# Capitalism, Efficiency and Self-Ownership

PETER DRAHOS*

In the conclusion to *Are Persons Property?* Davies and Naffine point out that Anglo-American legal systems for the most part have resisted 'formal recognition of self-ownership'.[1] Perhaps the closest the law comes to this formal acknowledgment is in the US where the courts have recognised the right of an individual to control the commercial uses of attributes of his personality.[2] The resistance to the idea of self-ownership in law is not really matched in liberal philosophising, where the idea has gained a more ready acceptance. Locke and Hegel, as Davies and Naffine point out, each accept some version of self-ownership in developing their respective theories of property.[3] More generally, there does seem to be a strong traditional and analytical link between the premise of self-ownership and the zone of non-interference that is set up as the right of all individuals by the conception of negative liberty that classical liberalism endorses. Why then does the law avoid openly embracing the idea of self-ownership when it seems to be a major premise in liberal conceptions of personal inviolability, security, autonomy and so on?

Davies and Naffine suggest that the answer to this question lies in the 'persistence of a relatively absolute concept of property'.[4] Their explanation is that courts and legal commentators avoid recognising the principle of self-ownership because they fear it will lead to a commodification of the person. The Roman concept of *dominium*, it seems, remains a ghostly presence in legal traditions, driving out a more instrumentalist, pragmatic conception of property that might allow the courts to recognise the principle of self-ownership for certain purposes. Following on from this explanation Davies and Naffine raise the natural normative question: should the courts recognise a principle of self-ownership? Their answer is a qualified yes. Such a principle may be '*strategically* useful'[5] in certain contexts, but it is

---

* Professor, Law Program, RegNet, Australian National University.

1 Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (2001) 182.

2 Ibid 126.

3 Ibid 3-4.

4 Ibid 182.

5 Ibid 183.

less relevant as a principle in those socio-legal orders that recognise group interests.

In the remainder of this comment I want to focus on two tasks. The first involves asking whether there are other explanations for the law's declaratory reluctance in the case of a principle of self-ownership. The second task is to ask whether in the here and now of present socio-legal orders the principle of self-ownership would serve a strategically useful purpose for individuals who are members of disempowered groups.

One explanation for the law's lack of formal recognition of the principle of self-ownership may be of an economic kind. Efficiency, the law and economics movement argues, plays an important prescriptive and descriptive role in the evolution of the law. The argument against finding a principle of self-ownership in the law might be that such a move would lead to efficiency losses of various kinds. In order to develop this line of argument we would have to overcome a basic objection. Well-defined property rights are needed to facilitate bargaining and contracting. The right of publicity, for example, helps to facilitate markets in merchandising. Might not the recognition of a principle of self-ownership help to constitute other kinds of markets, other kinds of trades that will lead to a Pareto improvement? So, for example, if the right of publicity, viewed as the right to control the image or likeness attributes of personality, helps merchandisers to grow certain markets, might not a similar kind of right be constructed to facilitate trade in the genetic attributes of the person? A full answer to this question is not possible here, but there is an *a priori* reason to believe that a principle of self-ownership might not always be efficient. The principle of self-ownership would in the case of information markets lead to the creation of some kind of intellectual property right. In theory, at least, intellectual property rights should only be created to optimise the allocation of resources to invention/creation.[6] Intellectual property rights target dynamic efficiency, but they do so at the cost of allocative efficiency losses (essentially the trade off between rules to protect creators versus rules to promote diffusion). It follows that there is no point in extending intellectual property protection to informational assets already in existence or informational assets that are the by-products of other activities. So, for example, there would be no dynamic efficiency gain in extending intellectual property protection to chess moves because chess moves are a by-product of an activity undertaken for reasons having nothing to do with intellectual property (the analysis, however, is different for markets in books about chess moves). Similarly, one might argue there is no point in protecting a person's genes by means of an intellectual property right since the genes are in existence and have come into existence as a by-product of

[6] Kenneth J Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Peter Drahos (ed), *Intellectual Property* (1999) 5.

an activity that has nothing to do with the incentive effects of any potential intellectual property right. This suggests that perhaps the majority in *Moore's Case* got it right, at least from an efficiency perspective.[7]

It does not follow from this analysis that a person's genes are not entitled to any protection, but rather that the form of protection should not be an intellectual property right. Information once in existence should be distributed at zero or close to zero cost. In the case of genetic information related to the person, the recognition of a principle of self-ownership could potentially stand in the way of an efficient distribution of that information. From an efficiency perspective courts should steer away from the principle, leaving the potential harms that flow from such a distribution to be regulated by other areas of law such as the right of privacy, tort and human rights law. At most the courts should allow for some muted recognition of the principle by, for example, allowing those in possession of genetic information to enter into valid contracts for the sale of that information. This would seem to be the case in the US where there is a thriving market in ova sold to fertility clinics by young women with the right looks, the right IQ and an Ivy League background.[8]

Both the explanation advanced by Davies and Naffine and the economic one are agent-centred and give normativity an important role (legal tradition in the case of the former and the value of efficiency in the case of the latter). I want to consider briefly a third alternative explanation, one that is structural in nature and which focuses not on agents and norms but rather on structural power.

Elsewhere John Braithwaite and I have argued that capitalism's relentless commodity production is now expressed in the pursuit of abstract objects, the objects of intellectual property laws.[9] In information economies wealth comes from controlling abstract objects through intellectual property rights. If, for example, you own a patent in a genetically engineered cow that produces twice as much milk as existing cows, you have an asset that is equal in value to all the herds of all the world's dairy farmers. Lying behind the redistribution of property rights involved in this economic transformation from industrial and financial capitalism to information capitalism are new kinds of inequalities, inequalities that form the basis of what we have called information feudalism.[10] Instead of extracting wealth

---

7 For a discussion of *Moore's Case* see Davies and Naffine, above n 1, 11-2; 169-73.

8 See Rosemary Neill, 'Hankering for the best genes money can buy', *The Australian*, Friday 14 June 2002, 13.

9 John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 56.

10 See Peter Drahos, 'Information Feudalism in the Information Society' (1995) 11 *The Information Society* 209; Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2002).

from cow herds by owning the land making the cow-herders vassals, the infofeudal aspiration is to propertise things that make cows productive, requiring the cow-herder to choose between going out of business and paying for this knowledge. Similarly with the Internet. The Internet evolved as part of the intellectual commons, but the infofeudal strategy is to propertise Gateskeeping software so that the choice is to either to pay your taxes to Baron Bill or some other infofeudal Sheriff of Nottingham, or to choose not to be a serf of the Net.

**Table 1: Inequality and Property Rights in World History**[11]

| Era | Emergent Property Right |
|---|---|
| Primordial/Ancient | Patriarchal. Men over women and children |
| Feudalism | Lord over land and vassals |
| Centralized State | King over taxes |
| Imperialism | Major powers over colonies, slaves |
| Industrial capitalism | Capitalists over labour and surplus value |
| Finance capitalism | Bankers and investors over securities, bonds, derivatives, interest |
| Information feudalism | Infogopolies, biogopolies over abstract objects |

Information feudalism, as represented in Table 1 is not an accomplishment that is realised. Yet each of the historical layers in Table 1 secured only very partial control that has both an inegalitarian residue today and an oppositional movement, beginning with the primordial hegemony of men over women and the continuing struggle of feminists against it. Information feudalism is a new variant of the transformation of the relations of production about which Karl Marx wrote so eloquently. Marx failed to grasp in a rounded way how partial and variegated these transformations are. There are ways in which they all have liberating effects, lifting some of the tyrannies of the old order, as Marx clearly saw in the transition from feudalism to capitalism. Marx also saw that the new dominium also brings in new inequalities that in some ways build upon persistent inequalities of the old order (see, for example, Davies and Naffine's discussion of the evolution of legal personality).[12] All of the prior institutional projects of world history, conceived narrowly for present purposes as projects to redistribute property unequally, have important surviving features today.

11 From Drahos and Braithwaite, above n 10, ch 13.

12 Davies and Naffine, above n 1, ch 3.

They are never fully supplanted. Information feudalism will certainly not supplant industrial and financial capitalism, nor the persistent residues of colonialism, nor the king's power to tax centrally, nor serfdom and slavery, nor patriarchy.

Lying at the heart of this structural story about the re-distribution of property rights are different kinds of power struggles that are only contingently, if at all, related to efficiency norms. Roughly speaking, those capable of mobilising different kinds of power (power over production, power over symbols, factional power, enrolment power and so on) to solve their particular externality and free-riding problems through the redistribution of property rights do so. Those without power are left without the benefit of a property rights solution. It is striking, for example, how in the second part of the twentieth century copyright was expanded to include protection for software and new forms of intellectual property protection such as semiconductor chip rights were created, while the free-riding problems related to indigenous knowledge were, at best, given soft law treatment.[13] The law's minimalist approach to the principle of self-ownership fits with this structural explanation. Personal genetic information remains in the intellectual commons. The intellectual commons here is a negative inclusive commons, meaning that anyone is free to appropriate the information for use.[14] Since, for example, there are very few countries in the world that have a genuinely innovative pharmaceutical industry, it follows that only a comparatively few technological players are in a position to appropriate this information from the commons. Liberalism's normative endorsement of self-ownership helps to reinforce the culture of possessive individualism, but that endorsement does not stray very far into legal recognition because such recognition might jeopardise the capacity of a technological elite to pursue a commerce in the valuable attributes of persons.

It remains to say a few words about the desirability of including a norm of self-ownership in the law. At the beginning of *Are Persons Property?*, Davies and Naffine point to the divided views on this question within feminist scholarship. Ultimately they incline towards supporting those who have argued that 'the better approach is to view persons in terms of relationships with others, not as self-owners'.[15] At the end of their book, however, they also suggest that the norm may have some strategic value. I think that they are right to see in their analysis of self-ownership a trade-off between the prescription of normative theory and regulatory praxis. Such trade-offs are everywhere in the redistribution of property rights that is

---

13 Peter Drahos, 'Indigenous Knowledge and the Duties of Intellectual Property Owners' (1997) 11 *Intellectual Property Journal* 179.

14 Peter Drahos, *A Philosophy of Intellectual Property* (1996) 58.

15 Davies and Naffine, above n 1, 15.

taking place under information feudalism. The patent system is fundamentally responsible for a world in which only 10 per cent of global health research investigates the causes of 90 per cent of the world's disease burden?[16] We desperately need a new system of global funding for R&D into the diseases that affect the majority of the world's population. But we are also faced with the fact that the anti-retroviral therapies that potentially enable HIV/AIDS patients to achieve a normal life span are under patent. According to UNAIDS estimates there are about 40 million people in the world with HIV infection.[17] Most of them live in developing countries. We have to find ways to get these therapies to poor people. Most of the civil society actors that are key players in this issue accept that for the time being we will have to reform rather than replace patent law principles, even if structurally the patent system is part of the problem.[18]

New regulatory orders are born out of contests of principles. At various times and places we seem to have little choice but to accept a principle that brings with it costs because the refusal to do so is even worse. The principle of self-ownership will, I believe, be a useful instrument for individuals and communities at a time when the two transformative technologies of the age, biotechnology and digital technology, allow for easy access to and manipulation of information about the self. It will help to reinforce other relevant principles such as the principle of informed consent. It will also provide individuals and their communities with a stronger base from which to negotiate the uses to which informational assets in their possession may be put. The alternative of non-recognition casts the individual self back into a negative intellectual commons where those with sophisticated technological capacities are free to roam and take.

16 See *Fatal Imbalance: The Crisis in Research and Development for Drugs for Neglected Diseases*, Médecins Sans Frontières Access to Essential Medicines Campaign and the Drugs for Neglected Diseases Working Group (September 2001) 10.

17 <http://www.unaids.org>

18 See Ruth Mayne, 'The Global NGO Campaign on Patents and Access to Medicines: an Oxfam Perspective' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development* (2002) ch 15.