

Property, Persona, and Publicity

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The explosion of online creation has been celebrated and fostered new debates regarding access to and use of information. Yet one issue inherent in online creation has received little theoretical attention. As the tools for creation move from the home to online services, the creator's access to and control over her creations has become mediated by other parties' terms of service. Thus whereas creations authored in the home in either the digital or analog format were under the creator's control, online creation places one's property in other's hands. For example, the recent case of a family trying to access a dead son's email but being denied access because of they did not have the proper password shows how one's email may be lost to the vagaries of online privacy policies. As such not only the creator but her heirs and historians may find that the wealth of creation occurring online is lost to the vagaries of inconsistent service provider policies and whether each person has the foresight to leave passwords and the like in their wills. In short, online creation and storage raise fundamental issues regarding the ownership of, access to, dominion over, and preservation of digital property. This paper investigates and sets forth the theoretical foundations to explain why society should preserve this information property and who should have control over such information. Investigating these questions reveals, however, that three groups have an interest in these artifacts: the creator of the artifact, the potential inheritor of the artifact, and historians. In short, all three groups have claims to the importance and value of digital artifacts but for different reasons. Thus, it appears that when one looks at each group's specific interest and the arguments that support each position separately, the position is coherent. But because each group makes a different claim regarding digital artifacts, the positions clash and reveal incoherence. Put differently, this Article addresses several problems stemming from the profusion of digital artifacts. At one level the creator must maintain access to and dominion over her creations if nothing else to preserve the information in the event of death or failure to pay for services. Thus part of this project seeks to examine and present the theoretical foundations that explain and address the questions surrounding the management and disposition of such creations by the creator. Yet once the importance of preserving and controlling digital artifacts is understood, a problem familiar to many who write about intellectual property arises: to what extent should the creator of the property be able to exercise her dominion over the property or put differently what normative theory justifies the amount of control the creator or her heirs is given. As such, the second part of the Article turns to the inherent problems of property, persona, and publicity that the creation of digital, if not all, artifacts raises. To unravel this issue, the Article examines the case of Stephen Joyce and his claim to absolute dominion over James Joyce's work under both a copyright and a privacy rationale. In examining this claim, the section finds that digital or not, the claim to complete control over artifacts as an extension of persona has deep roots. Indeed, those very roots are the reason that claims such as Joyce's have some force. Nonetheless this Article argues that the draw of the persona rationale is overstated and at times mythological such that it leads to erroneous conclusions and law. By examining recent analyses of the right of publicity, this section

demonstrates that the claim for dominion over digital artifacts during one's life has theoretical support, but when one considers the normative foundations of property law and the insights of Wilhem Dilthey regarding the historical theory, limits on this understanding arise. Specifically, despite strong arguments for non-copyright doctrines such as trademark, the right of publicity, and privacy to attach to creative artifacts, this Article argues that upon death there is little if any basis for those interests to persist. Furthermore drawing on the view that individual creation of its nature draws on others' work to exist, the article argues that other creators' and society's claim on creation mandates a return of the creation to the society from which it sprang.