



**Department of Law**

**Dimensions of Property under European Law**  
*Fundamental Rights, Consumer Protection and Intellectual Property:  
Bridging Concepts?*

**Sandra Passinhas**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

Florence, March 2010

EUROPEAN UNIVERSITY INSTITUTE  
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“(...) il diritto di proprietà (terribile e forse non necessario diritto)...”

Cesare Beccaria, *Dei delitti e delle pene*, XXII.

## Introduction: Property - A Melancholic Eulogy?<sup>1</sup>

Property is highly contentious, both as a concept and as a social institution. Firstly, the conception of property as a bundle of rights, and the personalist conception of property in many legal systems (that is, among scholars and in courts' case-law) lead to the desegregation of property rights and to an unhelpful concept, lacking internal or definitional coherence and efficient boundaries. Secondly, changes both in the kind of commodities that increasingly dominate the market and in the 'raw material', in particular information and socio-culturally skilled labour, endangered the importance of property as a social institution.

In fact, a range of theorists from the 1960s onwards have brought into prominence the shift of the economic centre of gravity from manufacturing to service and informational industries.<sup>2</sup> Economic activity is less involved in the transformation of material things and more in producing or commodifying activities, interpersonal relations, and acknowledge. More recently, in his book, *The Age of Access*,<sup>3</sup> JEREMY RIFKIN, an

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<sup>1</sup> I borrowed this expression from Christian Joerges, “What is Left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *E.L.Rev.* 461-489.

<sup>2</sup> John Kenneth Galbraith, *The New Industrial State*, 2<sup>nd</sup> ed., Deutsch, London, 1972; Mark Poster, *The Mode of Information: Poststructuralism and Social Context*, Polity Press in association with Blackwell, Cambridge, 1990; Alain Touraine, *The Post-Industrial Society: Tomorrows Social History, Classes, Conflicts and Culture in the Programmed Society*, Wildwood House, London, 1974.

<sup>3</sup> Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, J.P. Tarcher/Putnam, New York, 2000.

American sociologist, claimed that we are entering in a new era, the so-called age of access, where markets are making way for networks, and ownership is steadily being replaced by access.

In RIFKIN's opinion, markets and the exchange of property between sellers and buyers – the most important feature of the modern market system – give way to short-term access between servers and clients operating in a network relationship. The new commerce occurs in cyberspace, an electronic medium far removed from the geographically bound marketplace. Whereas in a geographically based economy, sellers and buyers exchange physical goods and services, in cyberspace, servers and clients are more likely to exchange information, knowledge, experience, and even fantasies. In former realm, the goal is transferring property, while in the new realm, the goal is providing access to one's daily existence.<sup>4</sup>

In the network economy, both physical and intellectual property are more likely to be accessed by business rather than exchanged. Ownership of physical capital, however, once the heart of the industrial way of life,<sup>5</sup> becomes increasingly marginal to the economic process. It is rather regarded by companies as a mere operational expense rather than an asset, and something to borrow rather than to own. Intellectual capital, on the other hand, is the driving force of the new era, and much coveted. Concepts, ideas, and images – not things – are the real items of value in the new economy. Intellectual capital, RIFKIN points out, is rarely exchanged. Instead, it is closely held by the suppliers and leased or licensed to other parties for their limited use.<sup>6</sup> Where the market used to boast sellers and buyers, now the talk is more of suppliers and users.

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<sup>4</sup> *Ibidem*, p. 17. A network-based global economy both drives and is driven by a dramatic acceleration in technological innovation. Because production processes, equipment, and goods and services all become obsolete faster in an electronically mediated environment, long-term ownership becomes less palatable, while short-term access becomes a more frequent option. Sped-up innovation and product turnover dictate the terms of the new market economy.

<sup>5</sup> See Philip Selznick, *Law, Society, and Industrial Justice*, Transaction Books, 1969, p. 63, on power and property.

<sup>6</sup> In the network economy, characterized by shorter product lifecycles and an ever expanding flow of goods and services, it is human attention rather than physical resources that becomes scarce. Giving away products will increasingly be used as a marketing strategy to capture the attention of potential costumers.

Moreover, goods themselves – the bulwark of the private property regime – are becoming transformed into pure services, the end of property as a defining concept of social life. As goods become more information-intensive and interactive, and are continually upgraded, they change character. They lose their status as products and metamorphose into evolving services. Their value lies less in the physical scaffolding or container in which they come and more in the access to services they provide. The nature of services is also changing. Traditionally, services have been treated more like goods and negotiated as discrete market transactions, each one separated in time and space. Now, with the advent of electronic commerce, services are being reinvented as long-term multifaceted relationships between servers and clients.<sup>7</sup>

The changes taking place in the structuring of economic relationships, according to RIFKIN, are part of an even larger transformation occurring in the nature of the capitalism system. We are making a long-term shift from industrial production to cultural production and a transition into what economists call an experience economy – a world in which each person’s own life becomes, in effect, a commercial market. If, for example, one contracts for an air-conditioning service rather than buying the air conditioner itself, one pays for the experience of having air-conditioning. The new capitalism, then, is more temporal than material. Instead of commodifying places and things and exchanging them in the market, we now secure access to one another’s time and expertise and borrow what we need, treating each thing as an activity or event that we purchase for a limited period of time. Capitalism is shedding its material origins and increasingly becoming a temporal affair.

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Holding their attention will depend on the ability of companies to deliver effective services and creating lasting relationships. Giving away software programs is a particularly effective strategy for information-technology firms because the more people who are linked together through a company’s program, the greater the benefits are to each participant and the more valuable the enterprise’s potential services become. In the industry, this phenomenon is known as the ‘network effect’. The larger the network, the greater the links, the more valuable the network becomes to those who are part of it. Giving away software helps build networks and is increasingly seen as a cost of doing business. *Ibidem*, pag. 85.

<sup>7</sup> *Ibidem*, p. 85.

When virtually everything becomes a service, capitalism is transformed from a system based on exchanging goods to one based on accessing segments of experience. In the Industrial Age, when producing goods was the most important form of economic activity, being propertied was critical to survival and success. In the new era, where cultural production is increasingly becoming the dominant form of economic activity, securing access to many cultural resources and experiences that nurture one's psychological existence becomes just as important as holding onto property. Old institutions grounded in property relations, market exchanges, and material accumulation are slowly being uprooted to make room for an era in which culture becomes the most valuable possession, and each individual's own life becomes the ultimate market.

In the new age of cultural capitalism, access becomes far more relevant and property far less in the ordering of commercial life.<sup>8</sup> Property relations are compatible with a world in which the primary task of economic life is the processing, manufacturing and distribution of physical goods. Inert objects are easily measurable, and because hard goods can be quantified, they are amenable to pride.<sup>9</sup> They can be possessed by only one party at a time and fit the requisite of exclusivity. They are both autonomous and, for the most part, mobile – with the exception of real estate. But in the new cultural economy, the organization of commercial life is not so simple.<sup>10</sup>

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<sup>8</sup> The principle of access to essential facilities is fundamental in networks industries. Where a monopoly or a dominant company owns or controls something access to which is essential to enable its competitors to compete, it may be pro-competitive to oblige the company in question to give access to a competitor, if its refusal to do so has sufficiently serious effects on competition. Cf. John Temple Lang, "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner", (2000) 1 *Journal of Network Industries* 375-405.

<sup>9</sup> John Kenneth Galbraith, *The New Industrial State*, 2<sup>nd</sup> ed., Deutsch, London, 1972; Mark Poster, *The Mode of Information: Poststructuralism and Social Context*, Polity Press in association with Blackwell, Cambridge, 1990; Alain Touraine, *The Post-Industrial Society: Tomorrows Social History, Classes, Conflicts and Culture in the Programmed Society*, Wildwood House, London, 1974.

<sup>10</sup> Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for Experience*, J.P. Tarcher/Putnam, New York, 2000, p. 138.

The world of the young people of the new protean generation, as described by RIFKIN, is, mainly, a world that is more theatrical than ideological and oriented more to a play ethos than to a work ethos. For them, access is already a way of life, and while property is important, being connected is even more important. For the first generation of the ‘age of access’, personal freedom has less to do with the right of possession and the ability to exclude others and more to do with the right to be included in webs of mutual relationships.

Following RIFKIN, it might be noticed that, when exclusive property relations were the reigning paradigm for organizing human activity, freedom was associated with autonomy, and autonomy with ownership. To be free was to be autonomous – that is, not dependent or not beholden to others. Autonomy, in turn, depended on being propertied. The more one could claim as mine rather than thine, the more independent and autonomous one could be. The government’s role was conceived of as a limited one – to help secure one’s private property and, by so doing, preserve each person’s individual freedom. In a network economy of suppliers and users, however, in which embedded relationships become the axial principle for structuring activity, freedom comes to mean something very different. Inclusion and access, rather than autonomy and ownership, become the more important tests of one’s personal freedom. Freedom is a measure of one’s opportunities to enter into relationships, forge alliances, and engage in networks of shared interest. Being connected makes one free. Autonomy, once regarded as synonymous with personal freedom, becomes its opposite. The right not to be excluded, the right of access, on the other hand, becomes the baseline for measuring personal freedom.<sup>11</sup> Government’s role in the new scheme of things is, thus, to secure every individual’s right to access the many networks – both in geographic space and

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<sup>11</sup> Not surprising, the shift from ownership to access is being accompanied by new theories about property relations. While property dealt with the narrow material question of what’s mine and thine, access deals with the broader cultural question of who controls lived experience itself.

cyberspace – through which human beings communicate, interact, conduct business, and constitute culture.<sup>12</sup>

RIFKIN does not claim that property disappears in the coming ‘age of access’. Property continues to exist but is far less likely to be exchanged in markets. Instead, the role of property will change radically. Suppliers hold onto property in the new economy and lease, rent, or charge an admission fee, subscription, or membership dues for its short-term use.

The sociological approach made by RIFKIN is a very provocative and interesting one, which should be reconsidered in legal terms. In my opinion the discussion of the usefulness and validity of property as a social institution demands, first of all, a clear definition of the concept of private property rights.

In Chapter One, I will reflect upon the concept of property. I will take a two-dimensional approach to property rights, both as ‘constitutional’ rights and as private individual rights. Property rights, for constitutional and international discourse, are individual rights to which individuals or legal persons are entitled before public authorities. They should be widely defined in terms of patrimonial rights, that is, the concept of property should be understood as comprising the whole of a person’s assets assessable in monetary terms. As concerns property as individual private rights, I will claim that the essence of rights *in rem* lies in the immediate and direct power of a

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<sup>12</sup> According to Jeremy Rifkin, *ibidem*, p. 178, access is, after all, about distinctions and divisions, about who is to be included and who is to be excluded. Access is becoming a potent conceptual tool for rethinking our worldview as well as our economic view, making it the single most powerful metaphor of the coming age. Like property relations, access relations are meant to create distinctions. With property, the distinction is between those who possess and those who are dispossessed. With access, the distinction is between those who are connected and those who are disconnected. Both property relations and access relations, then, are about inclusion and exclusion. In the former case, the separation is between the haves and the have-nots. In the latter case, the separation is between those who are inside and those who are on the outside. It is measured in quantitative terms by the number of networks one is a part of, and in qualitative terms by the embeddedness of one’s relationship and connections with others. In a society built around private property, whoever owns the physical capital and controls the means of production is in a position to determine who will succeed. In a society built around access relations, whoever owns the channels of communication and controls the passageways into the networks determines who is the player and who is not.

person over a thing. For an analysis of the discussion about the concept of property, both in Anglo-American countries and in Europe, I will sketch the fundamental debate about the ‘bundle of rights’ theory, the ‘exclude’ theories and the ‘integrated’ theories in the Anglo-American countries, and between realists and personalists in continental Europe. I will observe, first, that in the Anglo-American countries, the integrated theories (claiming that the thing itself matters, both as an empirical and theoretical matter, in the definition of property rights) are getting stronger. Similarly, in continental Europe the distinction between real rights and credit rights was never endangered by a prominent personalist theory (characterizing property rights as producing a universal and passive obligation, that is, the obligation of everybody to refrain from acts that interfere with the owner’s control of his goods). Finally, I will propose my own definition of property: an immediate power of control over a thing that is enforceable as against everybody. Private property comprises, first of all, a variety of contextual relationships among individuals and objects of social wealth. Secondly, property implies a variety of relations among individuals themselves and among individuals and the state. As a metaphor, I will borrow the web of interests metaphor proposed by CRAIG ARNOLD.<sup>13</sup> The web of interests’ metaphor focuses attention on the nature and characteristics of the object of property interests: it impinges upon both the relationships between interest holders and the object, and upon the diverse relationships among the interest holder.

After I have clarified my operative concept of ownership, I will expound upon the needlessness of property as a social institution, in Chapter Two. I will start by claiming that property is undergoing a major change. First, the object of property comprises mostly consumption goods. And secondly, the use of the thing is not direct, but conversely depends on a contract. Property is intrinsically linked to consumption, and the owner is often necessarily a consumer. I will inquire then, how property must be reinterpreted and is to fulfil the function normatively ascribed to it, in this context. I

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<sup>13</sup> Craig A. Arnold, “The Reconstitution of Property: Property as a Web of Interests”, (2002) 26 *Harv. Envtl. L. Rev.* 281-364.

will, first, devote my attention to consumers' search for meaning through consumption in contemporary societies. And, secondly, I will inquire into the answer provided by property rights. It is my contention that property is becoming increasingly relational. With its facets of interactivity, interpersonality, intertextuality, and interdiscursivity, property is *in relation* to contract and is a means for the owner *to establish relations* with others. A new conception of property, as increasingly dynamic, active, vibrant, vigorous, and communicative, is required to fulfil the needs of individuals in contemporary societies. The prognosis of the legal consequences of such a change will be made clear. Namely, that Property and Consumer Law are part of a web of interconnected regimes that revolve around things.

In Chapter Three, I will analyse the protection of property as a fundamental right under EU law. I will claim that economic regulation seems to have implied the total subjugation of individual property rights to Community policies. The European Court of Justice (hereinafter, ECJ) does not have a strong approach to property rights protection: in no case so far has the Court found a violation of the right to property. The outcome of such an adjudicative process is that the ECJ does not consider the need to establish a general principle to compensation. I will claim that the ECJ's challenge is to strike the right balance between property rights and market build-up. Such a balance is to be found in the institutionalized communicative network of discourses for the ECJ adjudicative activity on fundamental rights: the case-law of the European Court of Human Rights (hereinafter, ECtHR), and common traditions of Member States. In so doing, I will compare the case-law of the ECJ and of the ECtHR in two aspects: first, through the permission and, second, through the impairment of property rights. I will then suggest that the ECJ should be open to inputs from the ECtHR and appropriately ensure effective protection of individual property rights, namely through the 'excessive burden' criterion. According to this criterion, individuals shall not suffer an excessive burden; on the contrary, a fair balance must be found between the demands of the general interest of the community and the requirements of the protection of the individual's property right. Under this criterion, in order to assess the proportionality of

an interference with property rights, the payment of compensation (along with other elements, such as the increase of price) must necessarily be taken into consideration.

In Chapter Four, I will rely on the legal outcomes of the conclusions I have reached in Chapter Two. The fact that property is mainly restricted to consumer goods and that the use of goods increasingly depends on an ancillary contract implies that the owner is often a consumer. I will ask how the property holder must be conceived of in the framework of European Consumer Law. The function of EC consumer [protection] law, the function of European consumer policy, and the definition of the European consumer are the three interrelated questions that will guide my inquiry. The notion of consumer is linked up with functional approaches, namely the build-up and functioning of the internal market. The consumer is thus characterized as a confident, informed, circumspect and rational market player. The European market provides the enabling structural conditions to the flow of communicative actions among economic actors: the exercise of an effective and autonomous choice presupposes consumers to have the ability to choose among distinct options. Whilst a communicative framework, European intervention must be pragmatic and promote and reinforce effective autonomy and choice. I will claim that consumer policies should be asymmetrical: they shall create benefits for those who are boundedly rational while imposing little or no harm on those who are to be considered fully rational. Such policies are relatively harmless to those who reliably make decisions in their best interests, while at the same time advantageous to those making suboptimal choices. This distinction provides the basis for a new standard in the assessment of the costs and benefits of regulatory options. In respect of property rights holders, where the authority of the Community is so strong, fundamental rights protection may mandate specific policy decisions. That will be the object of my inquiry in the next Chapter.

In Chapter Five, I will, then, inquire how the proper balance between the provision of enabling conditions and the imposing of limits to distinct properties might be achieved. Intellectual capital is at the heart of the new economy, and gives rise to new regulatory questions. In fact, there are situations where a conflict of properties might exist between

a corporeal thing and an intellectual property right. This is often the case in the field of motor vehicles - consumer durables which at both regular and irregular intervals require expert maintenance and repair - and that I will adopt for my operative research. The principal producer might claim to be the intellectual property holder of a design right that encompasses spare parts, and consequently, the distribution can be made only through authorized car dealers and repair shops. The interest of the owner of the corporeal thing, the car, on the contrary, is to buy safe but cheaper products. If the car producer is protected by an intellectual property right, the owner of the car must buy a spare part that is exactly the same as the one whose design the law protects; the design right therefore requires him to buy the spare part from the original or an authorized producer. Before such a conflict, one might ask what exactly the scope of a design right is. The ECJ has already adjudicated on it, in cases *Maxicar* and *Volvo*, much debated decisions. The Directive on the legal protection of designs, adopted ten years after those decisions, failed to reach a consensus and failed to harmonize completely the Member States' laws on spare parts. I will contend that EC law has a word to say in such a situation, where intellectual property and physical property might conflict. The resolution of the conflict within the framework of a legal system begs a conceptual question, and must, therefore, be found during the institutive moment of the rule creating a property right. Rights are not pre-ordained truths to be discovered but rather are constructions, linked up with functional approaches. Therefore, the scope of a right shall be defined in such a way to make it possible to avoid foreseeable conflicts. Before formulation of property rights, an appropriate weighing and balancing of all relevant interests is thus in need, in order to avoid normative inconsistencies. In making explicit a property right, the regulatory decision encodes an overall assessment and displays a heuristic message on the communicational assessment of conflicting interests. The balancing outcome is a conditional, preferential statement, a requirement to optimize the guarantee, and obtain legal consistency. Intellectual and physical property should be treated identically in the law, for the grant of intellectual property rights cannot abridge or set aside entirely the interests of the owner of the corporeal things. My normative claim is that law-making bodies must autonomously consider the interest(s) of the

## *Introduction*

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owner of the corporeal thing in the overall assessment of granting an intellectual property right.