 (1983). See also I. Kant, *The Metaphysics of Morals* (M.J. Gregor trs., Cambridge, 1991), 106–107 where he discusses the question 'What Is a Book?'.

Kant's comparatively few remarks on the connection between personality and the nature of the rights of authors were taken up by German scholars who articulated and defended an authors' right jurisprudence.⁴⁷ While the juristic literature on moral rights is vast, much less attention has been devoted to a general philosophical evaluation of authors' rights jurisprudence. It is not clear, for instance, how rights for authors fit with the broader Kantian metaethical system, for it is a system which through its formal principle of universalisation seeks to avoid the possibility of special pleading by moral agents.

In any case, Hegel's analysis of the link between property and personality sets some problems for any Kantian personality-based justification for moral rights. Within a Kantian justification for authors' rights, those rights are seen as claims that the author can make over the fate of a work because the claim is not just a claim over the work, but simultaneously a claim to the protection of the author's personality. The author's work is simultaneously an expression of his or her ideas and an expression of personality. The consequence of taking such a view is that authors enjoy a distinct set of rights. To put it more provocatively, a certain class of personality (authors, artists) becomes entitled to make claims that other property-owning moral agents cannot. The motor vehicle enthusiast who 'pours' his personality into the restoration of an old car does not have moral rights over the car once he sells it. Hegel's argument, we have seen, is that private property is an essential part of the process in which personality realises itself in the world. There is no suggestion by him that through this process some personalities acquire special entitlements. Why should the law recognise special rights for artistic personalities? The reply – that rights of paternity and integrity help to protect important works, that they help to stimulate the production of unique and distinctive works (and therefore more economically valuable works) and that they serve to preserve the accuracy of a society's cultural record – is not really a reply that is centred on the importance of works to the artistic personality. Such a reply recognises that personality rights of authors are important because they serve some other goal, like the production

47 For a survey and discussion of some of the European literature, see A.S. Katz, 'The Doctrine of Moral Right and American Copyright Law – A Proposal', 24 *Southern California Law Review*; 1 (1951); E.J. Damich, 'The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors', 23 *Georgia Law Review*, 1 (1988). See also S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer, 1987), 456, fn. 435 for a sample of this literature.

and preservation of art. But this is not a justification based on the intrinsic importance of personality. To use Kantian language, it treats protection of the authorial personality as an important means to some other end. The question we began with remains. What is it about artistic personality that justifies rights peculiar to that personality? When we begin to think about this in the context of Hegel's analysis of the role of property, the answer that authorial personality simply gives rise to these rights is far more problematic than it first appears. Within Hegel's system property, whether in physical or abstract objects, is equally important to the survival and flourishing of personality in the world. Kant's brief remarks on the subject of authors and books suggest that it was only authors (and presumably artists) that gained these distinctive rights. Scientists and inventors who also produce abstract objects were not rewarded with personality rights. Equally there is no authors' rights tradition within patent law. On what basis should we discriminate between producers of physical objects, or between producers of different classes of abstract objects? In making such discriminations, do we not devalue the contributions of some and elevate those of others? The subjective freedom of some creators is ranked higher than that of others or those who are not recognised as creators. Hegel's systemic account of property does pose a more serious critical challenge to authors' rights jurisprudence than is commonly realised.

Hegel does make some observations that deal with intellectual property. Products of the mind which are 'peculiarly' ours may when externalised be produced by others.⁴⁸ Hegel does not see this as a problem but rather as a good. An individual, by coming into possession of externalised thoughts, whether in book or inventive form, comes into contact with 'universal methods of so expressing himself and producing numerous other things of the same sort'.⁴⁹

Hegel seems to tread the classic utilitarian path when he suggests that the best way of progressing science and arts is to protect scientists and artists from thievery. He is at the same time sensitive to the possible problems of this solution. The whole purpose of intellectual products for Hegel is that they be recognised by others: that is, that they become

48 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press 1952, 1st edn, 1967 reprint), [68].

49 Ibid.

the basis for learning by others. This recognition by others (perhaps recognition) relies on previous patterns of thought, ideas being accessible. In the social process of the transmission of knowledge 'well-established thoughts' are reworked and given new individual form. At any given moment individuals are engaged in personal, incremental contributions or modification of this stock of knowledge. Existing forms of knowledge are revised by individuals of different generations and so are thus both propagated and perhaps advanced for the benefit of others. To what extent can individuals appropriate even temporarily this flow of knowledge and claim property rights in these reworked forms? Hegel thinks there is no 'precise principle of determination' to answer this question.⁵⁰ Communities then presumably, through experience, have to work out legal boundaries within their intellectual systems that ensure those systems serve the learning needs of others and future generations. There is in this part of Hegel's analysis a recognition of the importance of an intellectual commons.

But while this is all that Hegel says on the subject of intellectual property directly, his theory of state, we shall see in the next section, helps us to understand the organic role of intellectual property and the dangers that intellectual property rights may pose for community.

The State, Civil Society and Intellectual Property

The idea of state remains one of the most complex and heavily criticised parts of Hegel's political philosophy.⁵¹ Our present interest in his concept of state is necessarily limited to its connections with property.

One traditional view of freedom, linked to (amongst others) Hobbes and Locke, is that individual subjective freedom is to be found outside of the state. The price of this freedom, represented by an uncertain and anxious life in the state of nature, is too high. The creation of the state involves restrictions on freedom but life is safer, more certain.

⁵⁰ Id., [69].

⁵¹ For a clarification of many misconceptions of Hegel's theory of state, see S. Avineri, *Hegel's Theory of the Modern State* (Cambridge at the University Press, 1972).

By contrast, for Hegel the state represents the highest form of freedom an individual can attain. Individuals no longer conceive of themselves in terms of abstract freedom, a condition in which they are free-willing agents confronting restrictions, but rather see restrictions in the form of duty as a form of objective freedom. The potentiality which begins with subjective free will and personality becomes concrete actuality in the state.⁵²

There are, Pelczynski has argued, three aspects to state in Hegel: civil society, the strictly political state and the political state.⁵³ Civil society is a more complex notion than in Marx, where it refers to the competitive, antagonistic relations of individuals in the world of business. For Hegel, civil society includes not only the relations that accompany self-interested individualism, but also the organisational and legal infrastructure which supports those relations. This infrastructure has to have a source, and in Hegel's terminology it is the strictly political state.

The political state is an obscurer but crucial part of Hegel's concept of state. It is obscure, Pelczynski argues, because Hegel does not make it clear that he is offering a third and distinct concept of state. This concept is full of moral significance. It refers to 'the whole population of an independent, politically and "civilly" organized country in so far as it is permeated by "ethical life" and forms an "ethical order" or "ethical community"'.⁵⁴ Vital to this third concept of state is the concept of ethical life (*Sittlichkeit*).⁵⁵ The concept has its source point in the Greek idea of *polis*. Ethical life implies a set of shared values but it also includes the distinctive attitudes and approaches to life of a given community, the common spirit which expresses itself in the daily life and practical affairs of a community. Ethical life refers to some deep element or idea that inspires a community way of life.

Hegel, like John Locke, assigns to the state the task of defending the property of its citizens. The state's function is to provide the laws which recognise and guarantee to individuals their property claims.

52 G.W.F. Hegel, *Philosophy of Right* (T.M. Knox trs., Oxford at the Clarendon Press 1952, 1st edn, 1967 reprint), [151].

53 Z.A. Pelczynski, 'The Hegelian Conception of the State', in Z.A. Pelczynski (ed.), *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge, London, 1971), 1–29.

54 Id., 13.

55 C. Taylor, *Hegel and Modern Society* (Cambridge, 1979), 83.

In *The German Constitution* he writes that a 'multitude of human beings can only call itself a state if it be united for the common defence of the entirety of its property'.⁵⁶ But in the *Philosophy of Right*, probably because of his dialectical methodology, Hegel drives his analysis of state deeper than many liberal thinkers. The state for Hegel is an amalgam of three subsystems: the political, the civil and the ethical. These three system operate in a kind of tense unity which is the source of the modern state's strength. Civil society represents the dangerous subjectivity of strong individualism while the ethical represents the enclosure of that subjectivity by the community, its public morality and attitudes. The synthesis of these contrary forces within a legal and institutional framework was for Hegel the secret of the state's success.

The stability of the state depends on each of these systems carrying out their function without any one achieving a dominance over the other. Hegel was particularly sensitive to the possibility that civil society or some of its elements might come to dominate the political state. He saw in the individualism of civil society the potential destruction of ethical life and therefore community.

Here we are not interested in Hegel's proposals for the political structure of the state but rather the implications of his argument for property. Within civil society are to be found those institutions necessary for the security of property, such as the law courts and the police. We have also seen that private property is a vitally important feature of individual development of the personality in civil society. But property for Hegel also seems to be an institution which embodies contrary forces. He sees logical difficulties in relying on Kant's principles of universalisation to establish the morality of claims to private property.⁵⁷ Property, he suggests, is opposed to universality, and if it is equated with it, it is superseded.⁵⁸

The existence of private property for Hegel is crucially dependent upon universal bonds created between persons interacting in the ethical dimension of the state. The security of my property is dependent

56 Hegel, 'The German Constitution', in *Hegel's Political Writings* (T.M. Knox trs., Oxford at the Clarendon Press, 1964), 153.

57 See the essay, G.W.F. Hegel, 'The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law' (1802, 1803; T.M. Knox trs., University of Pennsylvania Press, 1975), 77-80.

58 Id., 79.

on the conformity of the citizenry to those ideals which form part of the ethical life of the state. If this occurs then, in the context of civil society, I have real freedom to pursue my affairs. Civil society has its dangerous side, for it is there that subjective impulse is given the freedom to reign. Hegel was all too aware that this subjective impulse could become a predatory force which would threaten freedom and the state itself.⁵⁹

Of course it is the almost unanimous view of the pragmatic historians that if in any nation private interest and a dirty monetary advantage becomes the preponderating ingredient in the election of Ministers of state, then the situation is to be regarded as the forerunner of the inevitable loss of that nation's political freedom, the ruin of its constitution and even of the state.

While the interests of the wealthy and the propertied are legitimate within Hegel's state, the public authority of the state was not to be the private property of these or any other interests.⁶⁰ The danger lurking within civil society is that it can rob or weaken the ethical life of the state and it is the ethical life of the state which makes it a community. So much is clear from Hegel. Less clear, though, is that one profound source of danger to community comes from civil society's pursuit of property. The state has a very clear role in serving individuals as members of civil society, but at the same time the state has for Hegel an obligation to preserve the ethical life of the state. Satisfying the subjectivism inherent in the property claims of individuals runs the risk that the state simply becomes the compliant arm of civil society and for Hegel the ascendancy of civil society within the state is ruinous.

Intellectual property, through its nature and form, acts to increase the pressure which civil society brings to bear on the political state. The reason is simple enough. Individuals begin to realise the strategic business advantages which a proprietary control over abstract objects gives them. With this realisation the race to secure property rights in abstract objects begins. Civil society experiences an intellectual property consciousness. The vulnerability of abstract

59 Hegel, 'The English Reform Bill', in *Hegel's Political Writings* (T.M. Knox trs., Oxford at the Clarendon Press, 1964), 297.

60 Z.A. Pelczynski, 'An Introductory Essay', in *Hegel's Political Writings* (T.M. Knox trs., Oxford at the Clarendon Press, 1964), 49, note 2.

objects makes those elements of civil society most dependent on them put enormous pressure on the state to mint new forms of intellectual property protection. This process also has an international dimension. Individual owners of intellectual property want security of property, not just nationally, but in the context of trade of intellectual property rights in international markets.⁶¹ As individuals acting within global and regional markets there are limits to their capacity to protect their interests. A natural solution is to turn to the services of a strong state and influence its decision-making processes to bring about the realisation of a global property regime.⁶²

The upshot of this process of creation and enforcement of property rights in abstract objects is that civil society and political society undergo an increasing interpenetration. The process of the production of law-based privileges in abstract objects promotes an integration of elements of civil society and the political state. What Hegel would say about this is uncertain and so what we say about the implications of the rise of privilege-based property forms in the state is necessarily speculative. The clear message from Hegel's political writings is that the state should not be the creator and guardian of privilege. Yet this is precisely the risk the state takes when it begins to champion the property interests of parts of civil society. Clearly there is a critical role for the state in protecting the property of its citizens, but this is a fundamentally different proposition from saying that the state should be the servant of propertied interests. The danger in the political state becoming a captive of proprietarian elements of civil society is that, in Hegelian terms, it impairs the state's capacity to protect the ethical life of the state. Individual participation in the larger ethical life of the community is the final stage of the individual's journey to freedom. But in a situation where civil society has pushed the state into a protection of selected property interests the ethical life of the community faces the danger of replacement by a group morality. Individuals, when they reach the summit of the state, do not find a broader community life in which to participate, but rather a narrow group morality. It is the morality of property owners. Marx's class instrumentalist analysis

61 For an example of the concerns of international business, see *Basic Framework of GATT Provisions on Intellectual Property*, Statement of Views of the European, Japanese and United States Business Communities, June, 1988, The Intellectual Property Committee, Keidanren, UNICE.

62 The story of how this has been done is told in P. Drahos, 'Global Property Rights in Information: The Story of TRIPS at the GATT', 13 *Prometheus*, 6 (1995).

of morality is, on our view of Hegel, implicit in Hegel's system once civil society turns the state to its own uses and *Sittlichkeit* falls prey to the self-interest of property holders.

Hegel's analysis of state and property is also suggestive of another unsettling possibility when it comes to intellectual property: the evolution of intellectual property rights may exacerbate the problems of poverty and economic development rather than help them. Property which, at the level of abstract right, was a relation between a thing and an individual will becomes in civil society a formal and posited relation of recognition between individuals.⁶³ Hegel's description of civil society remains starkly functional. At one level, civil society can be described as the system of needs. Individuals have a social existence that is characterised by 'complete interdependence' in which the 'livelihood, happiness, and the legal status of one man is interwoven with the livelihood, happiness, and rights of all'.⁶⁴ Hegel's description of this stage of civil society is not particularly appealing in normative terms. Individuals have innumerable personal developmental possibilities and the pursuit of these simply 'breeds new desires without end'.⁶⁵ Needs become part of a self-generating process, in which the means to the satisfaction of needs becomes subdivided into further needs and means, the whole process being spurred on by the desire for equal satisfaction and a simultaneous desire for individual distinctiveness. Things that satisfy needs are the external products of the will of others. In civil society these individual products of subjective will become recognised as property. Property shifts from having a subjective pre-legal existence to a legal form of existence. Property rights, because they are posited by law, become part of the recognition patterns of individuals. Once law assumes a posited character then right, which at an individual level has been abstract, takes on a determinate form, one capable of greater determinacy of content through application to individual problems.⁶⁶ Civil society then is a functional combination of a system of needs with a system of law in which property constitutes the formal recognition of others and the embodiment of individual will in things.

63 G.W.F. Hegel, *Philosophy of Right* (1821; T.M. Knox trs., Oxford at the Clarendon Press 1952, 1st edn, 1967 reprint), [217].

64 Id., [183].

65 Id., [185].

66 Id., [213].

Hegel's analysis seems to indicate that poverty is an inevitable by-product of the system of needs in civil society. The reproduction of needs and means is a process which can go on endlessly.⁶⁷ The increasing particularity and division of needs produces a functional response – the division of labour.⁶⁸ Class systems also emerge. Individual survival and development within this system is conditioned by, amongst other things, a person's skill, something which, Hegel argues, is unevenly distributed by nature. If uninterrupted in its development, civil society becomes more complex, in the sense that more needs are generated for satisfaction. Simultaneously, however, Hegel asserts that 'dependence and want increase *ad infinitum*'.⁶⁹ The satisfaction of the needs of the poor (those lacking the requisite survival skills) is barred for two reasons. First, the possible objects of satisfaction have become the property of others. (Presumably in extreme cases a right of distress may operate.) Second, acquiring property now depends on contract and so satisfying needs through original modes of acquisition, such as taking possession, becomes no more than 'isolated accidents'.⁷⁰ Somewhat paradoxically, the systems complexity of civil society, if unchecked, produces poverty at the same time that it produces luxury and wealth.

The solution to this problem is not readily to hand. Public authorities and organisations, along with individual charity, can help the poor.⁷¹ There remains a certain bleakness in Hegel's discussion of poverty. He hints that the problem in the context of civil society is structural, in that it is driven by overproduction, and to this problem Hegel sees no solution except that civil society is led to seek markets outside of itself.⁷²

Implicit in Hegel's analysis is that the actualising possibilities of individuals within civil society are conditioned by formal property relations. There is a negative and positive aspect to this. On the positive side the existence of formal property relations means that the embodiment of my will in things is recognised. The negative is that a pattern of formal recognition of property rights can limit my

67 Id., [195].

68 Id., [198].

69 Id., [195].

70 Id., [217].

71 Id., [241] and [242].

72 Id., [245] and [246].

possibilities. The fact that others have property rights as well as the matrix of individual property relations within the social system means that some objects are put beyond my will. Contract can overcome this restrictive aspect of property in that I can acquire the property of others through agreement.⁷³ The basic point, however, remains unchanged. Property conditions the development potentialities of individuals and communities in both negative and positive ways. Intellectual property represents an extension of property rights to an almost indefinite range of objects – scientific ideas, art, the genetic codes of nature – all of which fall within intellectual property's ever expanding domain. This extension is full of possibility. On Hegel's systemic account of property in civil society, the prospects are likely to be negative. As we argued in Chapter 2, property in abstract objects increases the capacity of owners to place restrictions on the use of physical objects. The more objects that are removed from the possibility of direct occupation by personality, the greater the reliance by individuals on the contract mechanism to gain access. Contract, when it operates within the atomistic setting of civil society, is hardly likely to remedy unequal property distribution. The poor are unlikely to be able to bargain their way to a more equitable distribution of property, or even to negotiate just access and use. Civil society, through the self-generating system of needs, reaches higher and higher levels of production, but access to the benefits of this production becomes harder to achieve because more and more of the objects of production come to be guarded by property rights.

Intellectual property offers personality the possibility of a qualitative shift in its powers to extend itself into the world. Ideas, knowledge and all forms of information circulate in the world in a way that blocks of land and chattels do not. By the positing of property laws in abstract objects, the personality, in Hegelian terms, gains a proprietary hold over the production and distribution of physical objects in undreamt of ways. The very act of communicating an abstract object becomes the subject of a property relation. Moreover, since abstract objects are not territorially bound; it becomes meaningful for personality to begin to contemplate property laws that have a global reach. Through property, personality imposes itself on its immediate social world and

73 At the end of his discussion of property Hegel develops a transition which takes him into contract. *Id.*, [71].

local community. Through a global system of intellectual property law, personality has the potential to reach into other social worlds, other communities. The possibility of a global system of property to regulate relations between states is hardly a possibility that Hegel could have foreseen. Yet his theory does carry a warning for this kind of development. Within Hegel's system, property remains the embodiment of freedom because he clearly assumes that property relations occur within the context of a community which has its own distinctive ethical life. Property is a way of taking a participatory position in that life. This is not necessarily true of a global system of property that regulates access to the abstract objects of art and science. Property rights in abstract objects facilitate trade in culture between states. To the extent that such trade promotes the homogenisation of culture it threatens the survival of local cultural forms and therefore local communities.⁷⁴ There is another problem. The very fact that the global system of property regulates access to abstract objects means that it has the potential to separate some individuals from those objects. This separation occurs when individuals cannot meet the demands of the commerce in culture and information that a global system of property rights in abstract objects creates. In short, a global system of property can easily become a force for destabilising the pattern of local institutionalised cultural values and can separate creators from their creations or, in more Hegelian terms, for disrupting and perhaps destroying the ethical life of communities.

There is one final argument to make here and it relates to our earlier claim that intellectual property can exacerbate the problems of poverty and inequality within social systems. In sharp contrast to Marx, the principles which Hegel identifies as conditioning the evolution of the state do not lead Hegel to prophesise about the final outcome of that evolution. Nevertheless we have seen that Hegel seems to think that poverty and its attendant miseries are a more or less permanent feature of social life. Hegel's complex metaphysic is suggestive of a deeper explanation for his belief and it is this explanation, implicit in his analysis, that we want to bring to the fore.

74 On the dangers of homogenisation for the modern state, see C. Taylor, *Hegel and Modern Society* (Cambridge, 1979), 114–117.

Work plays a crucial role in Hegel's analysis, as it does in Locke's political theory.⁷⁵ Work in the world is the form needed for the realisation of spirit. For Hegel, spirit begins in a stage of ignorance and is led through stages of development and realisation. The medium of this development is work, speech and activity. Through these things the spirit gains the recognition of others. The relevance of this metaphysic for property comes about in this way. Property, we have seen, when viewed at the individual level, is a need, a survival mechanism, for without it spirit cannot survive in the world and go on to develop. But property, in order to function in this way, must be institutionalised as a set of norms. Property has to become systemic in character, a task which both Locke and Hegel assign to the legal system. Property rights are formally defined and sanctioned by positive law. Law's function is not solely to institutionalise property norms although, given the negative potentialities of group life without property norms, described so vividly by state of nature theorists, it is, within political theory, clearly a primary (although quietly stated) task of law.

Modern sociological theory has emphasised law's general integrative function⁷⁶ and, although Hegel did not see law in these exact terms, we know that mechanisms for producing a stable and cohesive society were important to him.⁷⁷ The question we want to address here is how formal property fits into law's general task of societal integration, because by grappling with this question we obtain a better understanding of the possible adverse effects of property within society.

At first glance property does not seem to fit in particularly well with law's general task of social integration, precisely because, as a mechanism of self-defence, it promotes relations of separation. It prevents others from doing as we do. It presents a vision from inside, not outside the fence. But, within an abstract sociological schema, integration is simply the adjustments required to be made to the subunits of a system so that the system as a whole can function

75 For an excellent analysis of the role of work in Hegel's political philosophy, see M. Reidel, *Between Tradition and Revolution* (W. Right trs., Cambridge, 1984), chapter 3.

76 See R.B.M. Cotterrell, *The Sociology of Law* (London, 1984), chapter 3.

77 Z.A. Pelczynski, 'Hegel's Political Philosophy: Some Thoughts on its Contemporary Relevance', in Z.A. Pelczynski (ed.), *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge, London, 1971), 230, 238.

effectively.⁷⁸ In this sense formal property contributes to integration because institutionalised property norms provide individuals, including those outside the fence, with information about the expectations of others so that others can plan and predict action. But, because property does involve relations of separation, it does at least potentially pose dangers for the kind of communal integration that is involved in Hegel's concept of the ethical life of a state. There are, within most formal property systems, mechanisms for ensuring that property as a relation of separation is not insisted upon too strongly, for otherwise group life becomes increasingly unworkable. The basic mechanism here is that of permission, which when viewed internally and manipulated by lawyers assumes an almost endless variety of legal forms. So within the English context we have easements of light and air, prescriptive easements, negative and positive easements of rights of way, licences of various kinds and so on. The mechanism of permission in its many different guises acts within a social system to limit the potentially disintegrative effect of property on social life.

The integrative role of property is critically dependent on the condition of permission being elaborated and utilised within a given social system. The structural problem that seems implicit in Hegel's analysis is that the fulfilment of this condition within the context of civil society becomes increasingly problematic. Once there is a widespread realisation by the members of civil society that it is control and monopoly of the abstract intellectual object which is the real source of economic wealth then, because individuals within civil society are universally driven by self-interest, the permission mechanism increasingly becomes the target of ownership forces. Permission to use the abstract intellectual object becomes conditional upon the capacity to pay for the use of that object. The possibility of creating many new property forms through law has the possible effect that the task of social integration becomes that much more difficult. Because of its individualistic and antagonistic nature, civil society is disposed to press home the advantages of new property forms at the expense of the value of communal integration and this in turn is not likely to do much which is positive for the problem of poverty. Participation in culture more than ever becomes conditional upon the

78 See, for example, T. Parsons, 'An Outline of the Social System', in T. Parsons et al. (eds), *Theories of Society* (New York, 1965), 40.

payment of a fee to intellectual property owners. Intellectual property, when placed within Hegel's systemic analysis of property, turns out to be the potential assassin of community.

The deleterious link between property and community is pursued in more detail by one of Hegel's critics – Marx – and it is to his version of the story concerning property and community we turn in the next chapter.

Conclusion

Although he expressly mentions patents and recognises the importance of the intellectual commons, Hegel does not present an analysis of property that explores the relationship between property and the commons. For Hegel, property represents the beginnings of a journey for individual will within its social environment. Intellectual property, like other forms of property, has a role to play in the development of the individual person. The danger of intellectual property lies in its utilisation by civil society. Civil society, once it comes to realise the pecuniary advantages of intellectual property rights, presses the state to build ever more elaborate intellectual property systems, systems which ultimately become a global system. This, we have suggested, threatens the ethical life of individual communities. The abstract objects to be found in science and culture lie at the centre of many of the interdependencies to be found in community life. Civil society's relentless pursuit of these objects produces relations of separation and a force for the fragmentation of community. Once property in abstract objects becomes part of a global system, it no longer acts within communities to enable freedom but acts upon them to restrict freedom. Or at least this is one possible outcome of such a system.

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