

Cezary Błaszczak  
University of Warsaw

## THE CRITIQUE OF COPYRIGHT IN HANS-HERMANN HOPPE'S ARGUMENTATION ETHICS

### 1. HANS-HERMAN HOPPE'S ARGUMENTATION ETHICS

There can be no doubt that establishing moral foundations of copyright is one of the most ambitious and intriguing subjects of scholarly pursuit<sup>1</sup>. Among many theories of intellectual property, the assessment of the author's rights inferred from the argumentation ethics by Hans-Hermann Hoppe deserves special attention. First, the theory presented by the German thinker is deontological. Set in the tradition of both aprioristic rationalism and legal naturalism, it maintains that economics and ethics are based upon general facts of nature, which can be inferred through the analysis of praxeology (the theory of human action) and logical discourse<sup>2</sup>. Even though the retorsive argument dates back to Aristotle and Thomas Aquinas, this approach is rather unique, and libertarianism – of which Hoppe is a leading advocate – seems one of the few schools of thought where copy-

---

<sup>1</sup> On the subject of legitimization of copyright see *i.a.*: W. W. Fisher, *Theories of Intellectual Property*, (in:) S. Munzer (ed.), *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, Cambridge–New York 2007, pp. 168–200; A. D. Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, 2<sup>nd</sup> ed., Transaction Publishing, New Brunswick 2004, *passim*; J. Hughes, *The Philosophy Of Intellectual Property*, “Georgetown Law Journal” 1988, Vol. 77, pp. 287–366; P. Drahos, *A Philosophy of Intellectual Property*, 2<sup>nd</sup> ed., Ashgate, Aldershot–Burlington 2001, *passim*; T. G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, (in:) A. Thierer, W. Crews (eds.), *Copy Fights. The Future of Intellectual Property in the Information Age*, Cato Institute, Washington 2002, pp. 43–93; S. van Gompel, *Relativizing the Legal-Theoretical Concerns with Copyright Formalities*, (in:) *Formalities in Copyright Law. An Analysis of their History, Rationales and Possible Future*, Wolters Kluwer, Alphen aan den Rijn 2011, pp. 215–284.

<sup>2</sup> Hoppe has distanced himself slightly from the natural rights doctrine, advocating rationalistic natural law approach. As he put it: “In contradistinction to the natural rights theorists, though, one sees that the answer to the question of which ends can or cannot be justified is not to be deduced from the wider concept of human nature but from the narrower one of argumentation” (H.-H. Hoppe, *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, p. 315).

right is discussed mostly outside of the consequentialist paradigm<sup>3</sup>. Second, most mainstream political and legal doctrines have, for the most part, supported the idea of universally enforceable incorporeal rights (in the case of copyright – Immanuel Kant’s or Georg Wilhelm Friedrich Hegel’s personalism, John Locke’s desert theory)<sup>4</sup>, whereas argumentation ethics speaks against it.

Hans-Hermann Hoppe’s academic biography starts with studies in philosophy conducted within the neo-Kantian tradition under the guidance of Jürgen Habermas. After receiving his Ph.D. from the University of Frankfurt in Germany, he proceeded with research into philosophy of economics, during which he stumbled upon the works by a neo-liberal rationalist, Ludwig von Mises. This led him to Murray Newton Rothbard, Mises’s intellectual heir and the leader of the libertarian movement in the United States. The apriorism and laissez-faire doctrines propounded by “Mr. Libertarian” impacted Hoppe so heavily he decided to leave his academic *alma mater* and move to America<sup>5</sup>. Since Rothbard’s death, Hoppe has been widely recognized as one of the most prominent exponents of the Austrian School of Economics, the libertarian-propertarian philosophy and political doctrine of anarcho-capitalism<sup>6</sup>.

Hoppe set foundations for the propertarian argumentation ethics in 1988 when he published his famous article “The Ultimate Justification of the Private

<sup>3</sup> For the exceptions *n.b.*: D. D. Friedman, *Standards as Intellectual Property. An Economic Approach*, “University of Dayton Law Review” 1994, Vol. 19, No. 1, pp. 1109–1129; T. G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, “Hamline Law Review” 1989, Vol. 12, No. 2, pp. 261–304.

<sup>4</sup> *Vide* I. Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, “Berlinische Monatsschrift” 1785, Vol. 5, No. 1, pp. 403–417, available at <http://www.flechtsig.biz/V04Kant.pdf>, retrieved August 10, 2016; J. Locke, *Second Treatise*, (in:) P. Laslett (ed.), *Two Treatises of Government*, Cambridge University Press, Cambridge 2003, pp. 265–428. Libertarian advocates of copyright include Ayn Rand and Robert Nozick (A. Rand, *Patents and Copyrights*, (in:) A. Rand, N. Branden, A. Greenspan, R. Hessen, *Capitalism: The Unknown Ideal*, Signet, New York 1967, pp. 130–34; R. Nozick, *Anarchy, State, and Utopia*, Blackwell, Oxford 1999, pp. 141–142, 181–182).

<sup>5</sup> M. N. Rothbard, *Beyond Is and Ought*, “Liberty” 1988, Vol. 2, No. 2, pp. 44–45; *The Private Property Order: An Interview with Hans-Hermann Hoppe*, “Austrian Economics Newsletter” 1998, Vol. 18, No. 1; B. Stocker, *Hoppe: Habermas’ Anarcho-Conservative Student*, at <http://istanbulfactsandideas.blogspot.com/2009/06/hoppe-habermas-anarcho-conservative.html> (visited August 12, 2016).

<sup>6</sup> This stream of thought is widely considered as the essence of libertarianism (so-called “libertarianism *sensu stricto*” or “radical libertarianism”). *Vide* D. Juruś, *Libertarny radykalizm*, “Filozofia Publiczna i Edukacja Demokratyczna” 2014, Vol. III, No. 1, pp. 45–58; *Idem*, *W poszukiwaniu podstaw libertarianizmu*, Kraków 2012, *passim*; M. Modrzejewska, *Libertariańskie koncepcje jednostki i państwa we współczesnej amerykańskiej myśli politycznej*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2010, *passim*; J. Bartyzel, *Geneza i próba systematyki głównych nurtów libertarianizmu*, (in:) W. Bulira, W. Gogłoz (eds.), *Libertarianizm. Teoria, praktyka, interpretacje*, Lublin 2010, *passim*.

Property Ethic”<sup>7</sup>. The text and later works drew heavily on Jürgen Habermas’s and Karl-Otto Apel’s discourse ethics, Misesian praxeology and of course, Rothbardian naturalism<sup>8</sup>. Thus, Hoppe’s article may even be perceived as a turning point for libertarianism, since he managed to combine aprioristic rationalism with deontological ethics – a *manoeuvre* that many before had struggled with and failed<sup>9</sup>. It is worth noting that the Austrian School of Economics – one of the pillars of contemporary libertarianism – had been traditionally set in a strict utilitarian tradition<sup>10</sup>. On the other hand, thinkers such as Murray Newton Rothbard, Robert Nozick or Ayn Rand<sup>11</sup> relied heavily on the natural rights doctrine. Admittedly, Rothbard attempted to reconcile rationalism with the natural right of self-ownership<sup>12</sup>, but it was Hoppe who finally managed to set-up an ethical system relying solely on the praxeological axiom. This method of reasoning may not be used by all libertarians; however, it is acknowledged by most of them and practically every propertarian agrees with its conclusions.

Even though the argumentation ethics constitutes the propertarian discourse that may be applied to any social behavior without making value judgements, Hoppe did not specifically analyze the problem of copyright. However, he explicitly spoke against them on a few occasions<sup>13</sup> and his acolyte in the sphere of legal

<sup>7</sup> H.-H. Hoppe, *The Ultimate Justification of the Private Property Ethic*, “Liberty” 1988, No. 2, pp. 20–22.

<sup>8</sup> H.-H. Hoppe, *Property, Causality, and Liability*, “The Quarterly Journal of Austrian Economics” 2004, Vol. 7, No. 4, pp. 87–95; *Idem*, *The Economics and Ethics...*, *passim*; *Idem*, *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010, *passim*; H.-H. Hoppe, W. E. Block, *On Property and Exploitation*, “International Journal of Value-Based Management” 2002, vol. 15, pp. 225–236.

<sup>9</sup> More on this subject: R. T. Long, *The Hopppriori Argument*, <http://praxeology.net/unblog05-04.htm#10> (visited August 10, 2016); H.-H. Hoppe, *On Praxeology and the Praxeological Foundation of Epistemology*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, pp. 265–294; *Idem*, *Economic Science and the Austrian Method*, Ludwig von Mises Institute, Auburn 2007, *passim*; T. Machan, *Individualism and Political Dialogue*, “Poznan Studies in the Philosophy of Science and the Humanities” 1996, No. 46, pp. 45–55; D. B. Rasmussen, *Political Legitimacy and Discourse Ethics*, “International Philosophical Quarterly” 1992, Vol. XXXII, No. 1, pp. 17–34.

<sup>10</sup> *Vide* L. von Mises, *Theory and History. An Interpretation of Social and Economic Evolution*, Ludwig von Mises Institute, Auburn 2007, p. 55 et seq.; *Idem*, *Human Action. A Treatise on Economics. The Scholar’s Edition*, Ludwig von Mises Institute, Auburn 1998, pp. 173–174, *passim*.

<sup>11</sup> The long debate whether Rand’s objectivism is a strain of libertarian thought is insignificant to this argument, since the author of “Atlas Shrugged” was adherent of both Misesian economics and natural rights doctrine.

<sup>12</sup> *Vide* M. N. Rothbard, *Ethics of Liberty*, New York University Press, New York–London 1998, p. 29 et seq.

<sup>13</sup> A. Wile, *Exclusive Interview. Dr. Hans-Hermann Hoppe on the Impracticality of One-World Government and the Failure of Western-style Democracy*, The Daily Bell, March 27, 2011, at <http://www.thedailybell.com/exclusive-interviews/anthony-wile-dr-hans-hermann-hoppe-on-the-impracticality-of-one-world-government-and-the-failure-of-western-style-democracy/>, retrieved August 5, 2016; *Law and Economics* (by Hans-Hermann Hoppe) – *Introduction to Austrian*

doctrine, N. Stephen Kinsella devoted most of his scholarly work to this issue<sup>14</sup>. Nevertheless, Kinsella referred to the reasoning of many streams of the so-called Austrian Political Economy and a few studies touching on Hoppe's doctrine set against intellectual property did not concentrate on the argumentation ethics *per se*<sup>15</sup>. As a consequence, there is a significant gap in libertarian enquiries into the law of intellectual property. This paper aims at filling this void by formulating a comprehensive argumentation ethics stance on copyright. And the purpose seems attainable because of the holistic approach of Hoppe's proprietarianism. For this reason, the first part of this text presents a brief exposition of the general theory of property, whereas the other half discusses the problem of intangibles. Finally, the ultimate objection based on the retorsive argument against natural copyright is given. The deontological critique of copyright, as it will be demonstrated, is a direct consequence of the theory's presuppositions and may be derived from the praxeological axiom.

To conclude this introduction, it bears mentioning that although a few institutions of positive copyright law might be adduced, the deontological nature of Hoppe's normative theory applies to intangibles regardless of their statutory status. As in any conception of strong property, there is no distinction between abstract objects which are discovered or invented. That is to say, prerequisites for legal protection of creative works and typology of incorporeal rights are irrelevant. With this in mind, the following constataions concern also – *mutatis mutandis* – patents. Last but not least, the argumentation ethics critique is aimed both at the proprietary and monopolistic models of copyright, however this paper concentrates on the former – most common in continental legal systems.

## 2. PROPETARIANISM

As it has already been indicated, Hoppe's stance on property – its origins, characteristics and distribution – is the essence of his ethics and economics. As he decisively stated: “any ethic, correctly conceived, must be formulated as a the-

---

*Economics*, V for Voluntary Library, <https://www.youtube.com/watch?v=TI-RUPQ9RdA>, video of a public lecture (visited August 8, 2016).

<sup>14</sup> E.g. N. S. Kinsella, *Against Intellectual Property*, Ludwig von Mises Institute, Auburn 2008, *passim*; *Idem*, *Law and Intellectual Property in a Stateless Society*, “Libertarian Papers” 2013, Vol. 5, No. 1, pp. 1–44.

<sup>15</sup> E.g. Ł. Dominiak, *Aggression and Copyright*, “Political Dialogues” 2014, No. 16, pp. 37–48. For the economic analysis of IP from Austrian School perspective *n.b.*: H. Bouillon, *A Note on Intellectual Property and Externalities*, (in:) J. G. Hülsmann, N. S. Kinsella (eds.), *Property, Freedom, and Society. Essays in Honor of Hans-Hermann Hoppe*, Ludwig von Mises Institute, Auburn 2009, pp. 149–160.

ory of property, *i.e.*, a theory of the assignment of rights of exclusive control over scarce means<sup>16</sup>. Therefore, in order to formulate Hoppean stance on copyright, one ought to start with an investigation of his general theory of property.

Property is – as Jörg Guido Hülsmann, the Austrian School economist and Hoppe's fellow scholar, suggested – a twofold term<sup>17</sup>. First, in the “old” sense of being proper to something, a quality of an object is its property (the very use of possessive pronouns indicates this meaning). A thing may originally become someone's property only after projection of that person's self upon that thing. Second, it denotes the idea of a title. Nevertheless, in terms of economics the latter is linked to the former, since an ownership may arise only as a result of control – objectively perceivable possession. A property that is established is the “true” right in its broadest, “economic” sense. It's a *dominium*. The connotation of a title to an object with its control allows for an undisputable identification of owners. Nevertheless, it does not make it possible to *determine* the legitimacy of any rights. In other words, the recognition of ownership relations does not indicate what constitutes a *rightful* property. Inferring the latter from the former shall be considered as famous “naturalist error” – the problem described by David Hume among other non-cognitivists. “Ought” simply cannot be deduced from “is” – *non sequitur*<sup>18</sup>.

Considering this, Hoppe turned his mind to Misesian praxeology<sup>19</sup>. The aprioristic character of its reasoning was to form an irrefutable basis of the rational natural order. As Hoppe famously stated: “the libertarian private property ethic, and only libertarian private property ethic can be justified argumentatively”<sup>20</sup>. Hence, the author of “The Economics and Ethics of Private Property” declared that there is one constant that cannot be denied – men act<sup>21</sup>. Anyone who would dare to question this statement, would inevitably find himself in an argument. And since there is no doubt that arguing is a form of an action<sup>22</sup>, debating the

<sup>16</sup> H.-H. Hoppe, *A Theory of Socialism...*, p. 158.

<sup>17</sup> J. G. Hülsmann, *The A Priori Foundations of Property Economics*, “The Quarterly Journal of Austrian Economics” 2004, Vol. 7, No. 4, p. 51 et seq.

<sup>18</sup> D. Hume, *Book 3: Of Morals, Part I*, (in:) F. F. Norton, M. J. Norton (eds.), *Treatise of Human Nature*, Clarendon Press, Oxford 2007, p. 302 et seq.

<sup>19</sup> L. von Mises, *Human Action...*, *passim*; On the role of praxeology and *a priori* reasoning in Austrian law and economics approach see *i.a.*: L. J. Sechrest, *Praxeology, Economics, and Law: Issues and Implications*, “The Quarterly Journal of Austrian Economics” 2004, Vol. 7, No. 4, pp. 19–40.

<sup>20</sup> H.-H. Hoppe, *The Ultimate Justification...*, p. 20.

<sup>21</sup> For more on the praxeological axiom *n.b.*: L. von Mises, *Human Action...*, p. 11 et seq.

<sup>22</sup> As H.-H. Hoppe (*The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible*, (in:) *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010, p. 155) put it: “Now, arguing never just consists of free-floating propositions claiming to be true. Rather, argumentation is always an activity”.

notion of acting is self-contradictory. In other words, an attempt to overturn this praxeological axiom only reaffirms it<sup>23</sup>.

Based on this form of retorsive argument<sup>24</sup>, Hoppe inferred another axiom – self-ownership. By engaging in an inevitable argument (acting), an individual asserts his preference for private property of his own and others' bodies. For if it had not been for self-ownership, one could not freely use his mind and body and form an argument. Moreover, participation in a discourse makes sense only when the exclusive control of others over the self is acknowledged. Only an adversary who is capable of paying attention, formulating responses and being persuaded makes a partner of a discussion. Thus, since physical existence presupposes control over one's body, by the sole act of being men concede titles of self-ownership<sup>25</sup>. An individual recognizing his self-ownership (which he cannot logically deny) automatically recognizes self-ownership of others and the non-aggression principle (prohibitory rule against infringement on property) follows. Yet, the praxeological axiom does not provide a transition from "is" to "ought to". It is both at the same time<sup>26</sup>.

Furthermore, the praxeological axiom implies another two very important rules of non-contradictory ethics: universality and operationality. First, since an individual acknowledging his self-ownership asserts analogical rights of others, every norm derived from the axiom must apply equally to everyone. In other words, equality before the law – its abstraction and generality – is both aprioristically factual and normatively binding. Second, since one cannot argue that he is incapable of arguing, every norm of ethics shall allow for sustaining the discourse (life). What it means is that it would be both irrational and unethical to devise norms that conscientiously abided by lead to the extinction of mankind<sup>27</sup>.

Hence, any alternative to exclusive self-ownership is inconsistent – it is either incomplete (not universal), or inoperational (comprehensively executed leads to extinction). This might be demonstrated by Hoppe's and Rothbard's reflections on the problem of social order<sup>28</sup>. If an individual is not to be the owner of himself,

<sup>23</sup> H.-H. Hoppe, *On Praxeology...*, p. 278 et seq.

<sup>24</sup> For more on the history of the retorsive argument in Western philosophy *n.b.*: C. F. R. Illies, *The Grounds of Ethical Judgement. New Transcendental Arguments in Moral Philosophy*, Clarendon Press, Oxford–New York 2003, *passim*. For further analysis, see *i.a.*: E. M. Barth, J. L. Martens (eds.), *Argumentation. Approaches to Theory Formation*, Amsterdam 1982, *passim*.

<sup>25</sup> It might be also inferred that everyone is born with control, *i.e.* possession of his own body, that is necessary for argumentation and thus inalienable.

<sup>26</sup> For the complete explanation of Hoppe's stance on the naturalist error and his claim that argumentation ethics is merely epistemological (rationally) *n.b.*: H.-H. Hoppe, *Four Critical Replies*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, p. 401 et seq.

<sup>27</sup> H.-H. Hoppe, *Rothbardian Ethics*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, p. 383 et seq.

<sup>28</sup> *Ibidem*, p. 383 et seq.; M. N. Rothbard, *Ethics of Liberty...*, p. 48 et seq.

a space he occupies or goods he homesteads, there are only two other possibilities of distribution of those resources. Either they are owned exclusively by someone else or there is a universal communism (everyone is a partial owner of everybody else). In the first case, an owner becomes a master of those who are subjected to his property. As Hoppe observed, in such a situation “two categorically distinct classes of persons are created – *Untermenschen* (...) and *Übermenschen* (...) – to whom different ‘laws’ apply”<sup>29</sup>. This outcome cannot be accepted by consistent ethics because of the principle of universality. The second alternative leads to total co-ownership. It passes the principle of universality; however, falls short of the principle of operationality. For if it were administered, no one could undertake any action without a consent of all other members of a society. Having said that, he could neither ask for such permission, nor anyone could grant it to him, since both asking and answering constitute an action that needs to be consented to. Hence, the notion of universal co-ownership is a fallacy, because it does not allow for a survival of mankind.

On the basis of self-ownership some further tiers of the theory of private property may be constructed<sup>30</sup>. With self-evident rules of universality and operationality, man has a presupposed right to appropriate external objects. This right is natural because it is reasonable (no one who is alive could argue otherwise<sup>31</sup>), not because of interposed value judgements (*e.g.* appreciation of freedom). The contention here is rather simple. If one is to argue, he must sustain his life. Because the needs of the self-owned body are physical, man is compelled to attain material resources required to satisfy his hunger, thirst or even the fundamental necessity of taking space. This is executed through acquisition – either appropriation of unowned objects or consensual exchange. A proprietor must also be capable of full ownership, otherwise he could not freely dispose of a homesteaded object. Thus, property is not a right that is “bundled” or limited by titles of others. It is absolute and comprises *ius utendi, fruendi, abutendi et ius dispondendi*. “The right to determine how that particular resource – described in objective physical terms – is to be employed”<sup>32</sup>. Any ethical system that is operational must allow for this act, otherwise mankind would become extinct (the alternative being everlasting waiting for “later-comers” to settle the issue of distribution). This argument is also directed against the consequentialist ethics<sup>33</sup>.

<sup>29</sup> H.-H. Hoppe, *Rothbardian Ethics...*, (in:) *The Economics and Ethics...*, p. 384.

<sup>30</sup> Interestingly N. S. Kinsella referred to the praxeological axiom, self-ownership and right to absolute and negative private property derived from it as “grundnorms” – basic values of natural law constitution (N. S. Kinsella, *Law and Intellectual...*, p. 9 et seq.).

<sup>31</sup> H.-H. Hoppe, *On the Ultimate Justification of the Ethics of Private Property*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, p. 342.

<sup>32</sup> H.-H. Hoppe, W. E. Block, *On Property...*, p. 225.

<sup>33</sup> H.-H. Hoppe, *The Ultimate Justification...*, pp. 21–22.

Furthermore, the rule of universality applied to the absolute right of acquisition entails that property can only be negative<sup>34</sup>. Any usage of one's possessions interfering with another's belongings or self-ownership would constitute an obvious transgression (*actio in rem*). It would be a violation of the non-aggression principle and an assault on the consistency of order – and unreasonable one, since that could be read as an attempt to negate one's self-ownership<sup>35</sup>. Thus, the right of property is absolute merely in its negative sense. A *dominium* of one ends where other's *dominium* starts<sup>36</sup>. It deserves further emphasis that because the spheres of ownership are understood as physical, the negative aspect of property limits only the positive aspect of other rights. There is a difference between a title (having a right) and avail (using it)<sup>37</sup>. Therefore the original appropriation of unowned goods is not only a fact (people do it all the time, because they take some place or sustain their life), but also a natural right. It is legitimate and just<sup>38</sup>. Such and only such, say radical proprietarians – conception of property allows for a harmonious organization of an unconflicted society<sup>39</sup>. As a consequence, merely by *a priori*

<sup>34</sup> As W. E. Block claimed: “positive ‘rights’ are not rights at all. Rather, they are a not so heavily concealed demand for (the use of) the property belonging to others. Just as the welfare recipient of food or clothes forces farmers, restaurant owners, grocers or tailors to feed and clothe oneself (or to finance this out of general tax revenues), so do those who demand freedom to travel intend to legally obligate route owners to subsidize their movement” (W. E. Block, *Van Dun on Freedom and Property: A Critique*, “Libertarian Papers” 2010, Vol. 2, No. 4, p. 3).

<sup>35</sup> This is the argument N. S. Kinsella (*Punishment and Proportionality: The Estoppel Approach*, “Journal of Libertarian Studies” 1996, Vol. 12, No. 1, pp. 51–73) used in his natural rights theory of criminal law.

<sup>36</sup> This may or may not lead to a libertarian theory of negative freedom. Most proprietarians identify negative property with the notion of negative freedom; however, if one is to consider externalities of any usage, this connection can be disputed (*vide* W. E. Block, *Van Dun on Freedom...*, pp. 1–11; F. von Dun, *Freedom and Property: Where They Conflict*, (in:) J. G. Hülsmann, N. S. Kinsella (ed.), *Property, Freedom, and Society. Essays in Honor of Hans-Hermann Hoppe*, Ludwig von Mises Institute, Auburn 2009, pp. 223–236).

<sup>37</sup> In most abstract examples a man that finds himself encircled by a land of a neighbor could not enter it without a permission – he would have no rightful claim to a servitude right, the so-called “right of way by necessity” (for the proprietarian debate on this subject *n.b.*: W. E. Block, *Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock*, “Journal des Economistes et des Etudes Humaines” 1998, Vol. 8, No. 2–3, pp. 315–326; N. S. Kinsella, *The Blockean Proviso*, <https://mises.org/blog/blockean-proviso> (visited August 9, 2016); R. T. Long, *Easy Rider*, <https://aeblog.com/2007/09/11/easy-rider/> (visited August 9, 2016).

<sup>38</sup> H.-H. Hoppe, *The Ultimate Justification...*, pp. 21–22.

<sup>39</sup> *Vide* M. N. Rothbard, *Ethics of Liberty...*, p. 29 et seq.; H.-H. Hoppe, *The Justice of Economic Efficiency*, (in:) H.-H. Hoppe, *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, pp. 331–338; *Idem*, *On the Ultimate Justification...*, (in:) *The Economics and Ethics...*, pp. 339–347; B. Bouckaert, *What Is Property?*, “Harvard Journal of Law & Public Policy” 1990, Vol. 13, No. 3, pp. 775–803; D. Juruś, *Libertariańska koncepcja własności*, (in:) M. Nowak (ed.), “Studia prawnicze. Rozprawy i materiały”, Kraków 2005, pp. 123–132; D. Juruś, *W poszukiwaniu...*, *passim*; N. S. Kinsella, *Law and Intellectual...*, pp. 1–44.

reasoning, Hoppe managed to avoid the cognitivist error and logically prove that every human being has an absolute and exclusive property in himself and homesteaded goods, which no one can rightfully infringe upon<sup>40</sup>. “Anyone proposing anything other than a theory of property-in-physically-defined-resources would contradict the content of his proposition merely by making it”, claimed the German philosopher<sup>41</sup>.

As it has already been stated, the only manner of identifying homesteading is physical possession. Appropriation is not performed through a fiduciary declaration, but by taking over a certain object (these are the only two alternatives), e.g. by mixing one's labor with unowned resources (similar to Locke's theory of property, but without a *proviso*<sup>42</sup>)<sup>43</sup>. Thus, property becomes objective – only a manifested antecedent control accounts for it. Hoppe did not discuss the matter of original acquisition in great detail and rather referred to Rothbard (man becomes an owner of a given thing because he projected himself – his *own* work, talents, actions – onto that thing: so-called “theory of projection”)<sup>44</sup>. However, it is fairly important that homesteading based upon the principle of precedence and objectively perceivable control makes up for a general, abstract and operational rules of distribution. What happens later is extensively explained by such disciples of *laissez-faire* philosophy as Ludwig von Mises, Friedrich August von Hayek, Robert Nozick or Murray Newton Rothbard<sup>45</sup>. Titles to appropriated goods may be exchanged by industrious and rational men which in turn leads to the free market economy.

What is essential for this vision to happen is a chain of mutually consented exchanges. A society may prosper only as long as it is not tormented by permanent conflicts. In order to achieve conditions suitable for harmonious co-operation, just, clear (objective) and enforceable rules of property shall be established. Second, the non-aggression principle ought to bind all members of the society. Man cannot refrain from privatization of goods, because of their scarcity. If world were a blissful place with an infinite amount of resources, one could acquire and use them in abundance without a concern for their exhaustion or care for others being deprived of those means. However, that is not the case. There is only a limited number of scarce goods that may be used and consumed at the same time (goods are rivalrous) and when it happens, others are excluded from a possibility of this

<sup>40</sup> H.-H. Hoppe, *The Ultimate Justification...*, p. 22.

<sup>41</sup> H.-H. Hoppe, W. E. Block, *On Property...*, p. 227.

<sup>42</sup> J. Locke, *Of Property*, (in:) P. Laslett (ed.), *Second Treatise of Government*, Cambridge University Press, Cambridge 2003, p. 285 et seq.

<sup>43</sup> H.-H. Hoppe, *On the Ultimate Justification...*, (in:) *The Economics and Ethics*, p. 340 et seq.; *Idem*, *Rothbardian Ethics*, (in:) *The Economics and Ethics...*, p. 381 et seq.

<sup>44</sup> *Vide* H.-H. Hoppe, *The Economics and Ethics...*, pp. 341, 344, 381 et seq.; M. N. Rothbard, *Ethics of Liberty...*, p. 29 et seq.

<sup>45</sup> *Vide Ibidem*, *passim*; L. von Mises, *Human Action...*, *passim*; F. A. von Hayek, *The Constitution of Liberty*, London 1993, *passim*; R. Nozick, *Anarchy...*, *passim*.

activity (goods are excludable). If those resources were not subjected to the laws of private property, they would surely be abused and obvious conflicts between those who exploited and those who were deprived would arise. Thus, the necessity of the establishment of private property lays in potential disputes over scarce goods. Of course the notion that scarcity presupposes property is not unique and was expressed by thinkers such as John Locke or David Hume<sup>46</sup>; however, it is crucial to keep this point in mind when goods that are not scarce (because they are ideal) are discussed because the argument is twofold: as Kinsella claimed, without scarcity “property concepts would be meaningless”<sup>47</sup>. In other words, there is no need to establish property if goods are neither rivalrous nor excludable.

### 3. THE QUESTION OF COPYRIGHT

Since the argumentation ethics stands for the notion of absolute property, *prima facie* strong intellectual property rights shall entail. However, this is not the case. For Hoppean theory of property applies only to objects that have a physical form and are scarce (*i.e.* things). Therefore, intangible goods cannot be appropriated. Moreover, because of their ideal character, there is no need for their privatization. If one would attempt to establish effective *erga omnes* incorporeal copyrights regardless of nonexcludability and non-rivalrousness of creative works, it would only lead to the self-contradiction of the theory. This is where the conventional Hoppean critiques usually end<sup>48</sup>. This paper argues though that copyright (both moral and economic rights in terms of continental dualistic copyright systems) in the view of discourse ethics is to be abolished on the sole basis of the retorsive argument.

First, self-ownership denotes that individual, and only a particular individual, is entitled to his labor, actions and decisions. There can be no doubt that under Hoppe’s proprietarian theory man becomes the rightful owner of a figure he sculptured or a picture he painted. Now, a process of creation of an artistic expression obviously has to be conducted according to some idea conceived by an author, for it resembles an individual pattern. This is not a controversy. The praxeological

---

<sup>46</sup> Vide J. Locke, *Of Property*, (w:) P. Laslett (ed.), *Second Treatise...*, p. 285 et seq.; D. Hume, *Book 3: Of Morals; Of the Rules, Which Determine Property*, (in:) F. F. Norton, M. J. Norton (eds.), *Treatise of Human Nature*, Clarendon Press, Oxford 2007, Vol. 1, p. 322 et seq. More on this subject *i.a.*: B. Bouckaert, *What Is Property?...*, pp. 775–803; D. Faraci, *Do Property Rights Presuppose Scarcity?*, “Journal of Business Ethics” 2014, Vol. 125, No. 3, pp. 531–537; N. S. Kinsella, *Law and Intellectual...*, p. 4 et seq.

<sup>47</sup> N. S. Kinsella, *Against...*, p. 31.

<sup>48</sup> Vide *Ibidem, passim*; N. S. Kinsella, *Law and Intellectual...*, pp. 1–44; Ł. Dominiak, *Aggression and Copyright...*, pp. 37–48.

axiom implies that human reasons – regardless of whether the nature of a creative work is artistic or just mechanic. As Ludwig von Mises claimed: “Action is preceded by thinking. Thinking is to deliberate beforehand over a future action and to reflect afterward upon the past action. Thinking and acting are inseparable”<sup>49</sup>. If one is to partake in a process of argumentation, he must be considered as thinking. Therefore, *homo faber* is always *homo cogitans*.

It also bears mentioning that although libertarian propertarianism – as it will be demonstrated – leads to a total negation of copyright, it does not indicate that authors do not deserve a reward for their effort. On the contrary, the very propertarian nature of Hoppe’s doctrine implies that it is individual’s and only individual’s decision how to dispose of his creative work. An artist may come to an agreement with a publisher to reveal his *opus* for a large sum of money, or rather donate it to the public domain for free and even keep it as a secret and leave unpublished just for his own benefit. However, conceptions formulated by an author are exclusive to him only until they are not shared with the public – either incorporated in his creative work or communicated *in abstracto*. In other words, man might possess in recesses of his mind even the most unique ideas, act according to them and thus profit or lose, but is unable to physically control objects that do not manifest in corporal form. Therefore, neither disposing of ontologically understood creative works nor excluding others from disclosed works is materially possible. What may be done though, is to restrain others (by force) from the free use of already revealed conceptions (which in fact constitutes copyright) – and that would be a transgression against the non-aggression principle. Thus, the first impediment to privatization of intangible goods appears. Their abstract nature entails free-floating in the public domain, just as it happens in the case of any apprehensible information. Since the impossibility of control implies that no borders of an object may be set, it is infeasible to determine to what limited sphere exactly a private property would apply and exclude others from co-possessing and exploitation. It is simply impossible to establish true property in the intangible.

Having said that, the unfeasibility of incorporeal rights does not lead to any ethical dilemma, because the abstract nature of intangibles makes them non-excludable and non-rivalrous. An author may need resources to sustain his life, but creative works themselves are not scarce. Thus, even though, there is a limited number of books or trees that can be cut and made into printing paper, the ontologically understood *opus* is boundless. Theoretically, it might be manifested in a countless number of copies, so it is possible for everyone to use the same creative work concurrently without a concern for its exhaustion or anyone’s deprivation (for this very reason, conceptions, ideas or information are called “ideal

---

<sup>49</sup> L. von Mises, *Human Action...*, p. 176.

objects”)<sup>50</sup>. On the other hand, Hoppe maintained that what makes economics and ethics requisite and workable is the scarcity of resources. “The recognition of scarcity is not only the starting point for political economy; it is the starting point of political philosophy as well. Obviously, if there was a superabundance of goods, no economic problem whatsoever would exist”<sup>51</sup>. In other words, no reasonable social conflicts may arise over goods that are neither excludable nor rivalrous – proprietary copyright is not only impossible, but superfluous also<sup>52</sup>.

Nevertheless, men might choose to ignore the aprioristic reasons for dismissing the intellectual property and create the so-called “artificial scarcity” of ideal objects. Since creative works are abstract with no visible borders, the only possible manifestation of having a title is through a declaration (even though in many legal systems an author is entitled to protection regardless of his compliance with any formal requirements<sup>53</sup>). Such appropriation is purely conventional. Furthermore, because the essence of the right of property is its universal effectiveness, the certainty and stability of fiduciary titles require a decree of some third party – this is where the role of state and positive law commences. As Jörg Guido Hülsmann observed, from the economic point of view there are three methods of acquisition of resources: original appropriation (homesteading), mutually consented exchange and forced seizure. The latter category, as Austrian School economist claimed, may take a form of not only theft, pay-off or taxation, but also of “institutionalized fiat appropriation”. What is actually being attained in such a case is the universally mandatory privilege, a fiduciary good<sup>54</sup>. This seems applicable to copyright, which is enacted and enforced by the state. Since a title to artistic conceptions would not and could not exist in the terms of natural law, the author’s monopoly is understood by Hoppe’s argumentation ethics as unjust privilege

---

<sup>50</sup> N. S. Kinsella, *Against...*, p. 9 et seq. One may ponder if abstract objects were the only case of such goods. As H.-H. Hoppe (*Property, Contract, Aggression, Capitalism, Socialism*, (in:) *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010, p. 19) put it: “even if we were to assume that we lived in the Garden of Eden, where there was a superabundance of everything needed not only to sustain one’s life but to indulge in every possible comfort by simply stretching out one’s hand, the concept of property would necessarily have to evolve. For even under these ‘ideal’ circumstances, every person’s physical body would still be a scarce resource and thus the need for the establishment of property rules, *i.e.*, rules regarding people’s bodies, would exist”.

<sup>51</sup> H.-H. Hoppe, *The Justice of Economic...*, (in:) *The Economics and Ethics...*, p. 333.

<sup>52</sup> For this very reason H.-H. Hoppe (referring to M. N. Rothbard) claimed that intangibles could not become a good in the economic sense: “for something to be an economic good at all, it must be scarce and must be realized as scarce by someone” (H.-H. Hoppe, *From the Economics of Laissez Faire to the Ethics of Libertarianism*, (in:) W. E. Block, L. H. Rockwell, Jr. (eds.), *Man, Economy, and Liberty. Essays in Honor of Murray N. Rothbard*, Ludwig von Mises Institute, Auburn 1988, p. 308).

<sup>53</sup> *E.g.* art. 1 § 4 of Polish Act on Copyright and Related Rights [ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dz.U. z 2016 r., poz. 666, z późn. zm.].

<sup>54</sup> J. G. Hülsmann, *The A Priori...*, p. 56 et seq.

of one over the others<sup>55</sup>. Libertarians often refer here to Franz Oppenheimer, German sociologist who formulated the dichotomy between economic and political means of appropriation<sup>56</sup>. The former meant one's work and consensual exchange, the latter – using physical force to take over goods of others<sup>57</sup>.

Another key point of the argumentation ethics critique of copyright is that the assertion of copyright by positive law leads to inconsistency of property relations. For it must be emphasized that because creative works (ontologically understood) have no physical form, copyright protects only the expression of ideas, not the ideas themselves. Moreover, works and their incorporation in physical objects are not always corresponding (union of sets) or parallel (difference of sets). Most often – if an author chooses to publish and distribute his work – the economic copyrights and property rights of the rightful owner of *corpus mechanicum* intersect. Thus, since it is impossible to physically execute *ius utendi, fruendi, abutendi et ius dispondendi* to one's work, the title of an author constitutes a privilege to limit a proprietarian *dominium* of exemplars' possessors. For instance, the moral rights of an author granted by the art. 16 of Polish Act on Copyright and Related Rights provides for the author's right to protect the integrity of the content and form of a work and its fair use<sup>58</sup>. Economic copyrights assign to authors the privilege of exclusive use or disposition of a work in all fields of use, and remuneration for the use of their work<sup>59</sup>. Therefore, pronouncing the copyrights absolute entails that the authors' titles overrule the owners' chance to use, enjoy, use and dispose of their *corpus mechanicum*<sup>60</sup>. This result is limited in statutory law *i.a.* by the institution of permitted use. An already distributed *opus* may be used gratuitously for private purposes by the owners of exemplars without the author's permission, because of the lawgiver's decree – though only in the legally described scope<sup>61</sup>. This approach seems utterly antithetical to the proprietarianism

<sup>55</sup> For H.-H. Hoppe's critique of monopolies see *i.a.*: H.-H. Hoppe, *Capitalist Production and the Problem of Monopoly*, (in:) H.-H. Hoppe, *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010, pp. 195–218.

<sup>56</sup> B. Shaffer, *A Libertarian Critique of Intellectual Property*, Ludwig von Mises Institute, Auburn 2013, p. 20 et seq.; J. G. Hülsmann, *The A Priori...*, p. 62.

<sup>57</sup> *Vide* F. Oppenheimer, *Der Staat*, Keip, Frankfurt am Main 1975, *passim*; M. N. Rothbard, *Anatomy of the State*, Ludwig von Mises Institute, Auburn 2009, p. 14 et seq.

<sup>58</sup> Article 16 point 3 of Polish Act on Copyright and Related Rights [ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dz.U. z 2016 r., poz. 666, z późn. zm.].

<sup>59</sup> Article 17 of Polish Act on Copyright and Related Rights [ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dz.U. z 2016 r., poz. 666, z późn. zm.].

<sup>60</sup> B. Giesen made a similar statement within the Polish legal doctrine, *vide* B. Giesen, *Własnościowy model prawa autorskiego – analiza koncepcji przyjętej w prawie polskim*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2015, Vol. LXXVII, No. 2, p. 72. See also: M. Czajkowska-Dąbrowska, *Treść (elementy “struktury”) prawa autorskiego a treść prawa własności*, “Studia Iuridica” 1994, Vol. XXI, pp. 269–282.

<sup>61</sup> Article 23 et seq. of Polish Act on Copyright and Related Rights [ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dz.U. z 2016 r., poz. 666, z późn. zm.].

of the argumentation ethics. For the libertarian social order relies on separate and non-conflicting titles to things. The harmony of natural property is possible because of the negative character of those naturally limited (by the physical borders of objects) rights. In the case of free-floating abstract goods that interfere with tangibles, it is infeasible to avoid a conflict between the owners. As Hardy Bouillon observed, “ideas, melodies, and theories have no material extension *per se* as material goods do. Therefore, we cannot without further assumptions claim for them what we can claim for material goods, namely that they cannot collide with other material goods”<sup>62</sup>.

The claim that under the argumentation ethics only tangibles are eligible for appropriation may also be argued on the basis of the value theory. Now, one must remember that a given object constitutes a good only if it is of some worth to at least one individual. Having said that, man cannot own a value for the worth is an attribute that derives from subjective perception, not an objective quality that is – *nomen est omen* – proper to a thing. A value of a certain good may only be kept by imposing upon others, *i.e.* making them appraise the object at a certain level. Such action is surely contradictory to the principle of non-aggression and thus, the theory of objective value is neither compatible with the idea of private property, nor praxeologically possible. Establishing a fiduciary copyright under a statutory law regime means forcing individuals to recognize the worth of an idea and to treat it as a good<sup>63</sup>.

Therefore, Hoppean propertarianist could hold that copyright does not only make the theory of property self-contradictory, but also infringes upon universality rule of ethics also<sup>64</sup>. Moreover, it seems possible that the retorsive argument against copyright, which is based on Hoppe’s principle of operationality, could also be formulated. Acknowledging a right to appropriate intangible goods would lead to the extinction of mankind, since the idea of appropriation could be appropriated itself and leave the rest unable to acquire resources necessary to sustain their lives. At first this concept might seem rather idiosyncratic – for it is a common knowledge that only a certain product of human mind can constitute a legally protected (copyrighted) creative work<sup>65</sup>. Moreover, the act of homestead-

<sup>62</sup> H. Bouillon, *A Note on Intellectual...*, p. 151.

<sup>63</sup> For more on this subject see *i.a.*: H.-H. Hoppe, W. E. Block, *On Property...*, p. 225 et seq.; J. G. Hülsmann, *The A Priori...*, p. 43 et seq.; H. Bouillon, *A Note on Intellectual...*, p. 215 et seq.; B. Bouckaert, *What Is Property...*, p. 806; M. N. Rothbard, *Man, Economy, and State. A Treatise on Economic Principles. With Power and Market. Government and the Economy*, Ludwig von Mises Institute, Auburn 2004, pp. 17–33, 316–317, *passim*.

<sup>64</sup> *Vide* H.-H. Hoppe, *From the Economics of Laissez Faire...*, (in:) W. E. Block, L. H. Rockwell, Jr. (eds.), *Man, Economy...*, p. 2319 et seq.; J. G. Hülsmann, *The A Priori...*, pp. 41–68.

<sup>65</sup> *Vide* art. 1 § 1 and art. 4 of Polish Act on Copyright and Related Rights [ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dz.U. z 2016 r., poz. 666, z późn. zm.]. In case of patents *n.b.*: art. 24, 25 and 28 of Polish Act of Industrial Property Law [ustawa z dnia 30 czerwca 2000 r. – Prawo własności przemysłowej, Dz.U. z 2013 r., poz. 1410, z późn. zm.].

ing could be qualified as a process or a method and at best constitute a patentable object. However, at this point of analysis no positive law is taken into account and statutory differentiation between incorporeal rights to intangible goods is simply irrelevant. This is strictly deontological reasoning and no provisions of any act yet apply. There is only property in things and the question of acquisition of incorporeal rights being examined. And beyond any doubt, the appropriation process of resources is an intangible good itself. For it has a potential value (quite significant to be more specific) to many (thus it becomes a good), it is a deliberate product of human mind, and it constitutes a pattern or a method that may be employed in the physical realm. Claiming the title to this process would mean that only one individual – the first one to declare – is free to attain other goods, *i.e.* support his life and take space. All other would have to either disperse or function only at the original proprietor's mercy. Such a corollary is clearly conflicting with the factual and normative right of self-ownership and principle of operability. In order for any person to argue anything, it must be possible to subsist<sup>66</sup>.

One might transform this reasoning into a *reduction ad absurdum* even further, since if the appropriation of intangibles is feasible, it would also be possible to acquire the exclusive title to argumentation (action). That is, the first of interlocutors who formulates a statement would homestead the technique of active participation in a discourse. Such assertion is surely absurd. It would be a nonsense to profess an argument when only one participant is free to dissert. As Hoppe put it in "The Economics and Ethics of Private Property": "the question of what is just or unjust – or for that matter the even more general question of what is a valid proposition and what is not-only arises insofar as I am, and others are, capable of propositional exchanges"<sup>67</sup>. Therefore, the problem of justification (*e.g.* of copyright) exists only when subjects are capable of argumentation. The praxeological axiom applies<sup>68</sup>. That is to say, arguing in favor of copyright is – according to discourse ethics – inconsistent with the act of argumentation itself. This is "most deadly defeat possible in the realm of intellectual inquiry"<sup>69</sup>. Therefore, copyrights (and all other titles to intangible goods) are inconsistent with the ethics and

---

<sup>66</sup> As we read in one of H.-H. Hoppe's essays: "Whether or not persons have any rights and, if so, which ones, can only be decided in the course of argumentation (propositional exchange). Justification – proof, conjecture, refutation – is argumentative justification. Anyone who denied this proposition would become involved in a performative contradiction because his denial would itself constitute an *argument*. Even an ethical relativist must accept this first proposition, which has been referred to as the *a priori of argumentation*" (H.-H. Hoppe, *Rothbardian Ethics*, (in:) *The Economics and Ethics...*, p. 384).

<sup>67</sup> H.-H. Hoppe, *On the Ultimate Justification...*, (in:) *The Economics and Ethics...*, p. 341.

<sup>68</sup> One should however be careful with asserting this argument to the whole tradition of the aprioristic reasoning in libertarianism and proto-libertarianism. Especially Mises's stance on copyright was complex and not unequivocally critical (*vide* L. von Mises, *Human Action...*, pp. 657–657, 676–677).

<sup>69</sup> H.-H. Hoppe, *On the Ultimate Justification...*, (in:) *The Economics and Ethics...*, p. 342.

economics of private property. Even more, introduction of such titles makes every proprietarian natural law doctrine self-contradictory<sup>70</sup>.

#### 4. CONCLUSIONS

Hence, the argumentation ethics by Hans-Hermann Hoppe inevitably leads to the conclusion that the appropriation of creative works entails the self-contradiction of deontological ethics based on aprioristic rationality. It is inconsistent with both the praxeological axiom and absoluteness of negative rights. Moreover, copyright is neither possible, nor indispensable, since works are ideal, non-scarce (non-excludable and non-rivalrous) objects. These conclusions determine Hoppean stance on fiduciary incorporeal rights introduced by the state. Any conscientious follower of the German philosopher's political doctrine shall view them as a monopoly granted by the government to the privileged. They are involuntary and forced upon, thus amount to the violation of the non-aggression principle and transgression on the self-ownership and property of non-copyrightholders. For this reasons, argumentation ethics stands for the abolition of copyright.

Even though Hans-Hermann Hoppe's discourse ethics is a rational *a priori* theory of justice that is value-neutral and may be used in any given political setting regardless of its doctrinal and cultural background, it would seem as an imposture to take its position on intellectual property for granted. The debate between adherents of the deontological and the consequentialist ethics appears to be undecidable. The very libertarian movement comprises proponents of naturalism, utilitarianism or teleological ethics and many don't agree on the role of the praxeological axiom<sup>71</sup>. It would also be naïve to pressure a legislator to mold statu-

<sup>70</sup> Similarly in reference to Locke's iusnaturalism: A. D. Moore, *A Lockean Theory of Intellectual Property Revisited*, "San Diego Law Review" 2012, Vol. 49, pp. 1069–1118.

<sup>71</sup> Vide M. Eabrasu, *A Reply to the Current Critiques Formulated Against Hoppe's Argumentation Ethics*, "Libertarian Papers" 2009, Vol. 1, pp. 1–29; R. P. Murphy, G. Callahan, *Hans-Hermann Hoppe's Argumentation Ethic: A Critique*, "The Journal of Libertarian Studies" 2006, Vol. 20, No. 2, pp. 53–64; W. E. Block, *Rejoinder to Murphy and Callahan on Hoppe's Argumentation Ethics*, "The Journal of Libertarian Studies" 2011, Vol. 22, No. 1, pp. 631–639; L. Lomasky, *The Argument from Mere Argument*, "Liberty" November 1989, Vol. 3, pp. 55–56; D. R. Steele, *One Muddle After Another*, "Liberty" September 1987, Vol. 2, pp. 45–46; D. Osterfeld, *Comment on Hoppe*, Austrian Economics Newsletter, Spring/Summer 1988, pp. 9–10; F. van Dun, *Argumentation Ethics and the Philosophy of Freedom*, "Libertarian Papers" 2009, Vol. 1, pp. 1–32; F. van Dun, *Economics and the Limits of Value-Free Science*, "Reason Papers" 1986, No. 11, pp. 17–32; H.-H. Hoppe, *Appendix: Four Critical Replies*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006, pp. 399–418; L. Yeager, *Raw Assertions*, "Liberty" 1988, Vol. 2, No. 2, pp. 45–46.

tory laws after iusnaturalist claims or to expect big business to comply with ethics that forbids it to enhance its profits.

That said, the author of this paper believes that the presented arguments adjudicated that it is rationally impossible to legitimize copyright within the propertarian argumentation ethics, or even more – within deontological theories of strong ownership rights. As Hoppe put it: “By being alive and formulating any proposition, one demonstrates that any ethic except the libertarian private property ethic is invalid”<sup>72</sup>. Therefore, the formulation of libertarian doctrines of property *per se* (among them Hoppe’s) might be perceived as the turning point for all inquiries into philosophical foundation of intellectual property. Up to this point, the Lockean liberal-libertarian tradition has been usually regarded as espousing the legal doctrine of strong economic copyrights. Moreover, even the legal doctrine may deem appropriate to use conclusions offered here while investigating the case for the liberalization of the IP-regime or the reconstruction of current proprietary model of the economic copyright<sup>73</sup>.

## THE CRITIQUE OF COPYRIGHT IN HANS-HERMANN HOPPE’S ARGUMENTATION ETHICS

### Summary

The accurate interpretation of Hans-Hermann Hoppe’s argumentation ethics inevitably leads to the conclusion that appropriation of creative works ought to be rejected since only tangibles can and need to be owned for artistic conceptions are ideal, not-scarce (non-excludable and non-rivalrous) objects. Moreover, their ownership would

---

<sup>72</sup> H.-H. Hoppe, *The Economics and Ethics...*, p. 344.

<sup>73</sup> For the debate on the propertarian model of incorporeal rights and economic copyright in Polish legal doctrine see *i.a.*: M. Czajkowska-Dąbrowska, *Własność czy własności (intelektualne)*, (in:) A. Kidyba, R. Skubisz (eds.), *Współczesne problemy prawa handlowego. Księga jubileuszowa dedykowana prof. dr hab. Marii Poźniak-Niedzielskiej*, Kraków 2007, pp. 45–64; *Idem*, *Treść (elementy “struktury”)*..., pp. 271 *et seq.*; J. Marcinkowska, *Dozwolony użytek w prawie autorskim. Podstawowe zagadnienia*, “Prace Instytutu Prawa Własności Intelektualnej UJ” 2004, Vol. 87, p. 93 *et seq.*; E. Traple, *Ustawowe konstrukcje w zakresie majątkowych praw autorskich i obrotu nimi w dobie kryzysu prawa autorskiego*, Uniwersytet Jagielloński, Kraków 1990, *passim*; P. Lech, *Własnościowa koncepcja autorskich praw majątkowych – czy to ma sens?*, (in:) M. Burnecka, R. Próchniak (eds.), *Dynamika kultury a (r)ewolucja własności intelektualnej*, Vol. 1, Wrocław 2007, p. 15 *et seq.*; B. Gawlik, *Ochrona dóbr osobistych. Sens i nonsens tzw. praw podmiotowych osobistych*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej” 1985, Vol. 41, pp. 123–141; B. Giesen, *Własnościowy...*, pp. 61–74.

inevitably lead to a conflict over titles to their exemplars. Incorporeal rights are thus inconsistent with both the praxeological axiom and absoluteness of negative rights. Hence, an attempt to introduce “artificial scarcity” through positive copyright law is unethical. It disregards the fundamental rules of any rational ethics: universality (equality before the law) and operationality (suitability for mankind survival) because it interferes with the proprietarian axiom of self-ownership and the principle of non-aggression. Therefore, a property in artistic conceptions is neither rationally feasible nor indispensable and entails self-contradiction of any deontological theory based on rules of praxeology.

## BIBLIOGRAPHY

- Barta J. (ed.), *System prawa prywatnego*, Vol. 13, *Prawo autorskie*, Warszawa 2013
- Barth E. M., Martens J. L. (eds.), *Argumentation. Approaches to Theory Formation*, Amsterdam 1982
- Bartyzel J., *Geneza i próba systematyki głównych nurtów libertarianizmu*, (in:) W. Butilira, W. Gogłóza (eds.), *Libertarianizm. Teoria, praktyka, interpretacje*, Lublin 2010
- Block W. E., *Rejoinder to Murphy and Callahan on Hoppe’s Argumentation Ethics*, “The Journal of Libertarian Studies” 2011, Vol. 22, No. 1
- Block W. E., *Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock*, “Journal des Economistes et des Etudes Humaines” 1998, Vol. 8, No. 2–3
- Block W. E., *Van Dun on Freedom and Property: A Critique*, “Libertarian Papers” 2010, Vol. 2, No. 4
- Bouckaert B., *What Is Property?*, “Harvard Journal of Law & Public Policy” 1990, Vol. 13, No. 3
- Bouillon H., *A Note on Intellectual Property and Externalities*, (in:) J. G. Hülsmann, N. S. Kinsella (eds.), *Property, Freedom, and Society. Essays in Honor of Hans-Hermann Hoppe*, Ludwig von Mises Institute, Auburn 2009
- Czajkowska-Dąbrowska M., *Treść (elementy “struktury”) prawa autorskiego a treść prawa własności*, “Studia Iuridica” 1994, Vol. XXI
- Czajkowska-Dąbrowska M., *Własność czy własności (intelektualne)*, (in:) A. Kidyba, R. Skubisz (eds.), *Współczesne problemy prawa handlowego. Księga jubileuszowa dedykowana prof. dr hab. Marii Poźniak-Niedzielskiej*, Kraków 2007
- Dominiak Ł., *Aggression and Copyright*, “Political Dialogues” 2014, No. 16
- Dominiak Ł., *Problem aksjomatyczności zasady autowłasności w filozofii politycznej libertarianizmu*, “Athenaeum. Polskie Studia Politologiczne” 2016, Vol. 49
- Drahos P., *A Philosophy of Intellectual Property*, 2<sup>nd</sup> ed., Ashgate, Aldershot–Burlington 2001
- Eabrasu M., *A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics*, “Libertarian Papers” 2009, Vol. 1
- Faraci D., *Do Property Rights Presuppose Scarcity?*, “Journal of Business Ethics” 2014, Vol. 125, No. 3
- Fisher W. W., *Theories of Intellectual Property*, (in:) S. Munzer (ed.), *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, Cambridge–New York 2007

- Friedman D. D., *Standards as Intellectual Property. An Economic Approach*, "University of Dayton Law Review" 1994, Vol. 19, No. 1
- Gawlik B., *Ochrona dóbr osobistych. Sens i nonsens tzw. praw podmiotowych osobistych*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej" 1985, Vol. 41
- Giesen B., *Własnościowy model prawa autorskiego – analiza koncepcji przyjętej w prawie polskim*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2015, Vol. LXXVII, No. 2
- Hoppe H.-H., *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010
- Hoppe H.-H., *Appendix: Four Critical Replies*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006
- Hoppe H.-H., Block W. E., *On Property and Exploitation*, "International Journal of Value-Based Management" 2002, Vol. 15
- Hoppe H.-H., *Capitalist Production and the Problem of Monopoly*, (in:) H.-H. Hoppe, *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010
- Hoppe H.-H., *Economic Science and the Austrian Method*, Ludwig von Mises Institute, Auburn 2007
- Hoppe H.-H., *Four Critical Replies*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006
- Hoppe H.-H., *From the Economics of Laissez Faire to the Ethics of Libertarianism*, (in:) W. E. Block, L. H. Rockwell, Jr. (eds.), *Man, Economy, and Liberty. Essays in Honor of Murray N. Rothbard*, Ludwig von Mises Institute, Auburn 1988
- Hoppe H.-H., *On Praxeology and the Praxeological Foundation of Epistemology*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006
- Hoppe H.-H., *On the Ultimate Justification of the Ethics of Private Property*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006
- Hoppe H.-H., *Property, Causality, and Liability*, "The Quarterly Journal of Austrian Economics" 2004, Vol. 7, No. 4
- Hoppe H.-H., *Property, Contract, Aggression, Capitalism, Socialism*, (in:) *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010
- Hoppe H.-H., *Rothbardian Ethics*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006
- Hoppe H.-H., *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006
- Hoppe H.-H., *The Ethical Justification of Capitalism and Why Socialism is Morally Indefensible*, (in:) *A Theory of Socialism and Capitalism*, Ludwig von Mises Institute, Auburn 2010
- Hoppe H.-H., *The Justice of Economic Efficiency*, (in:) *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy*, 2<sup>nd</sup> ed., Ludwig von Mises Institute, Auburn 2006

- Hoppe H.-H., *The Ultimate Justification of the Private Property Ethic*, "Liberty" 1988, No. 2
- Hughes J., *The Philosophy Of Intellectual Property*, "Georgetown Law Journal" 1988, Vol. 77
- Hülsmann J. G., *Knowledge, Judgment, and the Use of Property*, "The Review of Austrian Economics" 1997, Vol. 10, No. 1
- Hülsmann J. G., *The A Priori Foundations of Property Economics*, "The Quarterly Journal of Austrian Economics" 2004, Vol. 7, No. 4
- Hume D., *Book 3: Of Morals, Part 1*, (in:) F. F. Norton, M. J. Norton (eds.), *Treatise of Human Nature*, Clarendon Press, Oxford 2007, Vol. 1
- Hume D., *Book 3: Of Morals; Of the Rules, Which Determine Property*, (in:) F. F. Norton, M. J. Norton (eds.), *Treatise of Human Nature*, Clarendon Press, Oxford 2007, Vol. 1
- Illies C. F. R., *The Grounds of Ethical Judgement. New Transcendental Arguments in Moral Philosophy*, Clarendon Press, Oxford–New York 2003
- Juruś D., *Czy istnieje etyka libertariańska*, "Filo-Sofija" 2015, No. 29
- Juruś D., *Libertariańska koncepcja własności*, (in:) M. Nowak (ed.), "Studia prawnicze. Rozprawy i materiały", Kraków 2005
- Juruś D., *Libertarny radykalizm*, "Filozofia Publiczna i Edukacja Demokratyczna" 2014, Vol. III, No. 1
- Juruś D., *W poszukiwaniu podstaw libertarianizmu*, Kraków 2012
- Kant I., *Von der Unrechtmäßigkeit des Büchernachdrucks*, "Berlinische Monatsschrift" 1785, Vol. 5, No. 1
- Kinsella N. S., *Against Intellectual Property*, Ludwig von Mises Institute, Auburn 2008
- Kinsella N. S., *Law and Intellectual Property in a Stateless Society*, "Libertarian Papers" 2013, Vol. 5, No. 1
- Kinsella N. S., *New Rationalist Directions in Libertarian Rights Theory*, "Journal of Libertarian Studies" 1996, Vol. 12, No. 2
- Kinsella N. S., *Punishment and Proportionality: The Estoppel Approach*, "Journal of Libertarian Studies" 1996, Vol. 12, No. 1
- Kinsella N. S., *The Blockean Proviso*, <https://mises.org/blog/blockean-proviso> (visited August 9, 2016)
- Law and Economics* (by Hans-Hermann Hoppe) – *Introduction to Austrian Economics*, V for Voluntary Library, <https://www.youtube.com/watch?v=TI-RUPQ9RdA>, video of a public lecture (visited August 8, 2016)
- Lech P., *Własnościowa koncepcja autorskich praw majątkowych – czy to ma sens?*, (in:) M. Burnecka, R. Próchniak (eds.), *Dynamika kultury a (r)ewolucja własności intelektualnej*, Vol. 1, Wrocław 2007
- Locke J., *Of Property*, (in:) P. Laslett (ed.), *Two Treatises of Government*, Cambridge University Press, Cambridge 2003
- Locke J., *Second Treatise*, (in:) P. Laslett (ed.), *Two Treatises of Government*, Cambridge University Press, Cambridge 2003
- Lomasky L., *The Argument from Mere Argument*, "Liberty", November 1989, Vol. 3
- Long R. T., *Easy Rider*, <https://aeblog.com/2007/09/11/easy-rider/> (visited August 9, 2016)
- Long R. T., *The Hopppriori Argument*, <http://praxeology.net/unblog05-04.htm#10> (visited August 10, 2016)

- Machan T., *Individualism and Political Dialogue*, "Poznan Studies in the Philosophy of Science and the Humanities" 1996, No. 46
- Marcinkowska J., *Dozwolony użytek w prawie autorskim. Podstawowe zagadnienia*, "Prace Instytutu Prawa Własności Intelektualnej UJ" 2004, Vol. 87
- Modrzejewska M., *Libertariańskie koncepcje jednostki i państwa we współczesnej amerykańskiej myśli politycznej*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2010
- Moore A. D., *A Lockean Theory of Intellectual Property Revisited*, "San Diego Law Review" 2012, Vol. 49
- Moore A. D., *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, 2<sup>nd</sup> ed., Transaction Publishing, New Brunswick 2004
- Murphy R. P., Callahan G., *Hans-Hermann Hoppe's Argumentation Ethic: A Critique*, "The Journal of Libertarian Studies" 2006, Vol. 20, No. 2
- Nozick R., *Anarchy, State, and Utopia*, Blackwell, Oxford 1999
- Oppenheimer F., *Der Staat*, Keip, Frankfurt am Main 1975
- Osterfeld D., *Comment on Hoppe*, Austrian Economics Newsletter, Spring/Summer 1988
- Palmer T. G., *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, (in:) A. Thierer, W. Crews (eds.), *Copy Fights. The Future of Intellectual Property in the Information Age*, Cato Institute, Washington 2002
- Palmer T. G., *Intellectual Property: A Non-Posnerian Law and Economics Approach*, "Hamline Law Review" 1989, Vol. 12, No. 2
- Rand A., *Patents and Copyrights*, (in:) A. Rand, N. Branden, A. Greenspan, R. Hessen, *Capitalism: The Unknown Ideal*, Signet, New York 1967
- Rasmussen D. B., *Political Legitimacy and Discourse Ethics*, "International Philosophical Quarterly" 1992, Vol. XXXII, No. 1
- Rothbard M. N., *Anatomy of the State*, Ludwig von Mises Institute, Auburn 2009
- Rothbard M. N., *Beyond Is and Ought*, "Liberty" 1988, Vol. 2, No. 2
- Rothbard M. N., *Ethics of Liberty*, New York University Press, New York–London 1998
- Rothbard M. N., *Man, Economy, and State. A Treatise on Economic Principles. With Power and Market. Government and the Economy*, Ludwig von Mises Institute, Auburn 2004
- Sechrest L. J., *Praxeology, Economics, and Law: Issues and Implications*, "The Quarterly Journal of Austrian Economics" 2004, Vol. 7, No. 4
- Shaffer B., *A Libertarian Critique of Intellectual Property*, Ludwig von Mises Institute, Auburn 2013
- Steele D. R., *One Muddle After Another*, "Liberty" September 1987, Vol. 2
- Stocker B., *Hoppe: Habermas' Anarcho-Conservative Student*, at <http://istanbulfactsandideas.blogspot.com/2009/06/hoppe-habermas-anarcho-conservative.html> (visited August 12, 2016)
- The Private Property Order: An Interview with Hans-Hermann Hoppe*, "Austrian Economics Newsletter" 1998, Vol. 18, No. 1
- Traple E., *Ustawowe konstrukcje w zakresie majątkowych praw autorskich i obrotu nimi w dobie kryzysu prawa autorskiego*, Uniwersytet Jagielloński, Kraków 1990
- van Dun F., *Argumentation Ethics and the Philosophy of Freedom*, "Libertarian Papers" 2009, Vol. 1

- van Dun F., *Economics and the Limits of Value-Free Science*, “Reason Papers” 1986, No. 11
- van Dun F., *Freedom and Property: Where They Conflict*, (in:) J. G. Hülsmann, N. S. Kinsella (eds.), *Property, Freedom, and Society. Essays in Honor of Hans-Hermann Hoppe*, Ludwig von Mises Institute, Auburn 2009
- van Gompel S., *Relativizing the Legal-Theoretical Concerns with Copyright Formalities*, (in:) *Formalities in Copyright Law. An Analysis of their History, Rationales and Possible Future*, Wolters Kluwer, Alphen aan den Rijn 2011
- von Hayek F. A., *The Constitution of Liberty*, London 1993
- von Mises L., *Human Action. A Treatise on Economics. The Scholar's Edition*, Ludwig von Mises Institute, Auburn 1998
- von Mises L., *Theory and History. An Interpretation of Social and Economic Evolution*, Ludwig von Mises Institute, Auburn 2007
- Wile A., *Exclusive Interview. Dr. Hans-Hermann Hoppe on the Impracticality of One-World Government and the Failure of Western-style Democracy*, The Daily Bell, March 27, 2011, at <http://www.thedailybell.com/exclusive-interviews/anthony-wile-dr-hans-hermann-hoppe-on-the-impracticality-of-one-world-government-and-the-failure-of-western-style-democracy/> (visited August 5, 2016)
- Yeager L., *Raw Assertions*, “Liberty” 1988, Vol. 2, No. 2

#### KEYWORDS

copyright, argumentation ethics, praxeology, libertarianism

#### SŁOWA KLUCZOWE

prawa autorskie, etyka argumentacji, prakseologia, libertarianizm