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Work, Identity, and the Regulation of Markets: A Study of Trademark Law in the United States and Germany

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This article considers how legal systems capture different cultural perceptions of work in an individual's life. We inquire how two models—"human capital," based on the works of Adam Smith; and "vocation," based on the works of G. W. F. Hegel—are reflected in legal regulations and judicial rhetoric in the United States and Germany. Specifically, we examine how these two legal systems treat the practice of using personal names—the most direct referents to individuals' identities—in business. We discuss three sets of cases: cases involving the use of personal names as trademarks, cases involving conflicts between parties with similar names, and cases involving the transfer of rights in personal names. The article demonstrates that the US legal system treats work as a commercial asset, as "human capital" in Smith's sense, whereas German law perceives work as an integral part of one's identity, echoing the Hegelian line of "vocation."

INTRODUCTION

As citizens of market societies, we spend a considerable part of our time as market participants: as customers, clients, and consumers, but also as participants in the labor market. Most adults in Western countries spend large chunks of their waking hours at work. For many, their work is more than a source of income: it can also be a way of developing one's skills, contributing to society, experiencing community with others, and receiving social recognition (Gheaus and Herzog 2016). Nonetheless, attitudes toward work vary: for some, it is a "job" that they hold "nine to five"; for others, it is deeply tied to their personality. Anecdotal evidence suggests that these attitudes vary not only between individuals, but also between countries. Clichés abound about how obsessed individuals from different national backgrounds are with work, about whether or not "work" is seen as part of "life," and about whether work is seen as an instrument for making money or as a means of self-realization.

The history of ideas provides some cues about how these different attitudes toward work and its relation to one's identity have developed. In the late eighteenth century, the Scottish moral philosopher and economist Adam Smith ([1776] 1976a), whose views on markets strongly influenced the Anglo-American world, developed an account

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of education as an investment in sellable skills. Gary Becker, a member of the "Chicago School," pioneered the notion of "human capital" ([1964] 1993) based on this line of thinking. The German philosopher G. W. F. Hegel ([1820/21] 1942), in contrast, stands within a long tradition in the Germanophone world, in which one's "*Beruf*" ("vocation" or "calling") is seen as part of one's identity. "Human capital" is something one *has*, whereas a "calling" is something one *is* (Herzog 2013a, ch. IV). These are fundamentally different ways of thinking about the relation between work and identity.

This article explores how different cultural attitudes toward work and identity are reflected in legal rhetoric of the United States and Germany. Previous research has already shown the impact of different philosophical traditions on legal regulation. For example, differences in copyright law have been traced back to the influence of Lockean thought on the US legal system, and of Kantian and Hegelian thought on the legal systems of Continental Europe (for example, Netanel 1994). But no attempts have been made to date to expose the role of the different philosophical visions of work and identity in the legal regulation of markets. We focus on legal rules that regulate the connection between commercial products and the identity of their producers in trademark law.

More concretely, we examine how the legal systems of the United States and Germany perceive the practice of using one's own name in business. As onomastics, the study of names, teaches us, nothing and nobody exists in our mind without a name (Bardsley 1897, 1–2). A person's name defines and establishes her identity (Liebesman 2010, 6–7); it is the most personal and direct referent of her identity: "Name and self-identity are permanently wed" (Kaplan and Bernays 1997, 10). Hence, legal rules regulating the use of one's name in business expose the importance that each legal system attaches to the connection between personal identity and work. We look at three categories of cases: those addressing the use of personal names as trademarks, those addressing conflicts between parties with similar names, and those addressing transferals of names used in business.[1]

Understanding the philosophical ideas that underpin the legal rhetoric around the use of personal names in business is relevant for a number of reasons. Nonmaterial dimensions of markets already occupy a central place in today's economy, and with new technological developments, their importance will probably continue to grow. Accordingly, the regulation of nonmaterial dimensions of markets, e.g., protection against imitation or trademark infringements, comprises an expanding legal battleground. Meanwhile, legal rules regulating nonmaterial aspects of markets are characterized by significant vagueness and unpredictability (see, for example, Lemley and Shapiro 2005). Hence, analyzing the mental frameworks that surround them is helpful for a deeper understanding.

As Karl Polanyi (1944) has famously claimed, markets are not natural phenomena; they can only arise if the social and legal conditions for the tradability of goods are created. While Polanyi focused on labor, land, and money, the way in which markets are "legally constructed" has also been identified as an important factor for their

1. We focus here on the rules of trademark law. An alternative realm for protecting a name under American law could be the right of publicity. Yet, this right is not applicable to all the factual constellations discussed here, since it only protects famous persons. In the cases in which it *is* applicable, it would not lead to different results. This is why we chose to focus on the regulations of trademark law.

functioning (see, for example, Pistor 2013 on financial markets). If one accepts this assumption, scrutinizing which ideas underlie these legal constructions is of paramount importance for understanding market dynamics.

At the same time, many scholars expect revolutionary changes in labor markets with the advent of advanced robotics and digital solutions for many tasks previously performed by humans. This transformation is likely to shift cultural perceptions of work and identity. The relation of work and identity raises various normative questions, for example about nonmaterial benefits of work (Gheaus and Herzog 2016) or about meaningful work (Yeoman 2014). Legal regulation often reflects cultural perceptions; for instance, it has been repeatedly noted that copyright laws are influenced by the social vision of the individual "romantic author" (for example, Rose 1993). Hence, teasing out underlying philosophical ideas is a worthwhile endeavor in this field as well.

In the next section we describe in more detail how Smith and Hegel conceptualized the relationship between work and identity. We then explore the three categories of legal cases already mentioned: cases involving the use of personal names as trademarks, cases involving legal conflicts between parties with similar names, and cases involving the transfer of personal names used in business. Our focus is on the *rhetoric* used in US and German courts, and the ideas and images encapsulated in it. In legal decisions and judicial rhetoric, the differences between the two legal systems can be clearly demonstrated, and they do indeed track the distinction between "human capital" and "calling," as described by Smith and Hegel respectively. In the concluding discussion, we point out how this line of research could be taken further.

IDENTITY IN MARKETS—HISTORICAL ORIGINS

We here draw on two influential thinkers in the history of Western thought, Adam Smith (1723–1790) and G. W. F. Hegel (1770–1831), in order to identify two models of the relation between individuals and their work.[2] We do not claim to trace the—undoubtedly long and complex—intellectual history of Smith's and Hegel's theories, but rather treat them as templates that resonate with a number of features of the German and US legal systems. Smith is often taken to be the "father" of economics, and as having prefigured the notorious "economic man" that populates economics textbooks. While his moral psychology and his views of markets are far more nuanced than is often assumed (see, for example, Herzog 2013a, ch. II), his view of human beings and their work does indeed conceptualize them in a similar way as later "human capital" theorists, such as Fisher or Palmer, who explicitly referred back to Smith (Teixeira 2007). Smith holds that the "improved dexterity of a workman" is similar to "a machine

2. For a more detailed discussion see Herzog (2013a, ch. IV). Herzog (2013a) is one of the few comparative studies (see also Chamley 1965; Waszek 1988; Priddat 1990; Henderson and Davis 1991; Nuzzo 2010). The secondary literature on Smith and Hegel, taken individually, is vast; important commentaries on Smith include Campbell (1971), Haakonssen (1981), Griswold (1999), Fleischacker (2004), McLean (2006), and Forman-Barzilai (2010); commentaries on Hegel's social and political philosophy (which is what we draw on here) include Avineri (1972), Taylor (1975), Wood (1990), Hardimon (1994), Patten (1999), and Neuhouser (2000).

or instrument of trade," because "though it costs a certain expence, [it] repays that expence with a profit" (1976a, II.I.17).

By drawing a conceptual distinction between laborers and their work, Smith can describe labor markets as arenas in which workers sell their work, but not themselves (for example, Werhane 1991, 132). They can move flexibly between different jobs, which allows the price mechanism to adjust supply and demand in labor markets (Smith 1976a, I.VII.12–14).[3] Smith is skeptical of the institution of apprenticeships, assuming that the trade of a watchmaker can be learned within "a few weeks" (1976a, I.X.II.16). He describes traders as switching frequently between different occupations: a trader is "a corn merchant this year, and a wine merchant the next, and a sugar, tobacco, or tea merchant the year after" (1976a, I.X.I.38). The same holds for workers in manufacturing, as "[t]o the greater part of manufactures . . . there are other collateral manufactures of so similar a nature, that a workman can easily transfer his industry from one of them to another" (1976a, IV.II.42).

Thus, individuals offer their work in markets and flexibly sell it to the highest bidder. Their experiences, skills, or personal networks are understood as an investment for generating a higher income: "human capital" is something one owns and tries to increase. From that perspective, it is not helpful if one is too involved with one's job or identifies too much with one's occupation. Such attachments would create a vulnerability that others could try to exploit, and they are a hindrance to the smooth adjustment processes of the price mechanism. Presumably, the more detached one is, the more impartial and efficient one is, making wise decisions about how to invest one's "human capital."

Hegel understands the relation between individuals and their work differently. He holds that "a man actualizes himself only in becoming something definite, i.e., something specifically particularized" (1942, § 207). Everyone must have "the disposition to make oneself a member of one of the moments of civil society by one's own act, through one's energy, industry, and skill, and to maintain oneself in this position" (§ 207). This leads to "recognition both in one's own eyes and in the eyes of others" (§ 207; cf. also Muller 2002, 141; on Hegel on work in general see Schmidt am Busch 2002). While individuals have a free choice in determining their place in society, once they have chosen it, they become a member of one of the "moments" of civil society, of one of the different classes and corporations, presumably for lifetime (Hegel 1942, § 250ff.). One's choice of occupation is thus constitutive of one's self. Behind Hegel's ideas stands the protestant tradition, especially of Lutheranism, to understand one's occupation as a "calling" in which one fulfills the tasks God has determined for oneself.[4]

Why does Hegel draw a picture that is so different from Smith's, all while acknowledging him as one of the masterminds of the nascent science of economics (1942, § 189)?

3. A few scattered remarks also point to some hindrances to this flexibility: habitual sympathy between "colleagues in office" or "partners in trade" is "not unlike that which takes place among those who are born to live in the same family" (Smith 1976b, VI.II.15), and man is "of all sorts of luggage the most difficult to transported" (1976a, I.VIII.31). But these remarks sit uneasily with his optimism about the self-adjusting characteristics of markets and therefore cannot be taken to outweigh the overall picture.

4. On the theological background see, for example, Dostal, Stooß, and Troll et al. (1998, 441), who also note that there have long been "worldly" uses of the terms "Stand" and "Beruf," e.g., when artisans were "berufen" to a princely court.

On a pragmatic level, Hegel does not share Smith's optimism about the possibility of easily changing jobs (1942, § 241ff.; see also Priddat 1990, 202ff.). On a more philosophical level, Hegel emphasizes the deep, identity-forming ties between individuals and their work. Civil society, as the "stage of difference," gives free rein to individual "particularity" (1942, § 181). Everyone can "turn himself into that which he takes to be his calling" (Hegel [1818–1831] 1974, 509). Hegel calls the anxiety of young people, who do not want to commit themselves to a specific calling, a misunderstanding based on "abstract" thinking (1942, § 207). He notes that in Germany, when someone asks "What is he?," the answer standardly given is his social position and occupation ("*Stand*") (Hegel 1974, 525). It is from within concrete social roles that individuals fulfill their moral duties—"my station and its duties," as Bradley (1876) later put it.[5]

Why is it relevant to distinguish between these different ways of conceptualizing the relation between "work" and "identity"? As noted above, we think that they are useful as templates for understanding the differences that can be observed in the conceptualizations and rhetorical overtones in US and German legal approaches to the issue of using personal names in business. Smith and Hegel capture deeply rooted assumptions about what it means to be a working individual, assumptions that were influenced by earlier intellectual traditions and influenced later ones. To be sure, we do not claim that Smith and Hegel were the only, or most important, thinkers who had an influence on these legal areas in the United States and Germany. It would take a detailed historical and empirical study to show how their ideas traveled and how prevalent they are today, both among the legal professions and among the general public.[6] This task is beyond the scope of the present article. Nonetheless, let us briefly note a few indications that these different ways of understanding the relation between work and identity continue to be present today.

The term "Beruf" continues to be standardly used in German, while the English term "job" is used for describing short-term employment or for signaling distance from one's work ("it's just a job"). Dostal, Stooß, and Troll (1998, 442) provide a list of ways in which "Beruf" is understood by Germanophone sociolinguists, which includes numerous references to concepts such as personality, self-fulfillment, or social position. They note the aversion to "*botch*" ("*Pfusch*"), which implies a sense of occupational honor (450). Nietzsche's adage that "A calling is the backbone of life" ([1878] 1954, § 575) is often quoted on Web pages that offer advice for young people on which "calling" to choose. The term "human capital," in contrast, is seen with suspicion in

5. Hegel's approach to individuals' occupational identity can be related to the so-called romantic theory of ownership (see, for example, Ryan (2012, ch. 31) for a discussion). Rather than defining ownership in "instrumental and utilitarian" terms, this "will-based" theory, pioneered by Immanuel Kant (1724–1804), sees work and ownership as "expressions of character," as "ways of 'fixing' or objectifying the will in the outside world," as Ryan summarizes it (2012, 587). It should also be noted, however, that this notion of ownership has also left its mark on American law; see Radin (1982) for a discussion.

6. Such a study could, for example, trace the reception of Smith's and Hegel's thought (for the latter, though at a more general level of abstraction, see Herzog (2013b)). It could also design surveys (e.g., with vignettes about different individuals' working lives) to see what US and German citizens, respectively, conceive of as "normal" occupational biographies. One could also study how much weight legal decisions in areas other than the one explored here give to individuals' identification with certain occupations.

Germany: in 2004, it was chosen as "ugliest word of the year."[7] This move probably seems rather unintelligible from a US perspective, where Milton Friedman (1970) famously declared that "[t]he Social Responsibility of Business is to Increase its Profits," blocking any questions about any other moral responsibilities that individuals might have qua holders of certain occupational roles, at least in the world of business. There is no direct equivalent in the United States to the term "Beruf," and the term "profession" is often restricted to the traditional professions of divinity, medicine, and law.

These German and Anglophone traditions thus contrast sharply in how they conceptualize the relation between individuals and their work. We can assume they belong to the cultural underpinnings that have influenced, and are in turn influenced by, the developments of labor market structures in the "liberal" and "coordinated" market economies of the United States and Germany (Hall and Soskice 2001). In "liberal" market economies, such as the United Kingdom or the United States, labor markets are more fluid, and workers have "greater opportunities to move their resources around in the search of higher returns" (17). In "coordinated" market economies, such as Germany or Japan, skills are more specialized, and employees are more strongly protected against dismissal, which creates incentives to acquire firm-specific skills and to remain in jobs for longer periods, as employees in such economies indeed do (24). German "ordoliberalism" has long emphasized the necessity to create a powerful institutional framework for markets, with an awareness that the market is only one among several spheres of society (see, for example, Eucken 1952). This puts it in contrast with the endorsement of markets as the best possible principle of coordination for almost all spheres of life, which one finds in some versions of Chicago School thinking (see Mirowski 2013 for a discussion).

THE RIGHT TO USE ONE'S OWN NAME IN BUSINESS

Can the difference between these two mental models of work, as "human capital" or as a "calling," also be discovered in legal rules and rhetoric today? The law touches upon questions of personal and occupational identity at a number of points. Central among them is the right to use one's name in business. This material directly concerns the connection between a person—symbolized by the personal name—and her occupation. Inquiring how the German and US legal systems treat this issue—that is, how much importance the two systems ascribe to this connection—can serve as a good indicator of whether Smithian and Hegelian ideas on identity and work influence legal thought.

Of course, if a person uses her name as the name of her business without anyone objecting to this practice, no legal questions arise. To see how much weight a legal system ascribes the right to use one's name in business, we have to look at cases in which this right might collide with the rights of others. This can happen on various occasions: when a person seeks to register her name as a trademark; when two persons with similar names want to use them in business; and when a person transfers the right to her name, but later wishes to re-use her name in business. Legal solutions to such conflicts largely depend on the nature of the right to use one's name in business, specifically, whether

7. See Wikipedia, "Unwort des Deutschland." https://de.wikipedia.org/wiki/Unwort_des_Jahres_(Deutschland).

this right has a personal or a purely economic character. As we will see, this is quite different in the German and the US legal systems.

PERSONAL NAMES AS TRADEMARKS

A trademark creates a property right, thereby preventing other people from using similar symbols in the same branch of trade. Hence, a trademark in one's own name creates a strong right to use one's name in business. Therefore, trademark is an area in which we can see how each legal system perceives the connection between one's name, as a symbol of one's personality, and one's economic activities.

United States

American law generally distinguishes between two types of trade symbols: trademarks and trade names. A trade name is the name of a business (e.g., "Apple Computers"); a trademark is the name of a product or a service (e.g., "iPhone") (American Steel Foundries v. Robertson 1926). US trademark law traditionally granted greater protection to trademarks than to trade names. Hence, trademarks also had to meet higher requirements to gain legal protection. The earliest reported US trademark cases held that trademarks could only consist of purely fanciful, arbitrary, or suggestive terms. To clarify these terms: the word "Fanta" is fanciful, since it means nothing; the word "Apple" for a computer is arbitrary, since it has nothing to do with computers; and the word "Coppertone" for suntan oil is suggestive, since it suggests the effect of the product.[8]

Trademarks were protected as property rights, while trade names enjoyed much weaker protection under the law of unfair competition. Personal names did not qualify as trademarks, and hence could only enjoy the weaker protection of unfair competition law (Bone 2006, 565–66). For instance, brands such as Kellogg's Corn Flakes (since 1906) or Waterman pens (since 1884), despite their popularity, enjoyed weaker protection than fanciful, arbitrary, or suggestive trademarks (Handler 1996, 5). The reason for this rule was the fear of monopolization: courts maintained that everybody has the right to use his own name in business. Hence, no one can acquire an exclusive right in a name, taking it from the public domain (Avery & Sons v. Meikle & Co. 1883; Hilton v. Hilton 1918). If a trader uses his personal name as a trademark, he has to blame himself for choosing a trade symbol that others have an equal right to use (Handler and Pickett 1930a, 196).

This rule was somewhat softened over time. Although the federal Trade-Mark Act of 1905 explicitly excluded personal names from registration as trademarks, it established an exception: if the trade name in question had been used for ten years, it could be registered (for a critical review, see Handler and Pickett (1930b)). The Lanham Act of 1946, which is the current trademark law in the United States, confirms the old rule, barring federal registration to marks that are "primarily merely a surname." Yet, it states that such marks can be registered and will be protected if they have acquired so-called secondary meaning, that is, upon proof that consumers have learned to perceive them as

8. U.S. Trademark Registration No. 601,438.

trademarks rather than as names (15 U.S.C.A. §§ 1052(e)(4), (f); see, for example, Yarmuth-Dion, Inc. v. D'ion Furs, Inc. 1987; Flynn v. AK Peters, Ltd. 2004; see generally McCarthy 2017, § 13:2). Courts state that a secondary meaning grows out of a long association of the name with the business, so that the name and the business eventually become synonymous in the public mind and the secondary meaning *submerges* the primary meaning of the name as a word identifying a person, in favor of its meaning as a word identifying that business (see, for example, Visser v. Macres 1963; Lewis v. Marriott Int'l, Inc. 2007).

The term "secondary meaning" relates to the most basic requirement of trademark law: distinctiveness. Distinctiveness is the ability of a symbol to communicate the source of products and to distinguish them from products with other origins (15 U.S.C.A. § 1052). In other words, distinctiveness is the ability of a symbol to serve as a trademark. Nondistinctive symbols, such as descriptive words, can only be protected as trademarks if they acquire "secondary meaning," in other words, if consumers start associating them with particular businesses rather than perceiving them as descriptive terms. For instance, "American Airlines" is a descriptive term that, through intensive use, came to be associated with a specific company. The secondary meaning in this case is so dominant that it overshadows the initial meaning of the words and hence, the words may be protected as a trademark.

Back to personal names: US trademark law regards them as "descriptive," that is, inherently nondistinctive and incapable of serving as source identifiers. The Lanham Act has established this rule with respect to surnames only, but judicial practice has extended it to first names and full names (see, for example, *Tana v. Dantanna's* 2010, 776). As an early court put it, "in a technical sense, there can be no trade-mark in the name of a person, because all such names are generic, and because, speaking in a general sense, every person has the right to use his own name for the purposes of trade" (*Drake Medicine Co. v. Glessner* 1903, 356).

Courts often recite the principle that "an individual name is rather similar to a descriptive word, in the sense that it might properly be regarded as a convenient description of the fact that the named individual is or was affiliated with the firm" (see, for example, *Abraham Zion Corp. v. Lebow* 1985, 104; Yarmuth-Dion, Inc. v. D'ion Furs, Inc. 1987, 993). Yet, only names that the public perceives as personal names are regarded as descriptive and require a proof of a "secondary meaning" (for example, *Peaceable Planet v. Ty* 2004, 992). On the other hand, even uncommon personal names are categorized as descriptive and denied trademark protection if the public recognizes them as names (Altman and Pollack 2017, § 26:42). For instance, in one case, the court held that the designation "Philbrick's Sports" is descriptive despite the rarity of the name, because it solely denotes a sporting goods business owned by or affiliated with someone named Philbrick (*Philbrick v. eNom, Inc.* 2009, 368).

This judicial position explicitly detaches trademarks from their role as indicators of the producer's identity. It states, in essence, that while a personal name may denote this person's affiliation with a certain business, this is not the kind of information that a trademark should embed. This means that personal identity is seen as playing no relevant role in market transactions. In one remarkable case, Mr. Carl Lewis, a chef who worked for Marriott hotels, left his employer without any agreement that would have allowed Marriott to continue using his name. Yet, Marriott continued to use his name in advertising for its wedding packages. Mr. Lewis's right to stop such a use was not self-evident for the court. Rather, he had to prove that his name had acquired a "secondary meaning," so that it "submerges the primary meaning of the name as a word identifying a person, in favor of its meaning as a word identifying that business" to be able to gain protection. Lewis made his case by arguing that he had invested in creating a reputation, which now had commercial value (*Lewis v. Marriott Int'l, Inc.* 2007)—a line of argument that is reminiscent of the Smithian idea of "human capital" as an investment in commercially valuable assets.

This legal position is based a dichotomy between two types of information: the identity of a person who is involved in the production of goods (symbolized by a personal name), and the origin of goods (symbolized by a trademark). This dichotomy makes clear that the US legal system does not envision persons as origins of goods: disclosing the identity of a person who is affiliated with a product is seen as different from identifying the commercial origin of this product.

In this view, the real origin of goods is *not* a biological person. But a *legal* person, for example a business corporation, might well function as origin of goods. Its impersonal character can be indicated by fanciful, arbitrary, or suggestive words, as long as they serve the purpose of distinguishing one source from another. Personal names may be protected as a trademark only if they have already been used in connection with products and acquired a "secondary meaning," and only when this secondary meaning as a commercial product identifier "submerges" its primary significance as a personal identifier. In other words, personal names only deserve trademark protection if the "personal" element has disappeared. This implies an assumption that consumers do not care about different individuals as producers—the role of human individuals as producers is submerged in the corporate "origin."

This idea has been made explicit in legal decisions since the 1930s, when the idea of the "anonymity" of commercial sources emerged as a more general concept in trademark law: courts gradually started recognizing that a trademark represents for the consumer a "single, albeit anonymous or indistinguishable source" (McCarthy 2017, §§ 3:11–3:12). As one early commentator noted, "the purchaser does not particularly care who makes the collars he wears or the cigars he smokes so long as the goods bearing his favorite brand come from the same source. Anonymity of production and distribution tends to become the rule rather than the exception" (Handler and Pickett 1930a, 199). Indeed, courts repeatedly state that the consumer does not care about the physical origin of the products, as long as their quality is consistent (McCarthy 2017, §§ 3:10, 18:40). This view has been codified in the Restatement: "Trademarks serve as a means of communication between otherwise unknown or anonymous producers and their prospective customers" (Restatement (Third) of Unfair Competition (1995), § 9, cmt. c). The Lanham Act also recognizes that a trademark should "indicate the source of the goods, even if that source is unknown" (15 U.S.C.A. § 1127).

In other words, US law here explicitly detaches the goods that are traded in markets from the individuals who produce them. This position is plausible if workers behave like the individuals Smith described in the *Wealth of Nations*: flexibly moving around their "human capital" in search of the highest gains. A collar worker who produced the collar I bought one year may have long moved on to a different job when I want to buy another collar a year later. Quality standards are assured by the corporation, which presumably has a commercial interest in keeping up its reputation. Even the owner of the company cannot simply register her own name as a trademark, which implies that all companies are conceptualized along the lines of anonymous corporations, rather than as businesses shaped by individual human beings who would imprint their personality on business practices. It might be said that American law thereby embraced the realities of anonymous mass markets in the industrial and postindustrial age: the price that is paid for an abundant and variable supply of goods in a competitive consumer market is that individuals *as producers* disappear from the picture. This suggests that they should see their work as nothing but an act of selling their "human capital," while remaining personally detached from the goods they produce.

Germany

The German legal position has developed differently. During the entire nineteenth century, it was common custom to designate goods with the names of their producers, and legal literature described personal names as "the natural trademarks" (Kohler 1884, 157). German jurisprudence perceived personal names as inherently capable of serving as trademarks because of their capability to identify the producer of goods—a feature that fanciful trademarks lacked (84). German literature disfavored the idea of protecting words as trade symbols, because such protection could create privileges that would restrict the commercial freedom of other traders to use these words (Wadle 1979, 387; von Bassewitz 2005, 660). Note that US trademark law historically holds just the opposite view, regarding fanciful words as inherently distinctive and capable of trademark protection, while denying personal names these capacities. In addition, US law was traditionally hesitant to protect personal names as trademarks, in order not to create monopolies in these names. The first German trademark act of 1874 excluded signs consisting solely of words or numbers from registration as trademarks (Das Reichsmarkenschutzgesetz of 1874 § 3). Yet, it explicitly granted personal names the same protection as registered trademarks (§§ 13–20; see also Wadle 1979, 388). That is, although personal names could not be registered as trademarks, they enjoyed a special status; they were recognized as "natural trademarks," as already existing legal constructs that are protected *without* registration, at the same scope as registered trademarks (von Bassewitz 2005, 661). At the same time, courts refused to grant protection to invented marks, so that they enjoyed no protection at all (for example, RG 1880;[9] Wadle 1979, 388–89).

The perception that words cannot be registered as trademarks changed over time, and the trademark act of 1894 (Das Gesetz zum Schutz der Waarenbezeichnungen) allowed registering words as trademarks, which enabled registering personal names as trademarks as well (§ 4 sec. 1). The modern trademark act, enacted in 1994, explicitly recognizes that personal names are eligible for registration as trademarks (Das Markengesetz, § 3 sec. 1). The German literature continues to regard personal names as "prototypical" trademarks

9. We cite German cases using the name of the court and the year of the case, as is common in German literature. Unlike in the United States, the names of the parties are not published. "RG" stands for the Supreme Court of the German Empire, "BGH" for the Supreme Court of Germany, and "OLG" for District Court of Appeals (always accompanied by the name of the city in which it is located).

(Knaak 1979, 6; Götting 1995, 113; von Bassewitz 2005, 660). German legal practice consistently holds that personal names possess inherent distinctiveness, and sometimes even states that this rule is self-evident and does not require specific justification (for example, BPatG 2000, 277; BPatG 2006, 592). In contrast to their American counterparts, German courts do not demand a proof of secondary meaning in order to register a personal name as a trademark (for example, BPatG 2008a, 254; see also Ingerl and Rohnke 2010, § 8, sec. 147). They note: "because personal names intrinsically possess an individualizing character, they are essentially capable of indicating the origin of products and services" (BPatG 2004; BPatG 2008b; BPatG 2014).

Even very common surnames are eligible for trademark protection under German law (for example, BGH 2008; BGH 1991c, 473; BGH 1995b). Such names have limited distinctiveness, which means that they can enjoy only a limited scope of protection (for example, BGH 1990b; BGH 1991a; see also von Bassewitz 2005, 661). Yet, as long as the public identifies the word in question as a name indicating a person, the word is capable of serving as a trademark (BGH 1979, 643). Thus, in one case, the Supreme Court held: "Irrespective of its frequency, every last name is able and aimed to identify its bearer individually and to distinguish him from other persons. In this respect, each name constitutes a classical identification tool. This name function should not be contested because there are many other bearers of the same name and the name therefore cannot exclusively identify one specific person"[10] (BGH 2008; see also BGH 1995a, 508). Similarly, in another case, the German Patent and Trademark Office noted: "Personal names, whose traditional function is to individualize or to identify persons, have always been used to distinguish products of different manufacturers as well. They actually constitute the basic instance of a distinctive trademark" (for example, BPatG 2013).

The legal doctrine thus follows the Hegelian idea of a close connection between an individual's identity, as expressed in their name, and their work: the idea that individuals put their name onto the objects they produce, or the businesses they run, is considered obvious and natural. In the German legal view, personal names are primarily regarded as identifiers, not only in one's private life, but also in business. This makes sense if one assumes that one's occupational choice, one's "calling," is part of one's identity, which one cannot simply switch on and off in different social spheres. Individuals are here conceptualized, along the lines one can find in Hegel, as having an identity *as* producers (John *is* a shoemaker) in which they can develop their personality and individuality (John has *his own way* of making shoes), which in turn implies that the person's identity, symbolized by her name, can serve as identifier for the product (these are *John's* shoes).

CONFLICTS OVER THE RIGHT TO USE A NAME

In the previous section, we discussed the situation in which a person tries to register her name as a trademark—a situation that does not involve conflict with others. In this section, we inquire how the two legal systems treat situations that involve two

10. Here and below all the translations of German decisions are our own.

users of similar names. The most typical conflict of rights involves a senior user who has already established a reputation, and a newcomer with a similar name. The senior user tries to prevent the newcomer from entering the market, claiming that this would create consumer confusion[11] and impair the senior user's trademark or trade name rights. The newcomer, in turn, claims that she has a right to use her own name in business. Thus, the commercial interest to preserve the business reputation of an established company collides with the personal interest of newcomers in using their own names in business. Such an inquiry can help us better understand what each legal system regards as more important: the purely economic interest in a name, or the interest in a connection between oneself and one's business activities.

United States

US legislation recognizes no general right in one's name; in commercial context, the right to use one's own name has been developed in legal practice. In line with the Smithian tradition of seeing the relation between individuals and their work as questions of "human capital," the first US judicial decisions to deal with the right to use one's name in business defined it as a *property* right (*Brown Chemical Co. v. Meyer* 1891, 544; *Vassar College v. Loose-Wiles Biscuit Co.* 1912; *Tinker v. M.F. Patterson Dental Supply Co.* 1923; *Coty, Inc. v. Parfums De Grande Luxe* 1924, 874). Courts characterized this right as natural, absolute, and inalienable, guaranteed by the US Constitution, and sometimes even as a "sacred" right (*Ida May Co. v. Ensign* 1937, 344). They reasoned that without the right to use one's name in business, "the right to acquire, possess and protect property would be of little worth" (*Hilton v. Hilton* 1918, 183; *A. W. Cox Dep't Store Co. v. Cox's Inc.* 1976, 310). This position may seem puzzling at first glance—why is one's name so important for acquiring, possessing, and protecting property? The answer is that business reputation was often conceived as personal during this period, and hence, for practical reasons, one's name was an important tool in conducting one's business. Now we can better understand the rule against registering a trademark in one's name mentioned in the previous section: such a registration would mean that other people with the same name would be unable to use their name in business, and hence their property right would be unduly restricted (*Brown Chemical Co. v. Meyer* 1891).

The property right in one's own name has been conceptualized as a right against interference whose main content is protection against liability for damage that may result from a reasonable exercise of the right. A much-cited decision of 1891 made this point clear:

> A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for an injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land.

11. In both the United States and Germany, the question whether confusion is likely is usually decided by the court's judgment; in rare cases, consumer surveys are used.

> These and similar instances are cases of damnum absque injuria [loss without injury]. (*Brown Chemical Co. v. Meyer*, 544; see also Coty, Inc. v. Parfums De Grande Luxe 1924, 874; *Charles Broadway Rouss, Inc. v. Winchester Co.* 1924)

This rhetoric suggests a strong connection between individuals and their names. This may seem surprising, and, at first glance, more in line with the German tradition. But it is worth noting that this strong connection is modeled not as "identity," but as "property." And the "property right" in one's name has never been absolute. Even early cases restricted the right to use one's own name in business when another trader had already established a strong reputation—"goodwill," in trademark law's terms—in the name in question. In such cases, courts took account of the fact that the junior user might confuse the consumers and appropriate the senior user's reputation: "While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business" (*Garrett v. T.H. Garrett & Co.* 1896, 478). Courts perceived such cases as conflicts between two property rights—a property right in a personal name, and a property right in business goodwill—which must be balanced against each other. We will now see how courts defined this balance, and how it shifted over time.

During the nineteenth century, courts put great weight on the right to use one's personal name in business. Some decisions of that time found that the senior user must tolerate the confusion that results when a junior user with a similar name enters the market (for example, *Brown Chemical Co. v. Meyer* 1891). Others required the junior user to undertake measures to diminish confusion, such as including disclaimers—for example, "not connected to . . ."—or adding distinguishing symbols (*Charles Broadway Rouss, Inc. v. Winchester Co.* 1924). In that period, courts refrained from banning one's use of one's personal name in business altogether. The only exception was intent to deceive: such an intent could deprive the person of the right to use her name in business: "[E]very man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any thing calculated to mislead" (*Meneely v. Meneely* 1875, 431–32; see also *Reddaway v. Bonham* 1896; *Singer Mfg. Co. v. June Mfg. Co.* 1896, 204). The judicial approach toward one's right to use one's name in business changed in the course of the twentieth century. Courts gradually abandoned the rhetoric of a "sacred" and "absolute" right to use one's name in business (Wittrock 1985; McCarthy 2017, § 13:6; *Robin Woods, Inc. v. Woods* 1992, 870; *R.J. Toomey Co. v. Toomey* 1988, 879). They shifted their focus from the right of junior users to use their names to the right of senior users to preserve their business goodwill (for example, *L. E. Waterman Co. v. Modern Pen Co.* 1914; see also McCarthy 2017, § 13:8). The new judicial rhetoric made clear that "a man has no absolute right to use his own name, even honestly, as the name of his merchandise or his business. As such it becomes a trade name or service mark subject to the rule of priority in order to prevent deception of the public" (*John R. Thompson Co. v. Holloway* 1966, 113). In other words, the right of an established business in a name gained clear priority over the right to use one's personal name. Indeed, one court explicitly noted that since the beginning of the twentieth century, "the right of an individual to use his name in connection with his trade must yield to the need to eliminate confusion in the market place" (*Perini Corp. v. Perini Construction, Inc.* 1990, 124; see also *Basile, S.p.A. v. Basile* 1990, 39–40).

An honest intent no longer helped the junior user, since the injury to a business caused by the use of a similar name cannot be "alleviated by the second user's honesty of purpose" (*V. J. Doyle Plumbing Co., Inc. v. Doyle* 1978, 597). As one court put it,"[t]he objective facts of … unfair competition and injury to plaintiff's business are determinative, not the defendant's subjective state of mind" (*David B. Findlay, Inc. v. Findlay* 1966, 655–56; see also *Visser v. Macres* 1963; *Basile, S.p.A. v. Basile* 1990; *E. & J. Gallo Winery v. Gallo Cattle Co.* 1992, 1288; McCarthy 2017, § 13:22).

Courts no longer perceived the right to use one's name in business as a property right. They conceptualized it anew, as a personal right. Personal rights enjoy relatively weak protection under American law (for example, *S. Scrap Material Co. v. Smith* 1950, 358). The "sacred absolute" right shrunk to a limited defense against trademark infringement or unfair competition claims. Courts no longer allowed using one's name without any modifications or additions: the view that confusion caused by mere similarity of names should be tolerated vanished entirely (*Continental Motors Corp. v. Continental Aviation Corp.* 1967; McCarthy 2017, § 4:10). Courts began putting greater restrictions on newcomers using their names (Altman and Pollack 2017, § 22:57), sometimes issuing absolute injunctions, that is, eliminating the possibility of using one's name in a certain business altogether (*Hat Corp. of America v. D. L. Davis Corp.* 1933, 620; *Sullivan v. Ed Sullivan Radio & T.V., Inc.* 1956; *David B. Findlay, Inc. v. Findlay* 1966, 655–56; *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.* 2002; *Lazzaroni USA Corp. v. Steiner Foods* 2006). One court clarified: "People with names that are the same as strong and famous personal name trademarks have no 'right' to confuse the public by engaging in certain businesses under their name. [A] person has no right to use his name as a trademark simply because of the fortuity of his parents and their choice of names. The world is full of people who cannot use their names in whole industries: Marriotts in motels, Hugheses in oil tools, and McDonalds in fast foods" (*W-K-M Div. of Joy Mfg. Co. v. WK Industries* 1987). What can explain such a radical change in judicial position? An article written in 1930 by Milton Handler and Charles Pickett, two leading trademark scholars of that time, suggests that the protection of personal names developed when a personal reputation was economically significant. Since then, market structures grew to be highly impersonal. The purchaser does not particularly care who makes the goods bearing his favorite brand as long as they come from the same source. Anonymity of production and distribution became the rule rather than the exception. The inability to do business under a personal name thus no longer involves a "great commercial handicap" (Handler and Pickett 1930a, 199; see also Wittrock 1985, 999; Frey 1997). Similarly, in a case decided in 1933, the court remarked: "[L]imitations of the right [to use one's name], nowadays, involve no real hardship[.] In an age when by corporate activity, mass production, and national distribution the truly personal element has been so largely squeezed out of business, there is naturally less legitimate pecuniary value in a family name. Any other name is as valuable and as available for all legitimate purposes. Formerly, before the age of advertising, when good will in business was slowly developed from personal contacts, the situation may have been otherwise" (*Hat Corp. of America v. D. L. Davis Corp.* 1933, 623; see also Handler and Pickett

1930a, 199). In the same vein, a later court observed that a right to use a family name could prevail in earlier times "when the role of personal and localized reputation gave the right a more exalted status." The court went on to hold that the weight of this right has been decidedly diminished: "Other than understandable pride and sense of identity, the modern businessman loses nothing by losing the name. A junior user's right to use his name thus must yield to the extent its exercise causes confusion with the senior user's mark" (Basile, S.p.A. v. Basile 1990, 39–40). This shows that the courts focus on economic considerations as the only relevant aspect of how names are used, and once the economic value of personal names allegedly declined, there was no point in protecting them any longer.

This is the common judicial position still today. Courts will not allow newcomers, who have not yet established commercial goodwill in their names, to conduct a business under these names if they are similar to the names of established enterprises (*Basile, S.p.A. v. Basile* 1990). By contrast, if the junior user has already acquired significant business goodwill, the court will balance her right against the right of the senior business (*Bertolli, USA, Inc. v. Filippo Bertolli Fine Foods, Ltd.* 1987, 206–07). As one court stated, "a person has no property right in his individual personal name as used to identify himself as an individual, but when his name is used as a trade or commercial name a property right is created in it in association with the business or trade it identifies" (*S. Scrap Material Co. v. Smith* 1950, 358).

Such decisions deprive personal names of any preferential status in trademark conflicts, and indeed, several decisions held that personal names are now treated like any other symbols in trademark disputes (*Champion Spark Plug Co. v. Champion* 1938, 639–40; *Max Factor & Co. v. Factor* 1963, 126; *Robin Woods, Inc. v. Woods* 1992, 870). This line of jurisprudence is somewhat inconsistent, though. Other courts show reluctance to issue the "drastic" relief of an absolute injunction, instead requiring the junior user to add differentiating symbols and disclaimers (*John B. Stetson Co. v. Stephen L. Stetson Co.* 1942; *Hunt Potato Chip Co. v. Hunt* 1960, 338; *Abraham Zion Corp. v. Lebow* 1984; *Gucci v. Gucci Shops, Inc.* 1988; see also McCarthy 2017, § 13:9). So, it might be said that personal names have at times enjoyed preferential treatment in US courts until today. Yet, the tendency to forbid any commercial use of the name by a junior user who acquired no significant goodwill seems to have grown (for example, *Basile, S.p.A. v. Basile* 1990; *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.* 2002; *Lazzaroni USA Corp. v. Steiner Foods* 2006; *Paul Frank Indus. v. Sunich* 2007). Increasingly, names are seen from an exclusively commercial perspective.

Germany

German law solves conflicts over uses of similar names quite differently. The right to use one's name in business, notwithstanding the existence of a similar trade name, has been secured in German trademark legislation since 1874 (von Bassewitz 2005).[12]

12. The first German Trademark Act of 1874 included a specific provision that stated that a trademark cannot restrict anyone in his right to identify his goods with his own name (sec. 10), and the later Act of 1894 included a similar provision (sec. 13).

The current Trademark Act of 1994 states in sec. 23: "A trademark owner . . . does not have the right to enjoin a third party from using his name . . . in business."

Until 1998, German commercial law required that one's enterprise be named after its owner, or at least include his name (sec. 18–19 of German Commercial Code in its old version). This duty did not apply to companies with limited liability, but only to private businesses (sec. 18–19 of German Commercial Code in its old version). Hence, courts allowed the use of one's name in a private business, even if it caused confusion with a senior user of the same name (for example, RG 1925a; RG 1927; RG 1940; RG 1941b, 49). Yet, at the same time, courts did not allow a similar use of one's name in a company with limited liability, since there was no duty to use one's name for such a company (for example, RG 1925b; RG 1926b; see also Schmitt-Gaedke and Arz 2012, 565–66). This formalistic distinction between private businesses and companies with limited liability was sharply criticized (see Beier 1966, 628 and the citations there) and waived by the Supreme Court in 1966 (BGH 1966; see also BGH 1968, 213; BGH 2008). The Court stated that everyone has the right to conduct his business under his own name, as long as he does this in a fair manner and without the intention to cause confusion (BGH 1966, 625). It went on to hold that a person often has a reputation under his name in business life before he forms a company, even as an employee. Hence, a rule allowing him to use his name in business only when he has a legal duty to do so is too narrow. The junior user may use his name, but has to undertake reasonable steps to reduce confusion (625).

This view is broadly accepted in German legal practice still to this day: courts hold the view that nobody can be deterred from using his own name in business (for example, BGH 1952; BGH 1957a; BGH 1960, 35; BGH 1990a; BGH 2008). The junior user of a name is regularly required to undertake reasonable steps that are capable and necessary to reduce confusion, such as using her first name, the geographical location of the business, or some additional descriptive words (for example, BGH 1986; BGH 1987b; BGH 1990a; BGH 1990c; BGH 1991b; BGH 1997). But courts recognize that some "remaining likelihood of confusion" usually persists after such steps have been undertaken. The senior user must tolerate this "remaining likelihood of confusion" (BGH 1952; BGH 1960). This rule applies equally to junior users who have already used their names commercially and to users wishing to found a new business using their names (for example, BGH 1957b; BGH 1958b).

It is noteworthy that while American legal practice has developed the right to one's name in the specific context of conflicts over similar business names, German law recognizes a general right to one's name.[13] German judicial practice and literature hold the view that the right to one's name protects one's social respect for the name bearer and her economic freedom (for example, OLG Köln 1986; Fezer 2009, § 15, sec. 142). This right combines the right to personal esteem with the right to free development in all spheres of life, including the economic sphere. In this specific sphere, everyone has a legitimate interest to continue using her name, thereby transferring

13. Section 12 of German Civil Code (BGB) states: "Right to a name: If the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorised use of the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a prohibitory injunction."

the reputation and trust that she enjoys as a person to the commercial enterprise. This right derives from freedom of occupation (OLG Köln 1986; Fezer 2009, § 15, sec. 142; Beier 1966, 628). We can here see the "Hegelian" assumption that a person remains the same—and hence must have the right to use her name—across different social spheres, including the economic sphere.

German courts do not share the American perception that "a modern businessman loses nothing by losing the name." The right to use one's name in business is not only stronger in Germany, its nature is very different. It is not an economic right, but a profoundly personal right, protecting an individual's self-actualization, respectability, and personal development. The Court's remark in the *Kupferberg* case ([BGH 1966]), according to which a person often has a certain reputation in business life, even as an employee, is especially interesting. What is meant here is not so much the economic value of a name; rather, it is, in a Hegelian fashion, the reputation of a person who practices his profession and who is recognized as a professional among members of the same profession and other members of society alike.

Unlike US law, German law does not ascribe greater weight to property rights than to personal rights. In fact, the opposite might be the case: the personal right in one's name sets a limit to economic rights in a trademark or a trade name. No one can be banned from using his own name in business. Trademark rights must recede, and trademark owners have to tolerate a certain degree of confusion—in other words, a certain reduction of the commercial value of the mark—and sometimes may even be required to make changes in the mark to allow a newcomer to use her name. Many decisions include the following statement: "The exclusive right [of a senior user] finds its limits where the right of a person to do business honestly under his own name, especially in the field, in which he was doing business until now, starts" (for example, RG 1927; RG 1940; BGH 1960; BGH 1976; OLG Köln 1983). Another decision mentions: "no one can be stopped from using his name for a business in a field, in which his family has a commercial tradition and he was doing business until now" (BGH 1951, 412). Accordingly, courts sometimes do not allow extending the business conducted under one's name into a new field because of a business under a similar name operating in this field (for example, BGH 1952, 520; BGH 1958a, 145; BGH 1988)—while they *always* do allow one to conduct one's business in one's original field (for example, RG 1941a; BGH 1951, 412; OLG Köln 1983). This resonates with the Hegelian picture of "vocation" as something that becomes so deeply interwoven with one's identity, and maybe even one's family history, that it seems unnatural to switch to a different occupation; hence, the latter deserves lesser legal protection.

One especially remarkable case dealt with an American company called "Hellige," after its manager. It wanted to found a subsidiary in Germany, but the name turned out to be similar to the name of a German company. The court concluded that the interest in indicating the commercial connection to the American firm through the name does not justify imposing on the German firm the necessity to tolerate some likelihood of confusion. This holding emphasizes the contrast between American and German law: in Germany, the right of a person to use his own name in business is clearly perceived to be more significant than the right of a foreign company to use its name, although the *economic* interests of the company might be much stronger. While there may have been some protectionist overtones to this decision, what is really interesting is the *justification* the court provided. The *Hellige* court held that the central question in this case was whether Mr. Erich Hellige, the manager of the American firm, had an interest in using his professional reputation for the German branch (BGH 1968, 214). It concluded that since Mr. Hellige was not planning to be involved in the activity of the German branch, his interest in using his name was not particularly strong (214). This position once again reveals the personal nature of the right to use one's name in business: this right has to do with one's real involvement.

The right to use one's name is not unlimited, though: it may not be used in bad faith (Fezer 2009, § 15, sec. 142–43; RG 1928, 660; BGH 1951, 412; BGH 1952; BGH 1976; OLG Köln 1983). German courts closely examine the circumstances of each case to see whether the person has chosen to conduct the business under her own name in good faith or with the intention to exploit another's reputation (Fezer 2009, § 15, sec. 142–43; RG 1928, 660; BGH 1951, 412; BGH 1952; BGH 1976; OLG Köln 1983). But German courts are not quick to find bad intentions when a person uses her own name. Thus, for instance, the fact that a person uses his name, which is identical to a famous trade name, in the same trade and without any distinguishing elements is not enough to conclude that there was bad faith (BGH 1957a). Similarly, previous use of the name in bad faith does not indicate that the use in question is not honest (BGH 1960). Even when courts find the bad intention so clear that they forbid all the uses of the name, they still mention that it is possible to make a new start in the future, and to use the name in good faith: a future honest use of the name may never be restricted (BGH 1952, 515). This makes sense from a perspective that assumes a lifelong, intimate connection between a person and her work. The arguments courts bring forward include not just economic considerations, but also personal involvement in a business. This resonates with the picture that individuals are not just sellers of "human capital," but are the same persons in business as in the rest of their lives.

ASSIGNMENTS OF NAMES

The last topic of our inquiry is the rules regarding assignments of rights in one's name. Obviously, if a person opens a business under her name and then wishes to sell it, she should be able to sell it with its name. Yet, the question is whether there are some personal, inalienable elements in one's right to use one's name in business. The more a legal system believes in a deep connection between an individual's identity and her professional activity, along the lines of the "Hegelian" model, the more it is likely to recognize such elements.

United States

At the end of the nineteenth century, American courts started recognizing the possibility of selling one's right to use one's personal name in business. In 1888, the Massachusetts Supreme Court dealt with a case in which a manufacturer of liquid cement named Le Page sold his business to a company called "Russia Cement," but then started selling a product called "Le Page's Improved Liquid Glue" (*Russia Cement Co. v.*

Le Page 1888). The lower court found a breach of contract, and the appellate court affirmed, holding:

> It is equitable that a manufacturer or dealer, who has given reputation to any article, should have the privilege of realizing the fruits of his labors by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers; ... because, while it may be that individual efforts give them their value at the outset, yet, afterwards, this is ordinarily made permanent as a part of the entire organization ... and thenceforward depends less on the individual efforts of the originator than on the combined result of all which he created. (Le Page Co. v. Russia Cement Co. 1892, 943)

The picture here seems to be one according to which reputation accrues to a name in the same way in which capital is built up. Similar rhetoric is used in an 1887 case decided by the Supreme Court of Illinois, in which the inventor of a specific process of rosin oil manufacture named Frazer sold his business, but started a similar business under his own name afterward. The court held that "[Frazer] clearly did have the power to sell the exclusive use of his name in conducting [rosin oil] business. That power ... he exercised, receiving therefor a valuable consideration, and justice and equity alike demand that he should be held to his agreement" (*Frazer v. Frazer Lubricator Co.* 1887, 158–59). This line of jurisprudence, with its exclusive focus on the terms of the contract, was modified a few years later, in the *Hazelton* decision. The court held that the intention to sell one's right to use one's name in business must be clearly stated in the contract, and "will not be sustained upon doubtful or uncertain proof" (*Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 1892, 507–08).

Since then, US courts consistently find that the right to use one's name in business may be transferred and given up entirely provided that the intention to do so is clearly stated in the contract (for example, *Guth v. Guth Chocolate Co.* 1915; *Poorman v. Julian* 1959; *Barr v. Sasser* 1992; *Lazzaroni USA Corp. v. Steiner Foods* 2006; *D.L. Anderson's Lakeside Leisure Co. v. Anderson* 2008). This view is now codified in section 34 of the Restatement (Third) of Unfair Competition: "an assignment of a personal name mark will not ordinarily be interpreted to preclude the named individual from all subsequent use of the name in business unless the intention to do so is clearly expressed." In cases where the intention to sell one's name is unambiguously demonstrated, US courts show no understanding for sellers wishing to use their name in business again. Emphasizing the purchaser's property right in business goodwill, they seek to prevent the seller from "keeping for himself the essential thing he sold, and also keeping the price he got for it" (*Guth v. Guth Chocolate Co.* 1915, 934; *Levitt Corp. v. Levitt* 1979, 468; *In re Leslie Fay Companies, Inc.*, 1997, 124). This rhetoric demonstrates that one's right to use one's name in business is understood as a "thing," an asset that can be sold without a remainder.

Moreover, like in cases involving registration of trademarks in personal names, courts dealing with assignments sometimes envision a conflict between the name as a personal identifier and the name as a business asset: "when an individual chooses to use his name as a trademark or trade name, he runs the risk that the name will become inextricably entwined with the goodwill of the company and its brand, *thereby losing some or all of its personal significance*" (*JA Apparel Corp. v. Abboud* 2008, 316, emphasis added; see also *Levitt Corp. v. Levitt* 1979; cf. Liebesman 2010). When this happens, the assignment of the name may mean very far-reaching restriction on the seller's right to use her own name in her professional life. Thus, in one case, the building company "Levitt and Sons" was sold, together with its trademarks and goodwill, and changed its name to "Levitt Corporation" (*Levitt Corp. v. Levitt* 1979). Later, Mr. Levitt, the former owner of the company, got involved with a building project conducted by another company. The court discussed several instances where former customers of "Levitt and Sons" (including one "enthusiastic lady" and "a doctor on the verge of retirement") wrote to Mr. Levitt personally, warmly remembering his good work.

Strikingly, the court found that such correspondence indicates a contract infringement, since the customers are referring to business goodwill, which Mr. Levitt had sold. The court maintained: "any attempt to call public attention to Mr. Levitt's achievements as President of Levitt and Sons would inevitably connect his name to the spectacular success of that firm" (*Levitt Corp. v. Levitt* 1979, 469). It enjoined Mr. Levitt from issuing press releases, brochures, advertising, or publicity concerning his prior association with the projects of "Levitt and Sons." As the court noted, "sometimes a name used as a mark becomes a symbol of the corporation and its past accomplishments and losing its individual identity" (467). In this case, the corporate goodwill overshadowed the individual reputation and hence, Mr. Levitt could no longer refer to his personal reputation without exploiting the goodwill of the company.[14]

This decision demonstrates how much one's right to use one's name in business is indeed perceived as property, and hence also as an asset potentially for sale. Selling this right, a person can find herself in a situation where she cannot announce her professional experience—the very essence of her professional identity—because it is connected to a business that is now owned by someone else. A situation where recalling past professional encounters is perceived as a contract infringement is tantamount to stripping the person of her professional identity. This might appear harsh, but maybe less so if it is based on an assumption, implied by the rhetoric of the courts, that in selling their name at a certain point in time, individuals acted in a profit-maximizing way and were fully compensated for the reputation they had built up, once and for all.

Germany

The German legal position is quite different. As we have already seen, German law recognizes a general right to one's name and strongly protects it. This right is a personal right: it protects one's identity and dignity rather than one's economic interests, and it is inalienable. No one can transfer his or her name right to another person or give up this right (Säcker at al. 2017, § 12, sec. 76). The German legal literature describes the right in one's name as a right of a most personal nature (Säcker at al. 2017, § 12, sec. 76). Therefore, separating this right from its owner would be contrary to the basic warranty

14. In the same vein, consider that the fashion designer Kate Spade sold the brand "Kate Spade" and subsequently used the name "Frances Valentine" as a brand of clothes she designed.

of human dignity and the right to self-determination. A person cannot remain "nameless" (Säcker at al. 2017, § 12, sec. 76)—and this holds in all spheres of life, including the economic sphere.

The right in a name protects not only the personal component, but also the commercial value of the name. A person can permit others to use his or her name for commercial purposes—for instance, in advertising or in relation to products (Säcker at al. 2017, § 12, sec. 77; BGH 1987a; BGH 2000, 712; BGH 2002)—but can never sell it. In other words, the right to use one's name can only be licensed, which means that the name bearer undertakes not to sue the licensee for unpermitted use. Yet, the licensee does not acquire any property right in the name: the name bearer only gives up the enforcement of his name right against the licensee, but not the right itself (Säcker at al. 2017, § 12, sec. 77; Fezer 2009, § 15, sec. 135; RG 1899; BGH 1967, 92). On the other hand, trademarks and trade names *are* property rights that can be transferred without any limitations (Fezer 2009, § 3, sec. 179). Hence, when a person uses her name in business, there are two rights involved—one personal and one economic—each obeying different rules of transferal.

German scholars recognize that a name used in commerce should be protected as intellectual property that ought to be marketable and transferrable. Yet, the commercial character is only one component of the name right and does not affect the personal nature of the name right as a whole. A personal name used in business thus has a double nature: it creates a property right in certain respects, while preserving the personal nature of the name right as a whole (Fezer 2009, § 15, sec. 57–58). The personal nature of the name right sets a limit to possible trademark transferals: a contract clause attempting to sell inalienable components of a name right is void (Säcker at al. 2017, § 12, sec. 79).

A case illustrating the limited ability to transfer commercial rights in a name involved Ernst Heinkel, who was a famous inventor and engineer (OLG Karlsruhe 1989). In the 1940s, Mr. Heinkel founded the company "Ernst Heinkel Mechanical Engineering," while his brother Alfred founded a company named "Alfred Heinkel Apparatus Engineering." Both companies were part of the Heinkel group of companies. In 1984, "Ernst Heinkel" was sold out, and Mr. Alfred Heinkel sued the purchasing company, arguing that it could not use the name "Ernst Heinkel." The court agreed, holding that the use of this name by a company that had nothing to do with Ernst Heinkel's family, which enjoyed fame and good reputation, would inevitably lead to public confusion (263). Hence, the public would mistakenly assume that if the purchaser firm uses the name "Ernst Heinkel," it must be personally or commercially connected to the Heinkel family. Various additions to the name (such as the indication that the company belonged to another group of companies) would not be able to exclude this likelihood of confusion; only giving up the use of the name "Heinkel" entirely would do so (264–65).

We can deduce from this case that German jurisprudence recognized that a personal name may sometimes be so famous that it cannot be transferred as a business name without causing confusion. In other words, the significance of the word "Heinkel" as the name of a family that stood for a certain history and had a certain reputation overshadowed its significance as a name of a specific commercial enterprise, which could be bought and sold at will. This is a sharp contrast to US law, which only recognizes cases in which the commercial significance overshadows the meaning of a name as a personal identifier.

Unlike in the United States, in Germany a person cannot undertake not to conduct business under her own name: such a contract provision is invalid. The only exception is a noncompetition clause: if the seller undertakes not to do any competing business for a certain period, she will be able to bind herself not to use her name for this type of business during the respective period. But a contract clause attempting to limit the right to use one's name in business with a broader scope than the noncompetition clause does is always void. In other words, a person cannot oblige herself to conduct business under an invented name rather than her own name (Säcker at al. 2017, § 12, sec. 81).

Thus, in contrast to the United States, in Germany, a person who sells a company named after her may later found another company in the same field using her name again: she cannot be legally prevented from doing so. Yet, in such case, the general duty to act in good faith will require using additions that would clearly distinguish between the two firms, to prevent public confusion (Fezer 2009, § 15, sec. 141; RG 1926a; RG 1944a; RG 1944b; BGH 1953). Like in cases involving collisions of a name right with a senior right, courts demand that the seller wishing to use her name for a new business undertake necessary and reasonable steps to prevent confusion (BGH 1993a; BGH 1993b).

Another noteworthy rule in this context relates to the situation in which a person founds a company under her name and later leaves the company. German jurisprudence holds the view that the company will normally have the right to continue using the name in absence of a contract clause stating otherwise (OLG Saarbrücken 1999). Yet, since the company is only a licensee rather than an owner of the name, this relationship can be terminated upon a legitimate justification. In one case, a lawyer named Vossius founded a law firm called "Vossius & Partners" and explicitly consented that the firm would be allowed to continue using his name after his retirement. Yet, after retiring, Mr. Vossius decided to open a new law firm and claimed that this decision gave him a legitimate claim to terminate the permission to use his name. The court held that Mr. Vossius's change in life plans did not justify taking away the right of the firm to signalize its business continuity by using the name "Vossius & Partners" (BGH 2002). The contrast to the American view is compelling. Under the same circumstances, the question under American law would be whether the lawyer has the right to open a new firm using his name after having assigned it to the firm—and the answer would probably be "no." This difference again illustrates the different weight the two systems ascribe to personal and economic interests.

Like their American counterparts, German courts interpret contracts transferring rights in a name cautiously. Unlike in the United States, it is not possible in Germany to sell the right to use one's name in business, but only to license it. German jurisprudence interprets such licenses as nonexclusive, unless clearly stated otherwise. That is, if A conducts a business under her own name and licenses B to use her name, such a contract would normally allow her to issue additional licenses to C and D, if not provided otherwise (Säcker at al. 2017, § 12, sec. 86). Courts interpret licensee's rights narrowly: a licensee who has acquired the right to use another's name in business does not have the right to register a trademark in this name (Säcker at al. 2017, § 12, sec. 86). And the other way around: the one who acquires a trademark that contains a personal name is not allowed to use the name for any purpose other than designating the specific products (Säcker at al. 2017, § 12, sec. 86). One case involved an owner of a winery and a liquor factory named Johann Christoph Winter, who was the fifth person with this name in eight generations. His family had been in the wine and liquor business since 1838, using the name "J. C. Winter," which had been registered as a trademark. In 1990, Johann Christoph Winter sold the business, along with the trademarks "J. C. Winter, established in 1838" and "Winter" combined with the family crest. The buyer started using the name "Winter" alone in advertising, and Johann Christoph Winter sued, claiming that the use infringed his name right. The court held that the buyer did not have a right to use the name "Winter" other than as part of one of the trademark combinations (BGH 1996).

Note that in American law, no conflict would arise under the circumstances of this case, since American law recognizes no general right in one's name: the purchasing company would not be infringing anyone's right by using the name "Winter." In Germany, by contrast, a trademark in a personal name creates a rather complex legal construct, which includes transferrable commercial components along with personal and inalienable elements (Fezer 2009, § 15, sec. 73). Thus, in purchasing a trademark that includes a personal name, the buyer acquires only a limited, trademark-specific right, which ends when the buyer does not use the purchased trademark as is.

CONCLUSION

In this article we have tried to show that the distinction between a "Smithian" and a "Hegelian" model of conceptualizing the connection between individuals and their work provides a surprisingly well-fitting lens for understanding the differences between the US and German legal systems with regard to various constellations: the registration of names as trademarks, the right to use one's name in business when there are conflicts between junior and senior users, and the right to sell one's name as part of a business that is being sold. Underlying conceptions of human beings as selling their "human capital" in markets, and therefore not being intimately connected to their work, or as having a "Beruf" that is part of their identity and therefore deserves strong protection, can explain these different patterns.

In US jurisprudence, personal names are generally downplayed in commercial contexts; fanciful invented names receive stronger protection as trademarks or trade names. The American view creates a dichotomy between one's role as a private person and one's role as a producer. In contrast, the German view retains the connection between individuals as private persons and as businesspeople: personal reputation, which is attached to one's name, cannot be alienated; at best there can be a licensing agreement allowing its use by a third party. This suggests a more holistic picture in which consumers care not only about the quality of products as such, but also about the individuals who have produced them and vouch for them with their names. These names are protected, which gives producers an incentive to invest in a good reputation. In the case of a scandal, for example, because of violations of hygiene standards, it is not only the trademark of the product that is tarnished, but also the name of the individual who acts as producer. The economic sphere is not seen as an anonymous market, but as a sphere in which recognizable individuals are active and stand for their activities with their personal names.

While one might ask about the relative merits of these two approaches, any evaluation would have to see them in the context of other differential valuations in US and German culture. As Jeremy Rifkin argues, in the European mindset, with its origins in feudal times, individuals "belonged to the land and not vice versa" (2004, 97). Their place in society defined their rights and obligations. As Hegel emphasized, it is a mark of modernity that individuals can *choose* their place in society (1942, § 197), but this place continues to be understood as implying certain rights and obligations, which concern individuals' private *and* professional lives. In the United States, in contrast, society is conceptualized as an open playing field, in which individuals who have shed their "former cultural ties and become . . . free agents" (Rifkin 2004, 14) meet in anonymous markets. As consumers, they may care about the commercial origin of products, but this refers to corporations, not individual producers. Neither the employees who actually produce a good, nor the owners of a company—which may well be an anonymously held corporation—are seen as playing an important role.

It may thus seem as if US courts are simply more realistic about the structure of anonymous markets—or it may seem as if German jurisprudence reflects the fact that the German economy has a higher percentage of small or medium businesses, owned by families and sometimes in their possession for several generations. These are often deeply rooted in certain locations, and it is quite plausible that customers associate their names not only with the companies, but also with the persons who run them. While we have here focused on the legal rhetoric in relation to two influential models in the history of ideas of the two countries, further research would be needed to explore the connections to their economic structures.

Another interesting line that could be pursued concerns the attitudes individuals have toward names used in business. Is it indeed true that American consumers do not care about who produced "the collar he wears or the cigars he smokes," while German consumers implicitly expect that producers stand for their products with their name? One might also ask how different accounts of economic thinking, for example, "ordoliberalism" in Germany and Chicago School thinking in the United States, have been disseminated in public discourse, and how this might have shaped the perception of markets and of individuals' roles within them. Do individuals indeed perceive *themselves* as sellers of human capital, or as having a "Beruf" in the Hegelian sense, in the United States and Germany respectively?

In any case, we hope to have shown that a comparative perspective that combines considerations from the history of ideas and legal analysis can unveil interesting patterns of commonality and difference between legal systems. The countries we have focused on, the United States and Germany, form an interesting contrast not least because they embody the models of "liberal" and "coordinated" market economies (Hall and Soskice 2001). Further work might want to widen the horizon to include comparisons with yet other legal systems, helping to further nuance our understanding of the characteristic differences in legal thought and practice.

Studying the treatment of personal names in law thus contributes to understanding deep-seated assumptions about the social realm that rarely come to the surface, but that may nonetheless have a great impact on how individuals perceive the legal regulation of markets: are these seen as fair or unfair, as doing justice to deeply felt commitments or as brushing these aside, as hospitable or as hostile to personal projects and engagements? We certainly do not claim that the treatment of names is the only window into such cultural underpinnings, but we hope to have shown that it is one worth exploring.

These questions are all the more interesting because we can expect major changes in the way in which the world of work is organized as a result of the increased reliance on fully automated production. The question of whether or not the economic system offers individuals an opportunity to leave a mark, to produce goods or services for which they stand with their name, thus acquires new urgency. Traditionally, this had been a privilege of independent workers, whether farmers, artisans, or merchants, for whom their "Beruf" was a matter of pride and honor. Their work has always coexisted with forms of unfree labor, by servants and laborers of various kinds. With more and more work, even of highly complex kinds such as legal analysis or coding, being automatized, will the space for the individual's role in the economy shrink further? In the end, this is a question not only about technical details in trademark law, but about the kinds of economic systems we want to live in—and about the role of individuals as producers, not only consumers.

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