



# THE CLASH OF THEORIES: SEMIOTIC DEMOCRACY AND PERSONALITY THEORY IN INTELLECTUAL PROPERTY LAW

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## ABSTRACT

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This article discusses the two justifications that are commonly used in intellectual property law: the semiotic democracy and the traditional personality theory of intellectual property. Semiotic democracy emphasizes the right to distribute and access information and the democratization of institutions, practices, speech, dress, mannerisms, etc., while the personality theory of intellectual property emphasizes the development of the personality and the protection of the creator's dignity and personhood. However, this paper highlights some objections to the personality theory, including the unclear moral claim of creators to their feelings, character traits, and experiences and that intellectual property creations may not embody more of a creator's personality than another object. Despite these objections, the personality theory of intellectual property rights is important for the protection of the creators' reputation and their economic interests. Therefore, policymakers must strive to protect these rights to the greatest extent possible.

## INTRODUCTION

Intellectual property law is a complex and multifaceted field that encompasses various justifications and considerations. Two prominent justifications for intellectual property rights are the concept of semiotic democracy and the traditional personality theory of intellectual property. While both theories focus on moral considerations, their perspectives on who benefits from intellectual property differ. Semiotic democracy emphasizes the freedom of expression and rights of consumers, while personality theory focuses on the rights of creators to profit from their creations and protect their reputations. This article provides an overview of both theories, examining their strengths, weaknesses, and implications for intellectual property law, and explores the contrasting justifications of intellectual property rights and their implications for policymakers.

### 1. SEMIOTIC DEMOCRACY AND THE INTERSECTION OF INTELLECTUAL PROPERTY RIGHTS

#### 1.1. Semiotic Democracy vs. Traditional Notions of Intellectual Property

In the field of intellectual property law, there are many important considerations and justifications. One of the most modern is the concept of a semiotic democracy, which stands in contrast to traditional notions and justifications for intellectual property law, including the personality theory expounded by 19th Century German philosopher Georg Hegel. However, semiotic democracy does some features in common with these justifications along with the contrasts and differences. Both justifications are concerned with morality and the rights of the creators and the general public, but their focus is on different aspects of the debate over intellectual property rights.

The concept of Semiotic democracy in intellectual property law means that audiences freely and widely engage in the use of cultural symbols in response to the forces of media and give certain cultural symbols different meanings from the

ones intended by their creators.<sup>1</sup> Also within the field of intellectual property is the so-called “personality” theory of intellectual property, which states that individuals have moral claims to their own talents, feelings, character traits, and experiences, and this control is essential for self-actualization.<sup>2</sup> In relation to intellectual law, this means that the external actualization of the human will require property, in this case, the property right of the owner to the relevant material, and thus claims to control feelings, experiences, and character traits may be expanded to intangible works.<sup>3</sup> In some areas, the two concepts overlap and agree, and in others, the two justifications diverge and disagree. In other words, they differ in some features and share others.

#### 1.2. The Origins and Implications of Semiotic Democracy

Media studies professor John Fiske introduced the concept of a semiotic democracy, which refers to the unrestricted participation of audiences in utilizing cultural symbols.<sup>4</sup> This concept was groundbreaking in that it allowed audiences to ascribe meanings to cultural symbols that deviated from those intended by their creators, thus granting power to consumers rather than producers.<sup>5</sup> Thus, a sort of "cultural commons" emerged, wherein a communal sphere of cultural information was accessible for the public to remix, exchange, and connect.<sup>6</sup> This concept subverted the traditional view of intellectual property as belonging primarily to the creator because it gave the audience greater power in attaching meaning and different interpretations to intellectual property and allowing indi-

1 Katyal, S. (2012). Between Semiotic Democracy and Disobedience: Two views of Branding, Culture and IntellectualProperty. *Wipo J. Intell. Prop.*, 4, 50.

2 Moore, A., & Himma, K. (2011). Intellectual Property. <https://plato.stanford.edu/archives/win2018/entries/intellectual-property/>

3 Ibid.

4 Katyal, S. K. (2006). Semiotic Disobedience. *Washington University Law Review*, 84(3), 489–571.

5 S. Katyal, 2012, pp. 52–53.

6 Stark, E. (2006, June 19). Free culture and the internet: A new semiotic democracy. *OpenDemocracy*. [https://www.opendemocracy.net/en/semiotic\\_3662jsp/](https://www.opendemocracy.net/en/semiotic_3662jsp/)

viduals to become both producers and creators.<sup>7</sup> In addition, it subverted the notion of exclusive ownership, where authors may dictate a great deal of control over an original image or text.<sup>8</sup>

### 1.3 Subverting Traditional Concepts of Intellectual Property

Semiotic democracy is a subversion of traditional concepts of intellectual property, such as trademarks, copyrights, etc., because trademarks consist of a trademarked concept adopted by a manufacturer or merchant to identify their goods and distinguish them from others, which allows the owner to use the mark/symbol and exclude others from doing so,<sup>9</sup> and copyright is the protection of original works of authorship fixed in any tangible medium of expression.<sup>10</sup> The work copyrighted must be that of the author himself or herself.<sup>11</sup> In addition, patents consist of the ownership by an inventor of processes, machines, articles of manufacture, or compositions of matter.<sup>12</sup>

Semiotic democracy upends the traditional notion that tangible and intangible items are solely the property of their creators, inventors, or merchants by granting consumers greater power. Nevertheless, the proliferation of corporate sponsorship and branding in both public and private realms has enabled corporations to maintain their symbols and images, leading to a blurring of the distinction between real and intellectual property.<sup>13</sup> This notion has taken root thanks to the digital revolution, or the proliferation of technologies such as television and the internet that facilitate the transmission of copyrighted works and ideas, which allows for the greater speech by consumers and greater freedom to use and interpret copyrighted works.<sup>14</sup> The digital revolution has aided the dissemination of copyrighted works and ideas by making it cheap and easy

to copy and distribute information.<sup>15</sup> An example of this can be seen in the music industry, where copyrighted works can be freely remixed and distributed without regard to the intellectual property rights of the original artists.<sup>16</sup> The users are, in effect, creating their own product from the original product created by the producers, so in effect, anybody can now become a producer of original content.<sup>17</sup>

According to some views, conventional concepts of property rights have inhibited artistic expression by causing artists and activists to refrain from fully expressing themselves out of concern that they may face infringement lawsuits.<sup>18</sup> In response, semiotic democracy allows for the “democratization” of institutions, practices, speech, dress, mannerisms, etc., allowing ordinary people to fashion their own responses to cultural forces and allowing the audience to respond to an author by using the same channels and symbols.<sup>19</sup> The main focus of the notion of semiotic democracy is the concern over the right to distribute and access information, with the digital revolution creating greater opportunities for consumers to do so and potentially creating conflict with the property rights of creators.<sup>20</sup> For example, semiotic democracy has led to artistic parodies of many trademarked company logos and other intellectual property.<sup>21</sup> Another example is the rise of things like citizen journalism, blogging, and mashups made on platforms such as YouTube and Flickr, aided by the increased prominence of the internet in disseminating cultural information and copyrighted works.<sup>22</sup>

## 2. PERSONALITY THEORY AND INTELLECTUAL PROPERTY CONTROL

### 2.1. Defending Intellectual Property with Hegelian Philosophy

At the other end of the spectrum is the traditional justification for intellectual property rights

7 S. Katyal, 2012, pp. 50–51.

8 *Ibid.*, p. 50.

9 Moore & Himma, 2011.

10 17 U.S.C. §102 (1988).

11 Moore & Himma, 2011.

12 *Ibid.*

13 S. Katyal, 2012, pp. 50, 52, 53, 57.

14 Balkin, J. (2004). *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*. *New York University Law Review*, 79(1), 1–58, pp. 3, 6, 13, 16.

15 *Ibid.*, pp. 6, 13, 16.

16 Stark, 2006.

17 *Ibid.*

18 S. Katyal, 2012, p. 51.

19 *Ibid.*, p. 53.

20 Balkin, 2004, pp. 43, 49.

21 S. K. Katyal, 2006, pp. 514–515.

22 Stark, 2006.

of “personality theory”, which was argued by thinkers such as the German theorist Georg Hegel, who argued that the external actualization of the human will require property.<sup>23</sup> In this justification, individuals have moral claims to their own talents, feelings, character traits, and experiences.<sup>24</sup> Therefore, by controlling and manipulating tangible and intangible objects through intellectual property rights such as copyrights, patents, and trademarks, producers obtain a measure of freedom by making there will take form in the world.<sup>25</sup> This theory states that the personality of everyone builds itself in work and creation, and thus the development of the personality is inherent to the property rights that we have.<sup>26</sup> In this way, according to Hegel, intellectual property rights permit the development of the personality and protect it as well, which extends to the material things developed by the person.<sup>27</sup> Hegel states that because intellectual works are an extension of the creator’s personality, the creator deserves to have the right to control these works in order to preserve their dignity and personhood.<sup>28</sup> Therefore, granting creators property rights over their creations is part of their essential autonomy as human beings.<sup>29</sup>

## 2.2. Limitations of Personality Theory in Justifying IP Rights

However, there are some serious objections to the personality theory justification for intellectual property rights. For example, it is unclear whether or not people own their feelings, character traits, and experiences, so the moral claim of a person to

these things may not, in fact, exist.<sup>30</sup> In addition, it does not necessarily follow that these claims are expanded when people expand moral claims to their personality through tangible and intangible works, so the personality theory may not justify anything more than usage rights or prohibitions on altering the person’s works.<sup>31</sup> The personality is neither linked nor affected by the outcome of the creation because it does not constitute the human person by itself, and the work itself is independent of the creator and dependent upon whether the public decides to attach importance to it.<sup>32</sup> The personality argument does not account for the fact that intellectual property creations may not embody more of a creator’s personality than another object, and intellectual property creations often do not embody any personality from their creators.<sup>33</sup> This justification for intellectual property rights also does not take into account social recognition, which does not necessarily come from the recognition of property rights, but instead may come from processes that do not provide their creators with any compensation.<sup>34</sup> In addition, it can be said that the personality theory prioritizes the interests of the original creators at the expense of other uses or expressions of the protected works.<sup>35</sup> The personality theory has also been criticized as only being suitable for artistic and creative expressions protected under copyrights rather than technological products, which are invented to fulfil specific needs and are unrelated to the inventor’s personality.<sup>36</sup>

## 2.3. Personality-Based IP: Protecting Creativity & Reputation

However, a case can be made that personality-based theories of intellectual property rights can help protect a creator's reputation and protect the

23 Hegel, G. W. F. (1991). *Hegel: Elements of the Philosophy of Right* (A. W. Wood, Ed.; H. B. Nisbet, Trans.; Revised ed. edition). Cambridge University Press; Yoo, C. (2019). *Rethinking Copyright and Personhood*. *University of Illinois Law Review*, 1039-1078, p. 1039.

24 Hegel, 1991.

25 Ibid.

26 Boeraeve, C. (2016, October 19). Intellectual property theories: Are they fairly justified? *Law Right*. <https://www.law-right.com/intellectual-property-theories-are-they-fairly-justified/>

27 Ibid.

28 Justifying Intellectual Property Rights. (2018, February 19). *Flora IP*. <https://www.floraip.com/2018/02/19/justifying-intellectual-property-rights/> personality-based (GWF Hegel).

29 Ibid.

30 Moore & Himma, 2011.

31 Ibid.

32 Boeraeve, 2016.

33 Papaioannou, T. (2006). Can Intellectual Property Rights be Morally Justified? The Case of Human Gene Patents. *Dynamics of Institutions and Markets in Europe*. <http://www7.bbk.ac.uk/innovation/publications/dime/docs/WP08-IPR.pdf>, pp. 8-9.

34 Ibid., pp. 4, 9.

35 “Justifying Intellectual Property Rights,” 2018. *personality-based (GWF Hegel)*

36 Ibid.

creator himself/herself from unwarranted economic damage.<sup>37</sup> In this way, intellectual property rights help creators to have a measure of control over the risks they take in presenting their work to the public.<sup>38</sup> To this effect, Hegel's Philosophy of Rights has been used to develop a system for safeguarding intellectual property rights, which includes the following principles: (1) providing more extensive legal protection to highly expressive intellectual creations than to those with less expressiveness; (2) granting substantial legal protection to a creator's "persona," despite its not being the result of labour; and (3) allowing authors and inventors to earn recognition, esteem, admiration, and compensation by selling or distributing copies of their work, while also protecting them from the misappropriation or defacement of their work.<sup>39</sup> Thus, intellectual property rights are crucial for the satisfaction of some basic human needs and therefore policymakers must strive to protect these rights to the greatest extent possible.<sup>40</sup> In this way, the personality theory of intellectual property rights helps to protect the essential right of creators to protect their works, which are an expression of their personality and will, and thus create social and economic conditions conducive to intellectual activity and human flourishing.<sup>41</sup>

### 3. SEMIOTIC DEMOCRACY VS. PERSONALITY THEORY IN INTELLECTUAL PROPERTY

Semiotic democracy and the personality theory of intellectual property have one feature in common, namely, the focus on moral considerations. Semiotic democracy focuses on the moral considerations of empowering the consumer and enabling the freedom of expression,<sup>42</sup> and the main goal of this concept is to expand the marketplace of ideas.<sup>43</sup> This is made easy by the fact that the digital revolution has made it possible for content to cross-cul-

tural and geographic borders, allowing consumers to do what only large commercial enterprises previously could.<sup>44</sup> Semiotic democracy allows the consumers to reshape cultural perceptions about the meaning of things or messages and to freely build on what others have before them.<sup>45</sup> In this way, this notion gives consumers greater freedom in shaping their culture and exercising their freedom of expression.<sup>46</sup> For example, the digital revolution has given consumers greater power to alter existing content and produce something new.<sup>47</sup>

#### 3.1. Four Pillars of Symbolic Democracy in Copyright Law

Generally, there are four main rights that semiotic democracy has outlined: (1) the entitlement to publish, distribute, and access an audience; (2) the entitlement to interact with others and exchange ideas, including the right to impact and be impacted, transmit culture, and absorb it; (3) the entitlement to draw from preexisting cultural materials, combining, innovating, annotating, and subsequently sharing the outcomes with others; and (4) the entitlement to engage in and create culture, and therefore the entitlement to contribute to the development of the cultural and communicative powers that shape the self.<sup>48</sup> These outlined rights illustrate the concern that semiotic democracy has for the freedom of expression of consumers as well as their freedom of expression. In this way, the justification of semiotic democracy focuses on the moral rights of the consumers to utilize and interpret copyrighted works in the way that they choose, regardless of whether or not the intellectual property rights of the creator are impacted.

#### 3.2. Intellectual Property as Moral Rights: Justifying Protection

By contrast, the traditional personality theory of intellectual property focuses on the moral considerations of protecting the sciences and actively

37 Moore & Himma, 2011.

38 Ibid.

39 Fisher, W. W. (2000). THEORIES OF INTELLECTUAL PROPERTY. <<https://cyber.harvard.edu/people/tfisher/iptheory.pdf>>

40 Ibid.

41 Ibid.

42 S. Katyal, 2012, pp. 50, 52, 53, 60.

43 Ibid., p. 61.

44 Balkin, 2004, pp. 8, 13.

45 S. Katyal, 2012, pp. 53, 60.

46 Ibid., p. 53.

47 Balkin, 2004, pp. 13, 16.

48 Ibid., p. 46.



promoting them, therefore benefiting society by promoting progress and social utility.<sup>49</sup> This was the main concept and justification behind Hegel's personality-based justification of intellectual property.<sup>50</sup> It is for this reason that many corporations are attempting to shut down or limit the participation of consumers that semiotic democracy allows because it interferes with their economic interests.<sup>51</sup> In addition, intellectual property rights constitute a necessary part of the individual's personality, which can only be adequately expressed in an ethical community.<sup>52</sup> In this way, intellectual property rights are considered to be moral rights in that they facilitate the achievement of each individual's personality within this ethical community, which is a crucial part of the justification for laws protecting copyright and patent protection.<sup>53</sup> Therefore, since the creator's work is considered to be a key part of his or her personality, infringement is therefore considered to be a violation of his or her moral right to personality development.<sup>54</sup>

### 3.3. Semiotic Democracy vs. Personality Theory Clash

The issue of who benefits from intellectual property distinguishes semiotic democracy from personality theory. Semiotic democracy emphasizes the advantages to the consumer resulting from the challenge to conventional notions of intellectual property, whereas personality theory prioritizes the benefit conferred on creators by preserving the integrity of their creations. While traditional advertising seeks to enhance the economic value of the creator, semiotic democracy strives for the opposite outcome by allowing consumers to interpret the branded product in their own ways, even if the brand's image and philosophy remain constant in the consumer's interpretation.<sup>55</sup> Personality theory, in particular, focuses on private property as an abstract right related to needs and freedom, in that people need to have

control of resources in order to satisfy their physical needs and develop their own individuality and freedom.<sup>56</sup> Hegel stressed that both freedom and personality must be translated into the external objective world through the ownership of private property because the individual who owns an object may liberate himself or herself from any particular need and embody his or her own free will and personality into that object.<sup>57</sup> Thus, denial of the intellectual property rights of a creator results in their inability to gain recognition as persons in the community, necessitating the intervention of the state to protect these rights.<sup>58</sup>

Semiotic democracy, by contrast, is concerned with democratizing the impact of intellectual property rights by giving consumers more power relating to their ability to interpret copyrighted and trademarked works. As an example, the democratization of the marketplace caused by the digital revolution has caused an uptick in digital piracy, an act that is symbolic of the newfound power of consumers at the expense of creators.<sup>59</sup> Semiotic democracy places consumers and producers on a level playing field,<sup>60</sup> while traditional notions of intellectual property, such as personality theory, focus primarily on the welfare of the creator without any regard for the welfare of the consumers.<sup>61</sup>

Semiotic democracy highlights the tension between freedom of expression and intellectual property rights, as the digital revolution's democratization of the market challenges the exclusive rights awarded to creators under conventional intellectual property law.<sup>62</sup> These technological advances have caused many creators to be concerned about greater piracy and trademark infringement, even as they themselves leverage derivative rights in their own works.<sup>63</sup> Thus, the ascent of a semiotic democracy, facilitated by the digital revolution, has led to the expansion of intellectual property rights and a more assertive promotion of these rights by creators.<sup>64</sup> As an illustration, the Record-

49 Moore & Himma, 2011.

50 Ibid.

51 Balkin, 2004, pp. 22, 25.

52 Papaioannou, 2006, pp. 5, 8, 20.

53 Ibid., pp. 4–5, 8.

54 Ibid., pp. 8–9, 20.

55 S. Katyal, 2012, pp. 51, 54, 60.

56 Papaioannou, 2006, pp. 5, 8.

57 Ibid., pp. 8–9.

58 Ibid., pp. 2–5.

59 Balkin, 2004, pp. 9, 15–16.

60 S. Katyal, 2012, pp. 53, 60.

61 Moore & Himma, 2011.

62 Balkin, 2004, pp. 14, 49, 52.

63 Ibid., pp. 16–17.

64 Ibid., pp. 14, 25, 49, 52.

ing Industry Association of America (RIAA) has taken action against individuals who produce videos that infringe on their copyrighted content by issuing "cease and desist" notices to video creators and collaborating with YouTube to clamp down on offending videos.<sup>65</sup> In addition, digital rights management (DRM) technologies that limit access to a particular work have impeded the development of the digital commons.<sup>66</sup> However, these restrictions have been burdensome for creators and consumers alike because the threat of legal action has stifled the creation of any work that even remotely samples or makes legal use of others' works.<sup>67</sup>

Copyright is gradually assuming an enduring and infinite status as mere property, while trademarks and patents are expanding in range due to the digital revolution's democratization of content distribution.<sup>68</sup> As a result, intellectual property rights, once viewed as a government monopoly to incentivize innovation, have transformed into a counterforce to innovation, granting greater authority over digital content and constraining the free expression of consumers.<sup>69</sup>

Consequently, semiotic democracy diverges from personality theory and other conventional rationales for intellectual property by affording consumers greater democratic involvement, as opposed to promoting greater centralized control by creators.<sup>70</sup>

An instance of semiotic democracy in action can be seen in the case of Elizabeth Stark, a writer who uploaded a compilation of Brazilian Baile funk music to her blog.<sup>71</sup> The mix was subsequently picked up by multiple other blogs and downloaded tens of thousands of times, earning a spot in *The Wire's* compilation of the best mixes of 2005, a leading electronic music magazine.<sup>72</sup> In doing so, Stark had entered the cultural commons, a public sphere of cultural information accessible for sharing, reworking, and remixing.<sup>73</sup> The mix was disseminated without regard for copyright, and this

cultural common has facilitated the proliferation of Baile music in Brazil.<sup>74</sup> This stands in contrast to conventional copyright law, which would lock down the work and preclude public access to, or manipulation of, the mix.<sup>75</sup>

The notions of semiotic democracy and personality theory are two of the most interesting justifications for intellectual property rights in that they represent opposing viewpoints regarding the focus on who benefits. Semiotic democracy is primarily concerned with the benefits to the consumers, while personality theory necessarily focuses on the benefits to the producer of the patents, trademarks, copyrights, etc. However, both theories focus on the moral considerations involved in intellectual property rights, with the difference being where they place their focus. Semiotic democracy places its focus on the rights of the individual consumers to use copyrighted works in the way they see fit, while personality theory and other traditional notions of intellectual property rights place their focus on the rights of the creators to license and profit from their intellectual creations and therefore benefit from the efforts involved in their creations. Semiotic democracy and personality theory are two sides of the same coin in that they explain different perspectives on the same issue within intellectual property. Both of these theories are but a few of the different justifications and perspectives on intellectual property, which is a field that has many different theories and justifications looking at this amazingly complex and important topic.

## CONCLUSION

In conclusion, the debate over intellectual property rights is complex and multifaceted, and policymakers must balance the competing interests of creators and consumers. The personality theory of intellectual property provides a moral justification for protecting the works of creators, but it has also been criticized for prioritizing the interests of creators over other uses of protected works. Semiotic democracy, on the other hand, emphasizes the rights of consumers to freely engage

65 Stark, 2006.

66 Ibid.

67 Ibid.

68 Balkin, 2004, pp. 14, 15, 25, 27.

69 Ibid., pp. 25, 27.

70 Ibid., p. 49.

71 Stark, 2006.

72 Ibid.

73 Ibid.

74 Ibid.

75 Ibid.

with cultural symbols and information, which challenges traditional notions of intellectual property.

Despite their differences, both semiotic democracy and personality theory highlight the importance of moral considerations in intellectual property law. As policymakers navigate this com-

plex field, they should strive to protect the essential rights of creators while also allowing for the free exchange of information and ideas. By doing so, they can create conditions that are conducive to intellectual activity and human flourishing.

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