The rationale of publicity in the law of corporeal movables and claims

Zhang, J.

2 Property Rights and Publicity

The theme of this research is publicity for property rights of corporeal movables and claims. In light of the doctrinal viewpoint, property rights are a kind of private right that has binding force over third parties. Thus, these parties should be provided with a channel through which property rights can be known easily and securely. This is the core of the principle of publicity. To have a further understanding of this principle, it is necessary to first outline what property rights are.

This Chapter consists of two sections. In the first section, we discuss the essence and characteristics of property rights (see 2.1). In this section, we have a general view on the similarities as well as differences between property rights and another type of patrimonial interest, namely personal rights. The borderline between the two types of rights has long been a topic in the theory of private law. It will be argued that property rights and personal rights have the same essence: both are an inter-personal relationship. However, they differ in the breadth of legal effect. Property rights have a feature of absoluteness or exclusivity, which means that they are enforceable against third parties. As will be presented, third parties include three main categories: strange interferers, subsequent acquirers, and general creditors. Personal rights, as a legal relationship *inter partes*, in principle bind the creditor and the debtor only.

In the second section, we show that the feature of exclusivity makes publicity of property rights important for third parties (see 2.2). This feature gives rise to an asymmetry of "proprietary information" between the holder of property rights (i.e. the proprietor) and third parties. This information problem can be addressed to a large extent by different methods, such as the disclosure of transacting counterparties, the inquiry with independent intermediaries, and publicity. Among these methods, publicity seems to be most important: it is supposed to not only make property rights transparent to third parties, but also provide a basis for the protection of the reliance of third parties. In other words, publicity is a *secure* source of proprietary information. This section also outlines the specific proprietary information demanded by different types of third parties.

2.1 Definition of Property Rights

2.1.1 Initial Difficulties

Property law textbooks often begin with an introduction to the concept of property rights. This concept is commonly used, but not easy to define. The common usage of a concept usually implies difficulty in definition, since many nuanced meanings will be given to this concept. In general, the context in which a concept is used significantly affects its meaning. For example, the concept of ownership in ancient Germanic law differs from that in modern German law, as a result of socio-economic changes.[1] Moreover, the concept of ownership may be used with some distinctions in different subjects of law. For example, this concept in the German Fundamental Law is broader than that in the German private law.[2] Therefore, a universal definition of a concept is difficult as well as undesirable due to the fact that the meaning of the concept changes over time and varies in different contexts. This research confines itself to property rights in modern property law. Yet, despite such limitation, defining the concept of property rights is still not easy.

2.1.1.1 The Closed System of Property Rights

In most jurisdictions, property law usually provides a closed system of property rights under the principle of *numerus clausus*. The principle requires that both the type and content of property rights must be defined by property law, and individual parties are not allowed to craft a new property right as they like.[3] The principle, therefore, serves a function of drawing a boundary between property rights and other kinds of rights. On account of this principle, defining the concept of property rights amounts to describing the property rights that are already recognized by law. The work of definition concerns exploring the common core of the property rights recognized and distinguishing them from other rights. In this sense, we can

1 In ancient Germanic law, ownership of land had different layers. In relation to one parcel of land, there could be two or more persons holding an interest in the form of ownership, but with different rankings. Land ownership was fragmented and distributed to different persons, which can be seen as a remarkable feature of the feudal land system. See Hübner 1918, p. 232. On the contrary, the right of ownership in the current civil law system is in principle unitary, and fragmentation of ownership is not allowed. However, the unitary feature is eroded in some sense, such as in the situation of trust and security transfer of ownership.

2 In German law, the term "*Eigentum*" in art. 13 of the Fundamental Law (*Grundgesetz*) is broader than that in § 903 BGB. "*This has resulted in a property concept that is specifically formulated for purposes of the constitutional property guarantee, and that is wider than the private-law concept of corporeal things.*" See Van der Walt 1999, p. 151.

3 Van Erp 2012, p. 67-69.

say that the principle of *numerus clausus* makes the work of definition less complex.

However, the principle also brings some difficulties with it. Firstly, the principle does not eliminate the possibility that different jurisdictions might recognize different types of property rights. A right might be treated differently in different jurisdictions. For example, the right of land lease is proprietary in some jurisdictions (such as English law), but it is shaped as a personal right with some proprietary features in other jurisdictions (such as German law and Dutch law).[4] Ownership might be allowed to be fragmented in one jurisdiction, but it is subject to the unitary principle in another legal system.[5] In addition, the principle of *numerus clausus* is implemented to different degrees by different systems of law. For example, compared with civil law, common law has a longer list of property rights; thus, individual parties under common law enjoy more autonomy in creating a legal relationship of property rights.[6] Some common law scholars even hold that "*the possibility of overreaching beneficial interests renders the concept of the numerus clausus redundant*".[7] In other words, the recognition of trust and equity law allow individuals to circumvent the principle without difficulty, which in essence makes the system open.[8]

Moreover, the principle should not be viewed as it appears: courts are always preparing to add new property rights into the list to cater to the demand in practice. The principle of *numerus clausus* can easily cause a problem of rigidity: property law fails to respond to the social demand for new forms of property rights immediately. The social-economic evolution requires that the list should be updated correspondingly. Before the list is updated by legislators, the judicial authority often recognizes some emerging property rights, which can be seen as an expedient. A famous illustration is what is known as the "right of expectation (*Anwartschaftsrecht*)" in German law: this right is not a "mature" property right, but it has certain proprietary effects and thus obscures the boundary between property rights and personal rights.[9] The possibility of the judicial recognition of new property rights means that only focusing on codes and statutes is not adequate, and the system of property rights in practice is often more diverse.

2.1.1.2 The Dynamic Aspect of Property Rights

Property rights are a concept used not only in a static dimension (namely the preservation against illegal interference) but also in a dynamic dimension (namely the transaction of rights). In reality, people seek to keep

4 See s. 1 LPA (1925), § 535 BGB, and art. 7:201 BW.
5 Matthews 2013, p. 319.
6 Swadling 2013, p. 181-182.
7 Sparkes 2012, p. 769.
8 Dalhuisen 2001, p. 289.
9 Baur and Stürner 2009, p. 30.

property rights as well as to transact them for a certain purpose. In the latter situation, it often concerns the question of how to distribute interests between the transferor and the transferee: what is acquired and retained by the transferee and the transferor respectively, and what do we mean by saying that a property right shifts from the transferor to the transferee. Once we take into consideration the dynamic dimension of property rights, the work of definition becomes more complicated.

For example, under the declaratory system in which publicity does not affect the acquisition of property rights, ownership is transferred upon the effect of the underlying contract, provided that the other conditions are fulfilled. Here, publicity has nothing to do with the acquisition of ownership *per se*. However, the transfer is not complete in the absence of publicity: the ownership acquired might be unenforceable against third parties in good faith with a competing interest.[10] For example, in the case of double sales, the ownership acquired by the first buyer might be subject to the second sale where the subsequent buyer acts in good faith and first completes the publicity. In this very situation, what do we mean when saying that the first transferee has acquired ownership upon the conclusion of the contract? Is a property right unenforceable against *bona fide* third parties still a (typical) property right? This question is closely related to another issue: what legal effects are essential for property rights and can make a right qualify as a property right?

The translative system, in contrast to the declaratory system, requires publicity as a condition for the derivative acquisition of property rights. Under a translative system, corporeal movables cannot be transferred until delivery occurs (the *traditio* rule), and transfer of immovable property only takes effect when entry into the land register is completed.[11] As property rights are only acquired at the moment of the completion of publicity, the rights acquired are effective against third parties, even if they are in bad faith. Under this system, the concept of property rights is used in a simpler and more consistent way. However, this does not mean that the questions mentioned at the end of the last paragraph do not exist for a translative system. For example, this system allows corporeal movables to be transferred in the absence of actual delivery, especially in the case of *traditio per constitutum possessorium*. Where the thing is still in factual control by other persons than the acquirer himself, the acquirer is always subject to the possibility of *bona fide* acquisition by third parties. As a result, the question also arises of whether a property right that cannot bind third parties in good faith can still be treated as proprietary. Notably, under Dutch law, ownership acquired in the way of *traditio per constitutum possessorium* cannot be effective against the property right existing on the object earlier and thus become "relativized (*gerelativeerd*)" (art. 3:90 (2) BW).[12]

10 Sagaert 2008, p. 18-19.
11 Sagaert 2008, p. 29; Krimphove 2006, p. 155.
12 Brahn 1992, p. 67.

In general, the application of the rule of *bona fide* acquisition means that the original property right loses its enforceability against third parties in good faith. The application causes a phenomenon of the "relativization" of property rights, as pointed out by some writers.[13] This phenomenon is a consequence of facilitating the "dynamic security": to promote the certainty of transactions and to protect the acquisition by third parties, the original proprietor's interest of preserving his proprietary right (the "static security") is sacrificed to some extent.[14] Truly, the *bona fide* protection only forms an exceptional restriction. However, it does imply that the exclusivity of property rights is limited under certain circumstances. Therefore, it can be said that all property rights are exclusive, but in varying degrees.

2.1.2 The Essence of Property Rights

In defining the concept of property rights, two questions are relevant. One concerns the essence, and the other concerns the characteristics of property rights. The concept of essence is used to describe what "property rights", as an umbrella term for a number of rights, are. In general, there are three approaches to the issue of essence: the subject-object approach, the subject-subject approach, and the mixed approach. The question of characteristics of property rights concerns how to differentiate property rights from other categories of rights, especially personal rights. The first question is addressed below, and the question of characteristics is discussed in another section (see 2.1.3).

2.1.2.1 The Subject-Object Approach

In the subject-object viewpoint, property rights are rights exercised by persons over things in the external world. Property rights imply a relationship of control between persons and things. The ownership of a house, for example, means that its owner is free to possess, use, enjoy and dispose of the house. According to this notion, the essence of property rights is a kind of legal control or domination over things.[15]

Blackstone, a famous common law scholar, expressed his notion of property rights in the following oft-cited excerpt.

> "*There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.*"[16]

13 Nieuwenhuis 2015, p. 9; Snijders and Rank-Berenschot 2017, p. 56-57; Wieling 2006, p. 670.
14 O'Connor 2005, p. 47-49.
15 Füller 2006, p. 38.
16 Blackstone 1893, p. 3.

In his perception, property rights amount to absolute dominion over external things, and the starting point (or the essence) of property rights is the relationship between proprietors and things. Though Blackstone points out, at the end of the excerpt, that property rights are exclusive to the world, the effect of exclusivity seems to be a feature or a further explanation of the subject-object relationship only.

Like Blackstone, German scholar Dernburg also held that property rights represented a kind of relationship between the subject and the object.[17]

> "*Dinglich sind die Rechte, welche uns eine körperliche Sache unmittelbar unterwerfen [...]. Die Forderungsrechten oder Obligationen sind Rechte des Gläubigers auf eine vermögenswertige Leistung durch den Schuldner. Auch bei Forderungsrechten handelt es sich meistens um körperliche Sachen. Aber die Forderung gibt nur ein Rechte gegen den Schuldner, sie heißt den Berechtigten nicht in eine unmittelbar Beziehung zu der geschuldeten Sache. Die Leistung durch den Schuldner ist also der Durchgangspunkt, um die Sache zu gewinnen.*"[18]

From Dernburg's notion, it is the direct domination by the proprietor over a specific object that distinguishes property rights from personal rights. Different from proprietors, creditors cannot gain by virtue of personal rights direct domination over the object. The power of domination over external things implies that property rights are a relationship of persons with respect to things. Wolf, another German scholar, also explicitly follows this approach.[19] Nowadays, property law scholars still hold the subject-object approach in understanding property rights.[20]

2.1.2.2 The Subject-Subject Approach

Under this approach, property rights are not a right to a thing, but to other persons. In other words, property rights give rise to a relationship between proprietors and their obligors, rather than a relationship between proprietors and things. The law is to regulate the interaction of human beings with respect to things. In this line of reasoning, things only serve as a "platform" for interpersonal interactions. The law focuses on the interactions *per se* rather than the "platform" on which they take place. Here a case in point

17 Gordley 2013, p. 225.

18 Dernburg 1894, p. 49-50. English translation: "*The proprietary right is a right based on which we can dominate tangible things […]. The personal right or obligation is a right of the creditor with respect to a performance by the debtor. Most personal rights also concern tangible things. However, the personal right only gives rise to a right against the debtor, and the creditor has no direct relationship with the burdened thing. For acquiring the thing, performance by the debtor is a point of connection.*"

19 Wolf and Wellenhofer 2011, p. 2.

20 MacCormick 1990, p. 1100; Penner 1996, p. 711; Snijders and Rank-Berenschot 2017, p. 3; Ritaine 2012, p. 13; Clarke and Kohler 2005, p. 17; Donahue 1980, p. 30.

is Robinson's isolated island. There is not any other person on the island except for Robinson himself. This implies that the social origin (the possibility of conflicts between persons) of property law is absent. As a result, it is nonsensical to say that Robinson has ownership of the island and of the things on the island in law.

Kant considers property rights as a relationship between the free will of different persons. The Kantian theory on the nature of rights is will-oriented. In the opinion of Kant, only human beings, as rational agents, have free will (freedom). Rights denote the province of free will of different persons. This implies that property rights represent a relationship between persons.

> "*A property right initially looks to be a strictly person-to-thing relation. On closer inspection, however, it does have a relational dimension, one that Kant certainly did not ignore […]. In Kant's scheme, property is not merely relational; it involves a special kind of relationship. If I own an apple, your duty with respect to my property rights to that apple is negative in nature.*"[21]

Von Savigny articulates his notion of property rights in constructing a theory of the private law system. The system is based on the concept of "legal relationship (*Rechtsbeziehung*)". In his opinion, a legal relationship "*appears to us a relation between person and person, determined by a rule of law.*"[22] The categorization of legal relationships (the original self, the self-widened into the family, and the outer world) determines the system of private law as well as the system of private rights (family rights, property rights, and obligational rights).[23] Among the three categories of private rights, property rights represent domination over things. His view regarding the distinction between property rights and personal rights can be shown in the following except.

> "*All now is dependent upon whether the thing in itself, independently of an act of others, is the object-matter of our right or whether our right is immediately directed to an act of others as the object-matter subjected to our mastery and without regard to whether this act has for its end to invest us with the right to a thing or to the enjoyment of it […]. The distinction between the two indeed for the most part, by no means however universally, coincides with the difference between an opponent undetermined and determined.*"[24]

This excerpt indicates that property rights and personal rights can be distinguished according to two factors: one is the nature of their object, and the other is whether the obligor is definite. The theory of legal relationship implies that property rights are no more than an instrument to demarcate

21 Alexander and Peñalver 2012, p. 75-76.
22 Von Savigny 1867, p. 271.
23 Von Savigny 1867, p. 280.
24 Von Savigny 1867, p. 302-304.

the province of free will. Thus, property rights are necessarily a relationship between persons. The view is followed by some later German lawyers, such as Windschied.[25]

In the common law world, Hohfeld is a representative theorist who articulates property rights as a relationship between persons.

> *"A right in rem is not a right 'against a thing' […]. A man may indeed sustain close and beneficial physical relations to a given physical thing: he may physically control and use such thing, and he may physically exclude others from any similar control or enjoyment. But, obviously, such purely physical relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from juridical relations."*[26]

The subject-subject approach is approved by some contemporary scholars.[27]

2.1.2.3 The Mixed Approach

The mixed approach is the result of an attempt to combine the preceding two arguments. According to this approach, property rights are not only a relationship between persons and things or a relationship between persons and persons. Instead, property rights are a compound of both. For example, ownership of a house is deemed to embody two relationships: the owner's relationship to the house and the owner's relationship with other persons. The former concerns a positive dimension of ownership: the owner has a right to dominate the house. The latter implies a negative dimension: the domination is protected from outside interferences.[28] The mixed approach is popular among contemporary scholars.[29]

An advantage of the mixed approach is that the approach, after combining the subject-object and subject-subject approach, can respond to criticism of the two approaches. However, the combination leads to an internal paradox. Upon treating property rights as a relationship between proprietors and things, how can we also deem that they are also a relationship with other persons? Essence (*esse* in Latin) denotes "*the basic or primary element in the being of a thing; the thing's nature, or that without which it could not be what it is*".[30] In this research, the essence of property rights refers to the "most basic" element of property rights. Thus, it is single and pure.

Indeed, property rights have the feature of thinghood and must exist on a tangible or intangible thing, as will be shown later (see 2.1.3.1). However, as will also be shown below, the essence of property rights should not be confused with their features. In fact, the issue of essence is a preliminary matter

25 Lebon 2010, p. 37.
26 Hohfeld 1917, p. 721.
27 Wolf and Neuner, p. 240-245; Cohen 1954, p. 374.
28 Yin 2002, p. 281.
29 Xie 2011, p. 8.
30 Blackburn 2008, online.

for comparison. Before starting to compare property rights and personal rights, it is necessary to make sure that the two types of rights are homogeneous: they share the same essence. Moreover, the subsequent discussion also criticizes the subject-object approach in different aspects. In general, the mixed approach is open to the same criticism because it includes the subject-object notion as an essential part.

2.1.2.4 Property Rights as an Interpersonal Relationship

A What Does Law Concern?

Law regulates persons' conduct. In this aspect, law is similar to other social norms, such as ethics and religions: they all regulate behaviors by persons.[31] On the other hand, law is different from other social norms. Law only regulates persons' external conduct, while ethics, for example, goes further and also concentrates on internal conscience.[32] In general, internal ideas of human beings are beyond the regulation of law, except when the idea is an origin of conduct that has occurred or might occur in the future.[33] In the field of private law, contracts and torts are all a result of conduct. When a valid contract is created, private law focus on performance by the debtor, and whether the debtor has internal willingness to perform the debt is irrelevant.[34] However, ethics not only requires keeping the promise, but also doing so voluntarily. Criminal law might impose punishment over those who only have an internal intention to commit crimes, this is because this intention is an origin of the imminent criminal act. If the criminal act will not happen, then just having the internal intention does not violate law. However, merely having the intention might breach an ethical duty.

> "*The conception of law, so as it relates to an obligation corresponding to it (that is, its moral conception), concerns first the external and practical relation only of one person towards another, so far as their actions as facts can influence on one another (either immediately or mediately) […]. Law, then, is the aggregation of the conditions, on which the arbitrement of one can be united with that of the other according to the universal law of liberty*."[35]

> "*The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all juridical relations must, in order to be clear and direct in their meaning, be predicated of such human beings.*"[36]

31 Giese 1948, p. 22; Schumann 1959, p. 31.
32 Giese 1948, p. 22; Schumann 1959, p. 31.
33 Radbruch 1929, p. 17.
34 Hedemann 1927, p. 43-44.
35 Kant 1799, p. 28-29.
36 Hohfeld 1917, p. 26.

As a result, property law, as a part of the entire legal system, also regulates interpersonal relationships only.[37]

B Objects or Things Lack Will

The fact that objects or things have no free will implies that the relationship between persons and things merely exists in the physical sense. In Kant's view, for example, freedom is the only original or natural right belonging to every person.[38] The ability of human beings to decide and reason by rationality makes them different from other creatures and things. Only between persons, can there be social interactions susceptible to regulation by law.

> "*Dem Berechtigten einer Sache steht damit die rechtliche Macht zu, mit einer Sache im Verhältnis zu anderen Personen zu verfahren. Die Beziehung zwischen dem Berechtigten und der Sache besteht in der Gebrauchsmöglichkeit.*"[39]

The owner of a house may live in the house for a long period. However, the house cannot interact with the owner because the house lacks free will. Therefore, no conflict can occur between the person and the house. Property law is created to solve conflicts between different persons with respect to the enjoyment, use and ownership of property and to maintain the order of property. The right of ownership is just a legal device used to regulate the relationship between the owner and other persons. For example, if a person has ownership of a bicycle, then this person is entitled to request others not to damage this bicycle. Moreover, the person can also transfer ownership of the bicycle, and, in principle, others cannot intervene in the process of transfer. In general, whether and how the owner makes use of the bicycle is not regulated by law, provided that no other persons are adversely influenced. Therefore, the problem of the subject-object theory is that it mistakenly confuses the physical (*de facto*) relationship with the legal (*de jure*) relationship. In practice, different persons may have competing claims with respect to things. The principal purpose of property law is to determine the priority or relative strength between these claims.

C A Systematic Concern

Thirdly, the subject-subject approach is also required to maintain the consistency of the entire private law system. In general, only objects of the same kind can be coherently arrayed within one system. In other words, all individual components in a given system should share the same essence. Otherwise, the system will be prey to becoming contradictory. In the sphere of private law, there is a fundamental dichotomy between patrimonial

37 Wolf and Neuner 2012, p. 205.

38 Alexander and Peñalver 2012, p. 71.

39 Füller 2006, p. 43. English translation: "*Therefore, the legal authority owned by the holder of a thing lies in dealing with the thing in relation to others. The relationship between the holder and the thing lies in the possibility of use.*"

rights and personality rights. The reason why both can be incorporated into the system of private law is that they share the same essence or the same denominator: both are a relationship between persons. In this line of reasoning, if one recognizes that personal rights are a relationship between persons (the creditor and the debtor), then he or she has to also treat property rights as an interpersonal relationship. It is impossible to categorize two kinds of rights of different essence into one system without undermining the systematic consistency.

> "*In the first place, it is striking that in the Pandecist approach to property law, emphasis is placed on the relationship between the person and the thing. This is not a very transparent means of presentation: the law is always concerned with regulating the legal relationship between persons after all. It is true that sometimes also a relationship to a thing can be construed, but that needlessly complicates the matter because different standards are then used for the law of obligations and the law of property […]. Thus the law of obligations and law of property are brought back to the same denominator: the question of both legal areas is to determine to whom one is bound, independent of any relationship to the thing.*"[40]

As mentioned above, the fact that property rights and personal rights have the same essence is a precondition for comparing them and revealing the characteristics of property rights.

D Remedies for Property Rights

The legal maxim "*no remedy, no right*" also implies that property rights are not a relationship between persons and things. Remedies and subjective rights are closely intertwined in the sense that rights are valueless in the absence of legal remedies. Rights are a legal basis for remedies, which will ensue when rights are infringed. Remedies must involve two or more persons. The interpersonal nature of remedies implies that property rights are a relationship between persons.[41]

> "*Although the relationship of a person to a thing may have meaning in philosophical discourse, it does not in legal discourse, because a thing cannot defend or bring a lawsuit.*"[42]

Therefore, treating property rights as an interpersonal relationship helps us to understand how the law of property functions in the real world. The relational attribute of property rights becomes evident when disputes, which necessarily involve different persons, occur.

40 Smits 2002, p. 252.
41 Füller 2006, p. 43.
42 Donahue 1980, p. 30.

2.1.2.5 *Two Irrelevant Issues*

The subject-subject approach is often questioned from two angles. The first criticism is that the approach is useless. According to this criticism, the subject-subject approach fails to indicate how to distinguish property rights from personal rights.[43] If property rights are viewed as an interpersonal relationship, then they are not distinguished from personal rights. This is because personal rights are also a relationship between persons. The criticism is based on a concern about utility: the approach fails to provide anything useful for the differentiation. In contrast, the subject-object approach creates such utility: in light of this approach, one can tell whether a given right is personal or proprietary.

Indeed, the preceding criticism correctly points out the "weakness" of the subject-subject approach. However, it fails to note the distinction between the issue of essence and the issue of differentiation. The subject-subject approach only concerns the essence of property rights. It does not intend to tell us how to distinguish them from personal rights. To identify a property right, one should pay attention to the "external features (*externe kenmerken*)" of property rights, which will be explored later (see 2.1.3).[44] As has been reiterated, essence is a preliminary issue for the differentiation. Only after demonstrating that property rights and personal rights share the same essence or the same denominator, does comparing them become possible.

The second criticism is that the subject-subject approach is rooted in, besides law, public policies and other extra-legal factors, which opens the door for public regulations and restrictions of private property rights. The criticism is raised against the background that the essence of property rights is discussed in relation to the movement of legal realism in the world of common law.[45] According to some scholars, the subject-subject approach takes extra-legal factors into consideration, an approach that disintegrates property rights and leads to the "*death of property*".[46] As a result, the subject-subject approach weakens the value of property rights for protecting individuals' freedom against public regulation.[47]

In general, the criticism from the political perspective is irrelevant to the essence of property rights. The subject-subject perception is merely a result of a conceptual analysis, irrespective of any political concerns and social values. The interpersonal relationship advocated by this approach is malleable. In other words, the notion that property rights are an interpersonal relationship can fit into each theory of property law, whether the social-

43 Smith 2012, p. 1697-1700; Penner 1996, p. 714.
44 Sagaert, Tilleman and Laurent 2013, p. 5-6.
45 William 1998, p. 296-297.
46 Krier 1990, p. 75.
47 Grey 1980, p. 69-70; William 1998, p. 298-299; Smith 2012, p. 1697.

obligation theory,[48] the personhood theory,[49] the social-relation theory,[50] or the individual-liberty theory.[51] The subject-subject approach should not be deemed as an "accomplice" of the anti-liberalism idea. For example, Kant, though as an advocate of individuals' liberty, approves that property rights are a subject-subject relationship, as has been pointed out above. In a nutshell, the subject-subject approach is value-neutral.

2.1.3 The Features of Property Rights

After describing the essence of property rights, we explore the distinctive features that enable property rights to stand out from other rights, especially personal rights. In general, property rights have two important features: thinghood and absoluteness. The term thinghood is borrowed from Penner's article, *The "Bundle of Rights" Picture of Property*.[52] In this research, thinghood means that property rights should be created on a specific thing, whether tangible or intangible. The other feature, absoluteness, amounts to the third-party effect or the effect of exclusivity in this research. It is used to describe the legal consequence that property rights can be enforced against third parties in general.[53] The feature forms a sharp contrast to the principle of privity in contract law as well as the principle of *paritas creditorum* in the law of obligations. These two features are elaborated on in the following parts.

2.1.3.1 Thinghood

Property rights are rights on a specific thing, as required by the principle of specificity in property law. It is impossible to create or transfer a property right where things are not ascertained or where no things are involved.[54]

> *"It follows from the principle of general enforceability that, if my right in a thing is to be a property right, it must be possible to identify the thing in question. Because a property right in a thing is enforceable against everyone who comes into contact with the thing, it must be possible to identify whether or not any particular thing has become burdened in this way."*[55]

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48 Alexander 2009, p. 745.
49 Radint 1982, p. 957.
50 Singer and Beermann 1993, p. 217.
51 William 1998, p. 277.
52 "*The essential feature distinguishing property is that it consists of a right to a thing which is only contingently connected to any particular person,*" and it "*[…] characterizes the objects of property which serves to mediate between an owner and his legal relation to all others who have that duty.*" See Penner 1996, p. 711.
53 Snijders and Rank-Berenschot 2017, p. 48.
54 Schwab and Prütting 2006, p. 9.
55 Clarke and Kohler 2005, p. 156.

The feature of thinghood, including the requirement of specificity, helps distinguish property rights from other types of rights in the following sense.

A What Does Thinghood Mean?

Firstly, thinghood implies an economic attribute of the object of property rights, thereby drawing a line between patrimonial rights and non-patrimonial rights. Property law forms a part of the patrimonial law, and property rights are of economic nature.

> "*The first feature of the composition of a patrimony is that it is limited to economic values. As diverse as these values might be, all patrimonial components share the possibility of being converted into money.*"[56]

Property rights emerge against the background that there is a motivation to maximize the utility of limited resources and to prevent low efficiency caused by externalities in managing resources.[57] On the basis of the economic attribute implied by the thinghood, it is possible to separate property rights from the other rights that have no economic value, such as the right to names, the right to "bodily integrity (*lichamelijke interiteit*)",[58] and the political right to vote.

Secondly, the feature of thinghood implies the existence of a thing, whether tangible or intangible. This makes it possible to distinguish property rights from some personal rights that concern no things. For example, in the situation of employment we cannot say that the employer has any property right to the employee's labor. Labor is not a thing in property law. In contemporary law, requiring a debtor to do or not to do something is possible, but any direct force over the debtor's body for the purpose of performance is in principle immoral and illegal.[59]

Thirdly, the requirement of specificity distinguishes those personal rights merely concerning unspecific or generic things from property rights. The requirement of specificity blocks a number of personal rights outside the door of property rights. For example, a claim based on a contract of sale with respect to a certain amount of generic goods (such as 10 bicycles of certain make and type) is doomed to be personal, provided that individualization is not completed yet.[60] This is why only specific corporeal movables can be transferred even under the declaratory system, as opposed to the translative system, despite the irrelevance of delivery to the acquisition of ownership.

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56 Christian Atias, Droit Civil: Les Biens (11th ed.), cited from Van Erp 2012, p. 38.

57 Demsetz 1967, p. 347-359. In economics, externalities refer to the costs or benefits that affect a party who did not choose to incur those costs or benefits.

58 Meijers 1948, p. 266.

59 Nowadays, imprisonment for debts may be still possible as a measure of indirect execution. However, it is subject to strict restrictions and only permitted in rare situations. See De Jong, Krans and Wissink 2018, p. 78.

60 Martinson 2006, p. 15.

> "*As a result of the principle of specificity, ownership of generic goods can pass only when certain goods are separated and appropriated for delivery to the acquirer. And, where there is a contract for the transfer of future goods, ownership can pass only after the goods have come into existence.*"[61]

However, the requirement of specificity has been relaxed to some extent. An example is what is known as bulk ownership in English law (see 3.4.2.1.B). In this situation, a purchaser of generic goods which form a part of a specific bulk, but are not individualized, may still gain a proprietary interest, namely ownership of a share of the bulk involved.[62] Another example is that in the secured transaction of movables, the requirement of *specificity* is eased to the requirement of *ascertainability* in some jurisdictions.[63] As a result, parties do not have to specify each object involved in advance; only a general description with adequate accuracy suffices. Thanks to this transformation, it is possible to dispose of future assets, namely assets that have not come into existence yet.[64]

It is worthwhile mentioning that personal rights, such as the right of lease, might also exist on a specific object. This implies that the feature of thinghood is not exclusively owned by property rights.[65] The difference lies in that property rights *must*, while personal rights *can*, take a specific or an ascertainable thing as the object.

B What Does Thinghood Not Mean?

The preceding discussion has shown that the feature of thinghood requires that property rights are only available with respect to a specific, at least ascertainable, thing. The feature does not mean that the object must be tangible. In current society, property rights can also be created on intangible things. For example, the BGB prescribes that "things (*Sachen*)" have to be tangible (§ 90 BGB); nevertheless, property rights can also be created on incorporeal things, such as the pledge of rights and the usufruct of rights.[66] In the Netherlands, only corporeal things (*zaken*) can be the object of ownership (art. 5:1 and art. 3:2 BW), but incorporeal things, such as claims and intellectual property rights, can be the object of pledge and usufruct.[67]

The continuing emergence of new forms of wealth, such as stocks, bonds, intellectual property and Bitcoins, has made the dogma obsolete that the object of property rights should be tangible.[68] In fact, it is the specificity (at least the ascertainability) rather than the tangibility that matters for the creation, transfer and acquisition of property rights.

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61 Van Vliet 2012, p. 892.
62 Clarke and Kohler 2005, p. 484-486.
63 Struycken 1999, p. 582; Bülow 2012, Rn. 1293.
64 Dalhuisen 2016, p. 323.
65 Sagaert 2005, p. 991.
66 Wilhelm 2010, p. 3.
67 Akkermans 2008, p. 289-293.
68 Krier 1990, p. 76.

> "*Indeed, it is not the physicality of the asset but rather the reasonable description possibility that is the key in a modern rights-based system of proprietary rights no longer constrained by physical notions.*"[69]

The dichotomy between tangibility and intangibility only reflects the physical attribute of objects, but property law should take the social effect as the prominent criterion in defining the scope of the object of property rights. Truly, the nature of the object of property rights sometimes affects the types of rights that can be created. However, it should not be deemed to be decisive for demarcating the scope of application of property law rules.[70] The notion of equally treating tangible and intangible assets lays a foundation for the general part of the patrimonial law (Book 3) in the new BW.[71] Tangible things can be specified and individualized, and property rights can exist on them. By the same token, where intangible things are sufficiently specific, they can also be an object of property rights.

> "*Virtual property shares three legally relevant characteristics with real world property: rivalrousness, persistence, and interconnectivity. Based on these shared characteristics, subsequent sections will show that virtual property should be treated like real world property under the law.*"[72]

Here, it should be noted that once personal rights are taken as the object of disposals, such as assignment and pledge, they begin to have a proprietary aspect.[73] As is shown in this research, like the transfer of corporeal movables, the assignment of claims also faces a problem of multiple disposals (see 4.1.1.1). This implies that the disposal of corporeal tangibles and that of claims have the same problem concerning publicity: how to address the problem of information asymmetry to potential acquirers. Nevertheless, the proprietary aspect does not mean that claims *per se* are a property right. At most, we can say that the disposal of claims is proprietary in the sense that relevant rules of property law are applicable, but claims *per se* are in nature not proprietary.

2.1.3.2 Absoluteness

In differentiating property rights from personal rights, another critical criterion is absoluteness. Property rights are an absolute right with *erga omnes* effect, while personal rights are a relative right governed by the principle of *paritas creditorum*. Thus, the effect of exclusivity is a distinctive feature of property rights. If property rights are understood as a bundle of rights,

69 Dalhuisen 2016, p. 321.
70 Dalhuisen 2016, p. 330.
71 Meijers 1954, p. 159.
72 Fairfield 2005, p. 1047.
73 Sagaert 2005, p. 1000; Lebon 2010, p. 4.

as often held in common law, then the right to exclude is deemed to be a fundamental element.[74] The effect of exclusivity allows property rights to be a more secure and reliable device for the utilization of things.[75] This is not difficult to understand. For example, different from a proprietary right to use, a contractual right to use is always under threats from competing claims held by others.[76] In the subsequent discussion, we elaborate on this feature of property rights by disclosing their legal consequences or effects.

A The Duty to Refrain

Absoluteness is first shown by the fact that third parties have a general duty to refrain from illegal interference with the property right. Property rights, needless to say, should be respected by others. The duty to refrain from interference also requires that the law should provide sufficient protection to proprietors. The protection may take the form of recovering the object, removing the imminent danger, suspending the existing interference, or providing compensation for the loss caused. Interferers are treated as a type of third party.

Typically, interferers are strangers who lack a legal reason to take any action with respect to the thing in question. Unlike subsequent acquirers, another type of third party, interferers have no intention to participate in a consensual relationship with the proprietor. Moreover, interferers are also different from general creditors: the latter are in a competing relationship with the secured creditors with respect to the debtor's assets. Thus, we can say that interferers often do not have any specific legal interest in the infringed thing. As interferences trigger obligations, how to avoid conducting illegal interventions becomes important. Following Merrill's opinion, this type of third party is called "strange interferers" in this research.

> "*By stranger, I mean any person who has no interest in particular objects of value other than to avoid interfering with those claimed by others.*"[77]

In reality, each of us tries to not interfere with others' things and to avoid becoming a strange interferer. Otherwise, the world would fall into chaos.

In respect of the duty to refrain from interference, property rights and personal rights appear to bear some similarity. If we acknowledge that rights mean a legal interest enjoyed by the holder of rights, then personal rights should also be protected from illegal interference by third parties.

74 Merrill 1998, p. 730.
75 Kelly 2014, p. 860.
76 Hijma, Van Dam, Valk and Van Schendel 2016, p. 323.
77 Merrill 2015, p. 29.

> "*De passieve verbintenis van eenieder om geen inbreuk te plegen op een zakelijk recht, bestaat immers ook ten aanzien van persoonlijke rechten. Derden hebben de verplichting om zich te onthouden van inbreuken op persoonlijke rechten waarvan ze kennis hebben.*"[78]

Indeed, personal rights might be protected from illegal interference in practice. For instance, a third party who intentionally induces the debtor to breach a contract may be required to compensate the damage suffered by the creditor.[79] This tort law protection constitutes an exception to the principle of privity as well as the relative effect of obligations, thereby blurring the line between property rights and personal rights.[80]

Nevertheless, the blurring effect should not be overstated. Personal rights are a legal relationship only between the creditor and the debtor. This determines that they can only in rare cases be interfered with by a third party. In principle, where the creditor does not obtain performance, it is the rules on default by debtors that will be applied.[81] When the creditor requires a third party to compensate for the damage of his personal right, strict conditions have to be fulfilled. For example, the interferer has to be malicious, and the act of interference is illegal or immoral.[82] Therefore, even though personal rights might be said to have a general effect against illegal interference, we have to acknowledge that such interference only arises in rare situations.

B The Right of Preference

Absoluteness is also reflected by the "right of preference" (or the preferential effect). In this research, this term is used to describe two different situations: one is the priority of secured creditors over unsecured creditors, and the other is the priority of older property rights over younger property rights.

B1: Property Rights as an Exception to Paritas Creditorum

Preferential effect first occurs where the holder of property rights has a prior position over unsecured creditors in the event of the debtor's insolvency. The principle of equality between creditors is the starting point for the distribution of the insolvent debtor's assets. It can only be overridden when statutory law prescribes otherwise.[83] The device of proprietary security constitutes an important exception to this principle. In practice, limited property rights of security, such as mortgage and pledge, can typically give

78 Sagaert, Tilleman and Laurent 2013, p. 5-6. English translation: "*The passive obligation borne by every person of causing no infringement on a property right also exists in relation to personal rights. Third parties have a duty to refrain themselves from interfering with personal rights they know.*"

79 Non-Contractual Liability Arising out of Damage Caused to Another, p. 546-555.

80 Hijma, Van Dam, Valk and Van Schendel 2016, p. 325.

81 Reehuis 2015, p. 358; Rank-Berenschot 1992, p. 133; Wolf and Neuner 2012, p. 227.

82 Non-Contractual Liability Arising out of Damage Caused to Another 2009, p. 546.

83 Sagaert 2005, p. 1029.

rise to a preferential effect. However, the purpose of security can also be realized in other ways, such as the reservation of ownership, a device which realizes the purpose of security by allowing the owner to recover the object. In general, the effect of preference is deemed by some scholars as the "*most important difference in practice between proprietary rights and non-proprietary rights*"[84] or "*the most significant practical application of the distinction between in personam and in rem rights*".[85]

This preferential effect is related to another type of third party: unsecured creditors or general creditors.[86] Different from strange interferers, unsecured creditors have a stake in the existence of proprietary security rights. In the event of the debtor's insolvency, whether and to what extent the debtor's assets are encumbered will affect how much property is available for unsecured creditors. In this sense, we can consider unsecured creditors as a type of third party in relation to proprietary security rights.

What should be noted here is that the law may provide, for policy reasons, a statutory privilege for some personal rights, such as the right of employees to salaries. With such privilege, these personal rights can also be enforced in priority to unsecured claims and even some property rights in the event of insolvency. Nevertheless, the statutory privilege is by no means a property right.[87] One reason is that, unlike pledgees and mortgagees, a creditor owning a statutory privilege cannot exercise his right outside the insolvency procedure: he lacks an executory title.[88] Moreover, the statutory privilege might not exist with respect to specific things, forming the "general privilege (*algemene voorrecht*)".[89] Even the "specific privilege (*bijzondere voorrecht*)", a kind of privilege existing with respect to certain specific assets, lacks the effect of tracing (*droit de suite*). The privileged creditor is not allowed to enforce his right against a third party who has acquired the asset from the debtor.[90] In other words, the specific privilege does not have an effect of preference over subsequent acquirers, a type of third party discussed below.

B2: Property Rights Subject to the Rule of Prior Tempore

The right of preference can also exist where the rule of *prior tempore* is applied. According to this rule, older property rights are in principle prior

84 Clarke and Kohler 2005, p. 163.
85 Bridge, Gullifer, McMeel and Worthington 2013, p. 4.
86 Here two points should be noted. The first is that the term "preference" is confined to the situation of two competing property rights by some scholars, while the legal effect of preference of proprietary security rights in relation to unsecured creditors is called the effect of separation. The other is that the effect of separation involves not only the situation of insolvency, but also that of judicial attachment. See Snijders and Rank-Berenschot 2017, p. 49.
87 Reehuis and Heisterkamp 2019, p. 757.
88 Reehuis and Heisterkamp 2019, p. 757.
89 Reehuis and Heisterkamp 2019, p. 765.
90 Reehuis and Heisterkamp 2019, p. 758.

to younger ones. It aims at dealing with the conflict between two or more property rights existing on the same object, rather than the conflict between personal rights and property rights.

> "*In case of a collision between two property rights the issue is decided by the principle of priority; the oldest property right is stronger than the younger one (droit de preference; prior tempore, potior iure).*"[91]

The rule implies "*the absolute nature of the pre-existing property right*".[92] Different from property law, the law of obligations applies the principle of equality to the conflict between different personal rights.

In light of this rule, we can say that the holder of younger property rights is a third party in relation to the holder of older property rights. This type of third party is termed "subsequent acquirers" in this research. Different from strange interferers, subsequent acquirers have a specific legal interest with respect to a specific object. The term has significant similarity with the concept of potential transactors in Merrill's theory.

> "*The audience of potential transactors […] consists of persons interested in engaging in exchange of rights to particular things having significant value and duration […]. I mean anyone who has an interest in purchasing, selling, leasing, or borrowing […]. Thus potential transactors are not just buyers and sellers, but include secured lenders, insurers, judgement creditors, asset securitization bundlers, and any others […].*"[93]

A subsequent acquirer is "subsequent" in the sense that he is a latecomer: at the moment of his acquisition of a property right, there might already be one or more property rights existing on the object. The existing property rights precede and thereby have priority to the property right obtained by the subsequent acquirer. For example, where a thing that has been encumbered with a pledge is transferred, the acquirer is a subsequent acquirer in relation to the pledgee. The security right comes into existence prior to the occurrence of the transfer of ownership. Thus, it can bind the new owner.

However, it should be borne in mind that the *prior tempore* rule may also exist in some situations in the law of obligations, giving rise to an exception to the principle of *paritas creditorum*. For example, the BW provides that where there are two competing personal claims for delivery of the same object, the older claim can under certain conditions prevail over the younger claim.[94]

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91 Salomon 2008, p. 15.

92 "*A property right can only be impaired by a new property right if the holder of the existing property right is a party to the creation of the new property right. If not, the absolute nature of the pre-existing property right protects the holder of such a property right against later property rights.*" See Van Erp 2006 (1), p. 16.

93 Merrill 2015, p. 30.

94 Salomon 2008, p. 82.

> Art. 3:298 BW: "*Vervolgen twee of meer schuldeisers ten aanzien van één goed met elkaar botsende rechten op levering, dan gaat in hun onderlinge verhouding het oudste recht op levering voor, tenzij uit de wet, uit de aard van hun rechten, of uit de eisen van redelijkheid en billijkheid anders voortvloeit.*"[95]

Indeed, this provision blurs the boundary between property rights and personal rights.[96] However, this should not be overstated. The priority enjoyed by the older creditor does not elevate the claim to be a proprietary right. Art. 3:298 BW is only a specific rule which, under several conditions and subject to exceptions, grants a priority to the older claim. The legal nature of the older claim is not changed, remaining to be a personal right.[97]

C The Right to Follow

In understanding the feature of absoluteness, the *right to follow* (*droit de suite*) needs to be mentioned. This right means that the proprietor is entitled to exercise the property right wherever the thing exists. It mainly arises in the situation where the thing is not factually controlled by the proprietor.

> "*Property rights are characterized by the notion of droit de suite: the titleholder is allowed to follow and claim his property from whoever holds that property without any title to it (e.g. a lease contract or a right of usufruct).*"[98]

> "*Het volgrecht (droit de suite), naar oud recht meestal aangeduid als zaakgevolg, is ook een consequentie van het absolute karakter van goederenrechtelijke rechten: de rechthebbende kan zijn recht uitoefenen ongeacht onder wie het object van zijn recht zich bevindt.*"[99]

Some scholars argue that the decisive difference between personal rights and property rights lies in the right to follow.[100] According to this viewpoint, property rights are in essence a "qualitative obligation (*kwalitatieve verbintenis*)" between the owner and the holder of a property right granted by the former. However, unlike personal rights, property rights can exist independently from the circulation of the object: the latter can bind automatically the person who later acquires the object. Here, it should be noted that this "qualitative obligation" approach may confine the concept of property rights to limited property rights, and the concept of ownership is

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95 English translation: Art. 3:298 BW: "*Where two or more creditors have conflicting claims for delivery of one thing, the oldest debt-claim has priority in their mutual relation, unless law, the nature of the claims or the requirement of reasonableness and fairness requires otherwise.*"

96 Nieuwenhuis 2015, p. 10.

97 Snijders and Rank-Berenschot 2017, p. 274-275.

98 Salomon 2008, p. 15.

99 Snijders and Rank-Berenschot 2017, p. 50. English translation: "*The right to follow (droit de suite), which was called thing-attaching in the old legal system, is also an outcome of the absolute feature of property rights: the entitled can exercise his right irrespective of where the object of the right situates.*"

100 Ginossar 1979, p. 286; Sagaert 2005, p. 997.

used in the general sense of belonging.[101] The object of ownership includes both tangible and intangible things, giving rise to a distinction between tangible ownership and intangible ownership. Regardless of whether the approach is convincing, it implies that the right to follow is not embodied within personal rights.[102]

The right to follow can take place in various situations. For example, an owner has a right to recover his property from the person who commits illegal dispossession. The right of recovery involves the duty to refrain from interference as discussed above, and the dispossessor is in fact a strange interferer. In addition, a secured creditor can keep his right of preference with respect to the collateral, despite the fact that the collateral has been purchased and controlled by a third party. The purchaser of the collateral is, in fact, a subsequent acquirer who has to respect the secured creditor. The two examples indicate that where the right to follow exists, the third party involved can be either a strange interferer or a subsequent acquirer. Therefore, the right to follow overlaps with the duty to refrain from interference and the effect of preference. As just mentioned, the right to follow shows the effect of exclusivity of property rights from a special angle: it highlights that the location of the object has nothing to do with the enforcement of property rights.

D Conclusion

In the preceding discussion, we have shown that property rights are absolute in relation to three types of third parties. The feature of absoluteness includes three aspects (the duty to refrain from interference, the right of preference, and the right to follow), and third parties can be categorized into three groups (strange interferers, general creditors, and subsequent acquirers). Some personal rights also have an absolute effect under some circumstances. This, however, only means that these personal rights are "propertized (*verdinglicht* in German or *verzakelijkt* in Dutch)" without becoming a property right.[103]

The three groups of third parties all bear a negative duty or a duty of respect to the proprietor, but they differ in terms of the situations where they appear.[104] In general, strange interferers appear in the case of illegal interference, general creditors in the case of insolvency, and subsequent acquirers in the situation of the acquisition of property rights. Moreover, they have different interests: (1) strange interferers usually have a need to avoid conducting illegal interventions in order to avert associated liabilities;

101 Gretton 2007, p. 810-811.

102 Ghestin and Goubeaux 1994, p. 185; Valsan 2013, p. 498-499.

103 Wolf and Neuner 2012, p. 228; Snijders and Rank-Berenschot 2017, p. 57-59.

104 In contemporary property law, positive duties can become part of the relationship of property rights in an increasing number of situations. However, positive duties must be supplementary and have a sufficiently close connection with the property right. See Sagaert 2005, p. 998; McFarlane 2011, p. 311.

(2) general creditors have a stake in whether and to what extent the debtor's assets have been encumbered; and (3) subsequent acquirers want to know whether their counterparty has the power of disposal and whether there are existing property rights on the object concerned. As will be shown later, this difference means that the three types of third parties demand different proprietary information (see 2.2.2.2).

2.1.4 A Possible Definition

The preceding two sections have shown the most important characteristics that differentiate property rights from other types of rights: thinghood and absoluteness. The feature of thinghood requires that the object of property rights, whether tangible or intangible, should be specific and of economic value. The feature of absoluteness or exclusivity means that property rights can be enforced against general third parties. After discussing the essence and the two characteristics of property rights, we can say that property rights are a right that can be effective against third parties with respect to specific things, whether tangible or intangible.

2.2 Property Rights, Proprietary Information and Publicity

As the preceding section shows, property rights must exist on specific or ascertainable things and can be enforced against third parties (see 2.1). The crucial criterion that distinguishes property rights from personal rights is that the former can be enforced against third parties. In this section, our attention shifts from property rights to publicity, the theme of this research. Property rights are enforceable against third parties. Therefore, these parties should be made aware of the existence of property rights. As will be shown later, publicity serves as the principal method of communicating information concerning property rights, though not being the only method. In this sense, property rights and publicity are closely linked.

> "*Der absolute Geltungsanspruch der dinglichen Rechte macht es nicht nur erforderlich, die gesetzlich zugelassenen Sachenrechtstypen zu begrenzen, das Bestehen konkreter dinglicher Rechte muss vielmehr auch erkennbar sein.*"[105]

> "*Furthermore, again given the strength of any property right, third parties must be able to obtain information about such a right: publicity is vital in property relations.*"[106]

105 Wolf and Wellenhofer 2011, p. 16. English Translation: "*The absolute effect of property rights not only makes it necessary to limit the types of property rights recognized by law, but also to ensure that the existence of a specific property right is transparent.*"

106 Van Erp 2012, p. 76.

This section seeks to provide a general discussion of the link between property rights and publicity. Here we introduce an intermediary concept that connects property rights and publicity. Based on this concept, a framework is provided for the subsequent discussion. The intermediary concept is "proprietary information". In this research, proprietary information refers to information concerning property rights. It includes the information regarding the subject (the person who holds the property right), the object (the thing on which the property right exists), and the content of the property right (the entitlements enjoyed by the subject with respect to the object).

After introducing the concept of proprietary information, this section further discusses the question whether and in what sense proprietary information is important for transacting parties and third parties. Here, transacting parties of a property right refer to the parties who establish or transfer this right, and third parties are the parties who are not transacting parties and bear a duty to respect this property right. As has been shown above, there are three types of third parties: strange interferers, subsequent acquirers, and general creditors (see 2.1.3.2). In this section, we describe the proprietary information demanded by every type of third party. At the end of this section, we show that publicity serves as the most important, though not the sole, means of providing proprietary information for third parties. As a regime in property law, publicity has its special aspects.

2.2.1 Information and Proprietary Information

2.2.1.1 Information

Information implies knowing something. In the economics of information, information refers to the "*data available to individuals, firms, or governments at the time economic decisions have to be taken. Information in this sense refers to economic statistics and the collection, use, and interpretation of those statistics.*"[107] This definition is an outcome of the understanding of information by economists, thereby being not universally applicable. It indicates two aspects of information: one is that information is essential for making decisions (the value of information), and the other is that information involves some activities that are not without costs (the cost of information). Therefore, information can be seen as a "product" that gives rise to costs as well as yields benefits.[108] As a type of information, proprietary information also involves these two aspects: collecting proprietary information is necessary for the creation and transfer of property rights and requires the collector to afford time, money and energy.

107 Black, Hashimzade and Myles 2013, online.
108 Stiglitz 2000, p. 1443.

The value of information is not difficult to understand. For example, knowing what the weather will be helps us to decide whether to take an umbrella with us before walking out the door. In general, before making a decision, people have to evaluate the possible consequences the decision will bring. The evaluation requires information. More reliable information implies higher certainty of the evaluation. In the absence of sufficient information, the evaluation will become uncertain.[109] If we do not know what the weather will be, then it becomes uncertain what the eventual result will be after we decide to take an umbrella with us. In general, uncertainty is undesirable. It may discourage actions. In the absence of sufficient information, people might be discouraged from taking actions, because they fear that these actions fall to be fruitless or give rise to an undesirable outcome.[110] When the weather is unknown, some people, who will definitely take an umbrella if they know that it will rain, choose to not take an umbrella. Therefore, we can say that the information a person obtains can affect whether he/she will make a decision and which decision he/she will make.

On the other hand, the definition also shows that information involves such activities as collection, use and interpretation of information. These activities, especially the collection of information, are not without costs. For example, to know what the weather will be, we need to watch the weather forecast. The costs of collecting information imply that one will not use all possible means to obtain all possible information in reality. As a result, a trade-off is usually inevitable: one has to balance the value of the information he or she is going to collect and the costs of the collection of the information.[111]

2.2.1.2 Proprietary Information

A Introduction of Proprietary Information

The preceding introduction on information indicates that information is a very broad concept. As this research focuses only on property rights, we will only devote attention to "proprietary information", namely the information about the legal relationship of property rights. For example, where a buyer wants to purchase a bicycle, the information concerning the ownership of this bicycle is a piece of proprietary information.

As proprietary information is information concerning property rights, the composition of the legal relationship of property rights determines the content of proprietary information. In general, a legal relationship of property right contains three elements: the subject, the object, and the content of this right. The subject refers to the person, whether natural or legal, who holds the property right. The object means the thing, whether tangible

109 Mackaay 1982, p. 107.
110 Mackaay 1982, p. 108.
111 Stiglitz 2000, p. 1443.

or intangible, with respect to which the property right exists. The content represents the interests and entitlements the subject enjoys with respect to the object. In a nutshell, property rights can be seen as the interests and entitlements a particular person enjoys with respect to a specific thing.

> "*In einer Rechts- und Gesellschaftsordnung, welche die vorhandenen Sachen nicht allen zum beliebigen Gemeingebrauch überlässt, sondern von der Institution des Privateigentums ausgeht (Art. 14 GG), muss geregelt werden, welche Sachen welcher Person zustehen und welche Befugnisse diese Person an der Sache hat.*"[112]

Correspondingly, the proprietary information of a property right consists of the information concerning the subject, the object, and the content. In principle, these three categories of information are important for a third party. They determine the person with whom this third party has to negotiate, the object with respect to which he will negotiate, and the existing legal relationships he needs to respect and consider. Here the information concerning the object reminds us of the principle of specificity: property rights need to exist with respect to specific, or at least ascertainable, things (see 2.1.3.1). If the object of a property right is unascertainable, which implies that the information concerning the object is insufficient, then the certainty of this property right would be hampered.[113]

In understanding the concept of proprietary information, we need to note the following aspects. Firstly, proprietary information does not include physical or functional attributes of the object. Truly, mere proprietary information is not adequate for transactions in reality because purchasers are also concerned about, for example, the quality and function of the thing in question. However, these attributes have nothing to do with the proprietary condition of the thing. Thus, they are not covered by the concept of proprietary information. For example, the right of ownership can not only exist on a flawless bicycle, but also on a defective bicycle. Property law does not prescribe different forms of ownership according to the physical or functional features of bicycles.

Secondly, proprietary information does not involve personal rights or claims. In principle, information concerning personal rights is not proprietary information. For example, as the starting point, contractual relationships cannot affect third parties under the principle of privity: they only have binding force over the particular parties who create the relationship. The existence of a contract has no effect on the legal position of third parties. However, exceptions exist. As has been shown above, some personal rights also affect third parties under certain circumstances (see 2.1.3.2). For

112 Wolf and Wellenhofer 2011, p. 1. English Translation: "*In a legal and social order, which does not leave things for arbitrary use by the public and takes the regime of private ownership as its starting point (art. 14 of the Fundamental Law), it is necessary to determine which things belong to which person, and which entitlements are enjoyed by the person with respect to these things.*"

113 Clarke and Kohler 2005, p. 156; Wolf and Wellenhofer 2011, p. 17.

example, a lease contract has a proprietary feature in the civil law system: the new owner of the leased thing may be subject to the already existing lease due to the rule of "sale does not break lease" (such as art. 7:226 BW and § 566 BGB). Due to this rule, potential purchasers need to pay attention to whether the thing in question has been leased out, so that they will not be surprised. Thus, the information concerning the legal relationship of lease is important for subsequent acquirers.[114] In this sense, we can say that the information is proprietary or at least quasi-proprietary.

B Value of Proprietary Information

After introducing proprietary information above, we now will demonstrate the value of proprietary information here. It will be contended that proprietary information is closely related to individuals' liberty. In the area of property law, the possibility of obtaining reliable proprietary information inexpensively is a precondition of facilitating individuals' liberty with respect to property.

Briefly speaking, liberty means individuals can do as they deem appropriate in the absence of the intervention by the state. Individuals are usually supposed to have a right to manage their own affairs and to assume the associated consequences, whether beneficial or detrimental. An important basis of liberty is personal rationality, the capacity to reason, evaluate and determine in an independent way.[115] Presumably, nobody is in a better position than a person himself in understanding what he desires and how to achieve it. Liberty lays a basis for and manifests itself in private law as "party autonomy (*Privatautonomie*)", a fundamental principle that makes private law distinctive from public law.[116] According to this principle, individuals are entitled to create a private law relationship with others freely and independently.[117] Under the principle of party autonomy, individuals' liberty is respected and guaranteed in private law.

Liberty can find its ethical root from the notion of personality. In light of Kantian ethics, moral personality is nothing "*but the liberty of a rational being under moral Laws*".[118] As liberty is the moral essence of human beings who should treat themselves as an end rather than a means, liberty can be seen as an ultimate end.[119] "*Liberty is not a means to a higher political end. It is itself the highest political end*", as Lord Acton asserted.[120] Moreover, liberty might also be deemed as a means of achieving certain purposes. From the view-

114 For this reason, some scholars argue that the lease of immovable property needs entry into the land register, at least when the lease is supposed to exist for a long period of time. After registration, the lease can be easily seen by subsequent acquirers, such as buyers and mortgagee. However, opposite opinions exist. See Westrik 2001, p. 257-263.

115 Lucy 2007, p. 82.s

116 Meijers 1948, p. 22; Medicus 2010, p. 7; Bork 2016, Rn. 99.

117 Bork 2016, Rn. 99; Wolf and Wellenhofer 2011, p. 98.

118 Kant 1799, p. 16.

119 Kant 1799, p. 31.

120 Acton 1909, p. 23.

point of some economists, such as Hayek, liberty is "*a means to the end of the satisfaction of overall interests*".[121] Mill, a utilitarian and libertarian, deems liberty as "*pursuing our own good in our own way*", which seems to imply that liberty is a means to realize the end of the maximization of happiness.[122]

It might be better to say that liberty is a means as well as an end. Liberty is a means because it is necessary for realizing such purposes as the maximization of overall welfare or happiness. On the other hand, liberty is also an end pursued by individuals because it is an ethical attribute of human beings. If one accepts this general conclusion, then one cannot deny that party autonomy has a double value in the law of property: efficient utilization of property and self-realization of individuals.[123] The first value, often a central topic in the economics of property law, is easy to understand. In general, allowing individuals to freely dispose of property guarantees that property can shift to the person who can make better use of it.[124] The second value means that property is an object with respect to which individuals' liberty is exercised and realized. Liberty with respect to property is also an end. This value is often overlooked but has been articulated by Hegel in the following excerpt.

> "*To have something in my power, even though it be externally, is possession. The special fact that I make something my own through natural want, impulse or caprice, is the special interest of possession. But, when I as a free will am in possession of something, I get a tangible existence, and in this way first became an actual will. This is the true and legal nature of property, and constitutes its distinctive character.*"[125]

On the basis of the double value of liberty, it can be further argued that the value of proprietary information lies in two aspects: facilitating liberty with respect to property and improving efficient utilization of property.

Proprietary information is useful for the interaction between different parties with respect to property. Every person has the liberty to act, which creates a possibility of conflicts between two persons. If justice means that one's liberty is harmonious with another's liberty, then how to coordinate the two liberties becomes a central issue for the law. To avoid illegal infringement of others' liberty, a person should first know of the boundaries between his and others' liberty. The knowledge of boundaries is

121 Gamble 2013, p. 350.

122 Mill 1859, p. 24; Kateb 2003, p. 48.

123 Here we do not intend to discuss the tension between party autonomy and the principle of *numerus clausus*. This principle requires that the type and content of property rights should be determined by property law, and individuals cannot create a new property right. Indeed, the principle forms a severe restriction over party autonomy. In this part, however, we focus on the party autonomy in the following sense: individuals are entitled to freely decide whether to transfer property rights and to create a property right that has been recognized by property law. This autonomy is by no means restricted by the principle of *numerus clausus*.

124 Shavell 2004, p. 18.

125 Hegel 2005, p. 58.

often essential for managing one's personal affairs in harmony with others' liberty. In this sense, proprietary information is important for the interaction between different people with respect to property. The information about a property right shows the boundaries of this right, i.e. the scope of the proprietor's liberty, thereby indicating the remaining area others can enter without fear of interfering with this right. If the proprietary information is insufficient, the boundaries are ambiguous, then a risk of conflicts will ensue. Due to this risk, individuals might be discouraged from participating in the utilization of the property: they worry about the occurrence of a conflict. This implies that the scope of individuals' liberty is narrowed. In a word, proprietary information has great importance for the realization of liberty, and the impossibility of obtaining proprietary information amounts to a restriction on liberty.

Secondly, proprietary information is necessary for efficient utilization of property. In general, free transactions ensure that property can flow to the hands of the person who can make the most of it. This is a precondition for the end of maximizing the utility of property. However, a heavy burden of information will often hinder free transactions and cause a risk of the occurrence of conflicts. If a person cannot obtain sufficient proprietary information concerning a thing cost-effectively, then he may choose to take no actions. This inhibits the circulation of this thing. Even if the person takes actions, despite the insufficiency of information, the consequence is likely to be a conflict with other rights that already exist on the thing. In fact, we have indicated this in introducing the concept of information: information can alleviate uncertainty, and potential decision-makers might be discouraged from taking actions when they do not have sufficient information.

> "*An advantage of registration systems is that they may ease sale and resale of things by assuring buyers of the validity of sellers' claims of ownership. In the absence of a registration system, uncertainty as to the validity of ownership might cause a wary buyer not to purchase. Alternatively, this uncertainty might cause the buyer to spend greater effort investigating the validity of ownership than would be necessary if there were a registry.*"[126]

In a word, proprietary information also has great importance for efficient utilization of property by reducing uncertainty, a potential impediment to free transactions.[127]

C Costs of Proprietary Information

Proprietary information gives rise to costs. The collection and interpretation of proprietary information are activities that are not without costs. This is not difficult to understand. Here we use the collection of proprietary information concerning immovable property as an example. If a potential buyer

126 Shavell 2004, p. 47.
127 Miceli 2005, p. 253.

wants to know whether his or her counterparty, the seller, has ownership of the house intended to be sold, this buyer or his or her agent usually needs to search the land register. The search of the register and further analysis of the information contained by the register book give rise to some costs. Thanks to the development of information technology, land registers might have been digitalized and become accessible online. This reduces the cost of collecting the proprietary information concerning immovable property significantly. Nevertheless, costs still exist.[128]

2.2.2 Parties and Proprietary Information

After introducing the concept of proprietary information, we explore the demand for proprietary information by different types of third parties in this part. Before doing this, a discussion concerning proprietary information and transacting parties will be provided.

2.2.2.1 Transacting Parties and Proprietary Information

Transfer and creation of property rights take place between two or more particular parties. These parties can, for example, be the owner and the usufructuary in the case of creating a right of usufruct, the pledgor and the pledgee in the case of granting a right of pledge, and the transferor and the transferee in the case of transfer of ownership. In this research, where a property right is created or transferred by two or more parties, these parties are termed "transacting parties" of this right, as opposed to third parties. In general, proprietary information concerning a property right is not a problem for the transacting parties of this right. This is easy to understand. The transacting parties are creators of the property right. They have negotiated the creation or transfer of the property right. There is no reason to say that they do not know what they have created and transferred. Therefore, every transacting party can be assumed to have obtained the proprietary information about the property right he or she transfers or creates. As will be seen in Chapter 5, this conclusion is important for defining the legal effect of publicity (see 5.1.3-5.1.4).

For example, to acquire a right of usufruct with respect to a parcel of land, the usufructuary usually has to conclude a contract with the owner of that parcel of land. This contract includes specific terms concerning the location of the parcel of land, the identity of the parties, the manner of use

128 For example, proprietary information concerning immovable property can be collected easily and cheaply from the land registry (*Kadaster*) in the Netherlands. The information can be downloaded from the website of the registry by paying a small amount of fee, such as 2.60 Euros for the information of land ownership. There is no doubt that the convenient and cheap system facilitates the smooth transaction of immovable property in the Netherlands.

and enjoyment, and the period of the right. The owner of the parcel of land and the usufructuary are assumed to have an understanding of these terms. In principle, it is unimaginable that these parties would not know the right of usufruct they created. Thus, the property right of usufruct does not cause any concern about lack of information to the transacting parties.

To avoid misunderstandings, we note that a transacting party of a property right may be a third party in relation to another property right. This is because multiple property rights might exist on the same object. In the example above, the usufructuary is assumed to have full knowledge of the right of usufruct. At the same time, he might be a third party in relation to another property right that already exists on the parcel of land, such as a right of mortgage. In relation to this mortgage, the usufructuary is a third party (a subsequent acquirer): he must respect that right, and yet it cannot be assumed that he knows of the existence of that right.

2.2.2.2 Third Parties and Proprietary Information

It has been shown that third parties bear a negative duty to respect property rights (see 2.1.3.2). This duty gives rise to a problem of information asymmetry to third parties: they need to know about the existence of property rights.[129] Obviously, third parties are different from transacting parties in this respect. Unlike transacting parties, third parties do not participate in the transfer or creation of property rights. Thus, it cannot be assumed that third parties know about the transfer or creation. In this part, we outline the proprietary information required by the three types of third parties: strange interferers, subsequent acquirers, and general creditors. It will be found that the information required varies from one type of third party to another.

A Strange Interferers

As already shown above (see 2.1.3.2.A), the term "strange interferer" refers to persons who have no particular interests in a specific object other than avoiding conducting illegal interference.[130] The principal purpose of strange interferers is to avert interfering in others' property rights. This type of third party has a very "low" demand for proprietary information. In general, for a person who intends to avert interfering with a property right, he only needs to know that he cannot act in a certain manner with respect to this right. The details of the property right are irrelevant. For example, if a person has already known that he has no right to step onto a parcel of land, then the other information about the proprietary interests of the parcel is useless for this person. This means that the person, upon trespassing on the parcel, cannot be exempted from corresponding liabilities by, for example, claiming that he does not know the identity of the landowner.

129 McFarlane 2011, p. 318.
130 Merrill 2015, p. 29.

> "*But most of the time virtually no one knows the identity of the owners of all the thousands of other cars they see on the streets and in parking lots. In order to maintain a semblance of stability in this system, not only must each owner recognize and exercise dominion over his own car, but virtually all members of society—owners and nonowners alike—must recognize and respect the unique claims of owners to their own particular auto. In other words, virtually everyone must recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other.*"[131]

> "*Thus, if a person is to avoid trespassing on land, it is sufficient for that person to know that he owns no rights in the land. It is a matter of some irrelevance whether or not rights in the land are all held by a single individual or, alternatively, have been carved up among various persons to include a fee tail, a joint tenancy, an easement, a lease, and/or a mortgage.*"[132]

To understand the low demand for proprietary information by strange interferers, we need to note the following two aspects. Firstly, interference with others' property only causes detriment and is contrary to morality in most situations; thus, it should be deterred to the largest extent.[133] If a person knows or should know that his behavior exceeds the boundaries drawn by law for him, then there is sufficient reason for him to cease and, if not, compensate for the damage caused. Secondly, property should be protected equally, irrespective of who the owner or proprietor is. This idea of equal protection requires that the specific identity of the proprietor is irrelevant in judging whether an illegal interferer needs to bear a duty of respect. That the interferer knows no details about the legal relationships of the property damaged is never a sufficient ground for impunity.[134]

Human beings live in a world crowded with things belonging to one or another. This means that a person might easily interfere with or damage another person's property when this person fails to be careful with his behavior. If interference or damage happens, then corresponding liabilities will often be triggered. Therefore, every person needs to know the boundaries of his or her free behavior with respect to property. However, a question is how to obtain such information. It will be shown later that people rely on possession to know the boundary of their behaviors (see 3.3). In general, possession can provide sufficient proprietary information for strange interferers, helping them to know whether their behavior constitutes illegal interference.

B Subsequent Acquirers

It has been shown that subsequent acquirers are another type of third party (see 2.1.3.2.B). They can be an acquirer of ownership or limited property rights. For this type of third party, proprietary information has great

131 Smith and Merrill 2007, p. 1853-1854.
132 Hansmann and Kraakman 2002, p. 411.
133 Smith and Merrill 2007, p. 1854.
134 Hansmann and Kraakman 2002, p. 411; Smith and Merrill 2007, p. 1853-1854.

importance. This is because, unlike strange interferers, subsequent acquirers intend to have a proprietary interest with respect to a specific object. In order to realize this purpose without falling into conflict with others, potential acquirers need to investigate in advance the already existing property rights on the object.

For example, where a potential purchaser wants to acquire a parcel of land, he usually has to pay attention to the following aspects: (1) whether the seller is the legal owner and has the authority of disposal; (2) whether there are any proprietary encumbrances on the parcel of land; and (3) whether the parcel has been attached by the seller's creditors.[135] If, for example, the land has already been encumbered with a right of mortgage, then the purchaser has to respect the mortgage. Therefore, the information about the mortgage is important for the purchaser. In the absence of this proprietary information, the purchaser has no chance to properly react to the encumbrance by, for example, lowering the purchase price, canceling the purchase, or reaching an additional agreement with the mortgagee.

In general, the difference in the need for proprietary information between strange interferers and subsequent acquirers implies that these two types of third parties take advantage of different means of publicity. As mentioned above, the former relies on possession to guide their behaviors, whereas the latter often conducts a detailed investigation by, if possible, searching the register for the property in question.[136] In general, possession cannot satisfy the demand for proprietary information by subsequent acquirers and general creditors, which is discussed in Chapter 3 (see 3.4 and 3.5). In the situation where claims are assigned or pledged, notification to the debtor cannot qualify as a method of publicity for subsequent acquirers (see 4.1.1).

C General Creditors

C1: The Concept of General Creditors

General creditors are another type of third party, which has been discussed above (see 2.1.3.2.B). As a starting point, general creditors can only use the debtor's property to realize their claims. In other words, one's property cannot be used to perform another's obligations, provided there is neither a legal prescription or agreement by the parties to the contrary.[137] Moreover, unlike secured creditors, general creditors have no priority interest with respect to specific collateral and fall in a position inferior to secured creditors. In the situation of the debtor's insolvency, general creditors only have a right to distribute the residual assets, i.e. assets remaining after the discharge of secured debts, in proportion to the sum of their claims. This often means that general creditors cannot fully realize their unsecured

135 Shavell 2004, p. 30.
136 Hansmann and Kraakman 2002, p. 416.
137 Van Buchem-Spapens and Pouw 2008, p. 21.

claims. As a result, general creditors are not only concerned about the assets owned by the debtor, but also the proprietary encumbrances on the debtor's assets. Roughly speaking, only unencumbered assets of the debtor (i.e. assets owned by the debtor and not encumbered with proprietary security interests) are available for general creditors.

For the sake of protecting certain types of general creditors, such as employees and tax authorities, a privilege is granted. As has been demonstrated in 2.1.3.2.B, there is a differentiation between general privilege and specific privilege. The former exists with respect to all the assets of the debtor, while the latter exists on specific assets. In general, the preferential position enjoyed by the privileged general creditor is an outcome of the operation of law. Moreover, different jurisdictions differ in the aspect of the number and type of privileged claims.[138] It should be noted that granting a statutory privilege only means that the creditor benefited will obtain payment in priority to other general creditors. If the asset involved has been transferred to others or encumbered with a limited property right before the beginning of bankruptcy, the transfer and limited property right will not be affected by the statutory privilege, provided that there is no contrary stipulation (art. 3:279 BW).[139]

As a result, privileged creditors are unsecured creditors, despite their having a preferential position over the unsecured creditors. In general, the statutory privilege remains to be a legal issue concerning the distribution of the unencumbered assets of the debtor to general creditors. Having a statutory privilege does not mean that the creditor has a property right.[140]

C2: The Demand of Information by General Creditors

Seemingly, the preceding introduction implies that general creditors have an interest in obtaining information about the debtor's unencumbered assets. This information involves two aspects: the belonging of assets to the debtor (information of belonging) and the proprietary encumbrance over the assets (information of proprietary encumbrance).[141] As both aspects are related to property rights or proprietary issues, the information is generally termed as "proprietary information of unencumbered property" in this research. For the following reasons, the information is only of very limited importance for general creditors.

In general, unsecured creditors rely on the overall financial health of the debtor, in particular "*the debtor's general earning power for repayment*", and

138 Keay, Boraine and Burdette 2001, p. 168.

139 Art. 3:279 BW: "*Pand en hypotheek gaan boven voorrecht, tenzij de wet anders bepaalt.*" English translation: Art. 3:279 BW: "*Pledge and mortgage are superior than the right of privilege, unless the law stipulates otherwise.*"

140 Snijders and Rank-Berenschot 2017, p. 596.

141 Here the term "belonging" is used as an equivalent to "*toebehoren*" in Dutch law and "*Inhaberschaft*" or "*Zuordnung*"in German law. "Belonging" amounts to the concept of ownership, provided that this concept is not confined to corporeal things. See Snijders and Rank-Berenschot 2017, p. 26-27.

usually do not have any direct stake with respect to a specific asset owned by the debtor.[142] Financial health is a term used to describe the state of a person's financial situation. Specifically, the debtor's overall financial health mainly refers to the ability of payment for creditors. This is easy to understand: what creditors principally concern about is whether the debtor is able to perform the obligations on the due date.

In this aspect, general creditors' demand for information differs from secured creditors'. Secured creditors usually have a particular concern about the existing proprietary relationships over the specific collateral, despite the fact that they may also pay attention to the debtor's overall financial health. This is because proprietary security rights are affected by, for example, whether the debtor has lawful ownership of the collateral, and whether the collateral has already been mortgaged or pledged to another person. In contrast, detailed information about specific assets is often beyond the concern of general creditors. Merely knowing the legal relationships of specific assets is neither sufficient nor necessary for general creditors. That a debtor has ownership of certain assets does not mean that this debtor will be able to perform unsecured obligations on the due date. Moreover, pledging or mortgaging certain assets to some creditors does not mean that the debtor will lack the ability to perform unsecured obligations in the future. In general, the realization of an unsecured claim is largely dependent on the debtor's overall financial health.

> "*An unsecured creditor relies on his debtor's overall financial health, which may be difficult to diagnose month to month or day to day. A secured creditor relies on specific property. As long as he knows that the debtor owns that property, his loan is safe, even if the debtor engages in a risky enterprise.*"[143]

Even if all the debtor's assets have been mortgaged or pledged, some creditors are still willing to provide credits without requiring any security when they have confidence in the debtor's ability to pay.[144] However, measuring the financial health of a debtor is not always easy. If a potential creditor finds it difficult to measure the overall financial health of the debtor, then he might require a property right of security, especially when the credit is granted by the creditor for a long period.[145]

That general creditors mainly concern about the debtor's overall financial health does not mean that a risky enterprise cannot obtain any credit without providing proprietary security. In reality, even if the overall financial state of a debtor is not sufficiently healthy, it is still possible for this debtor to transact with suppliers and acquire loans from banks in the absence of providing any proprietary security. This is because supplies and

142 Schwartz 1989, p. 221.
143 Baird 1983, p. 57.
144 LoPucki 1994, p. 1938; Hamwijk 2011, p. 620.
145 Finch 1999, p. 639.

banks can capture the risk of underpayment by, for example, adjusting the purchase price and the rate of interest respectively.[146] With these measures, the risk of underpayment can also be countered to some extent.

The proprietary information concerning unencumbered assets does not have great importance for general creditors also for another two reasons. The first reason is that the information obtained will soon become outdated. Even though a general creditor, after exerting much effort, learns about how many assets are owned by the debtor and how many proprietary encumbrances have been created over these assets, this information he obtains will become imprecise afterwards. This is easy to understand. The debtor is always disposing of or preparing to dispose of the assets.[147] For example, suppliers as a debtor need to transfer ownership of their products to the purchaser and are often required to mortgage or pledge their property to banks granting a loan. This can decrease the amount of unencumbered property. On the other hand, suppliers also need to acquire ownership of materials, and existing proprietary encumbrances over the suppliers' property might cease to exist due to the performance of the secured debt. This will increase the amount of unencumbered property. Therefore, the amount of unencumbered property is always in fluctuation. The proprietary information obtained today might become incorrect tomorrow. It cannot be expected that general creditors will investigate the amount of unencumbered property every day.

The second reason is that the proprietary information is useless for a special type of general creditors: involuntary creditors. Roughly speaking, involuntary creditors are those who acquire a claim from the debtor on a non-contractual basis. Tort victims are a typical type of involuntary creditor: they are "forced" to become a general creditor without expressing any consent to the debtor, namely the tortfeasor.[148] Involuntary creditors have no chance to decide whether and under what conditions they will have a relationship of obligation with the debtor. The legal relationship is often a result of the operation of law. Therefore, involuntary creditors cannot react to the existence of security rights on property by, for example, adjusting the price or the rate of interest, and thus are a "*non-adjusting creditor*".[149] Moreover, involuntary creditors often do not know about the amount of assets owned by the debtor at the moment when the obligation arises. In sum, due to the special way this type of unsecured claim comes into existence, there is no reason to say that the proprietary information of unencumbered property is useful for involuntary creditors.

The preceding observations require us to properly assess the value of proprietary information concerning unencumbered property for general creditors. In general, even if this information is relevant, we have to

146 Bouckaert 2006, p. 180.
147 Hamwijk 2011, p. 619.
148 LoPucki 1994, p. 1893.
149 Bebchuk and Fried 1996, p. 882-891.

acknowledge that its importance is very limited. The amount of unencumbered property can be seen as an indicator of the overall financial state of the debtor, but it is neither the only nor the most important indicator.

> "*Dieser hebt hervor, dass die Vermögensverhältnisse über eine Kreditvergabe jedenfalls nicht an erster Stelle entscheiden. Für die Kreditwürdigkeit einer Person sind andere Kriterien, wie die Einschätzung der Entwicklung der Leistungs- und Ertragskraft, von größerer Bedeutung.*"[150]

This is easy to understand. After all, more proprietary encumbrance means that unsecured creditors gain less in the event of the debtor's insolvency.

Therefore, the view that unsecured creditors neglect the debtor's unencumbered property is not completely correct.[151] Truly, unsecured creditors only suffer underpayment when the debtor becomes insolvent, and the debtor's overall financial health, in particular the ability of payment, is more important for them. However, as the preceding excerpt points out, the amount of unencumbered property owned by the debtor is an indicator of the debtor's creditability. Moreover, the clause of "negative pledge" used in practice also implies that the proprietary information of unencumbered property might be of some importance. Negative pledge clause is often used in unsecured transactions, especially unsecured loan agreements. Under this clause, the debtor is required by the unsecured creditor to refrain from granting security interests over certain property to other creditors in the future.[152] The creation of this clause indicates that the unsecured creditor has a concern about the proprietary encumbrance created by the debtor.[153] The unsecured creditor wants to avert the situation that no assets are left after the enforcement of security interests by secured creditors. As to the legal effect of negative pledge clauses, especially whether these clauses have binding force on third parties when being breached by the debtor, different opinions exist.[154]

In another aspect, the proprietary information of unencumbered property might be important for general creditors when the debtor becomes insolvent. This aspect concerns the date when ownership of property is validly transferred by the debtor and when proprietary encumbrances are validly granted to other creditors. In general, the debtor loses the authority to dispose upon the declaration of insolvency.[155] However, the transferee and secured creditors might conspire with the insolvent creditor to antedate the transfer and the creation of proprietary encumbrances. As a result, gen-

150 Von Wilmowsky 1996, p. 162. English translation: "*This highlights that the proprietary relationship is never decisive in the first place for the grant of credits. The creditworthiness of a person is of greater importance, such as the assessment of the ability of performance and profitability.*"

151 Hamwijk 2011, p. 626.

152 Schwartz 1989, p. 210.

153 Bebchuk and Fried 1996, p. 922.

154 De Bie 1991, p. 332; Bjerre 1999, p. 305.

155 Wessels 2012, p. 155; Van Buchem-Spapens and Pouw 2008, p. 31.

eral creditors have less unencumbered property to distribute than would be available if there were no such fraudulent act. If the date, when the transfer and the creation of limited property rights take place, can be ascertained reliably, the fraudulent antedating could be avoided. In this respect, the proprietary information of unencumbered property is useful for general creditors.

In sum, general creditors mainly rely on the debtor's overall financial health, in particular the ability of payment. Thus, they pay major attention to such factors as the cash-flow, earning capacity and development prospects of the debtor. The amount of unencumbered property is an indicator of the overall financial health, which, however, has limited importance for general creditors. For general creditors, the proprietary information of unencumbered property is doomed to become outdated after being collected, because the debtor is always disposing of or preparing to dispose of property. For involuntary unsecured creditors, this proprietary information is no use at all, because the legal relationship involved comes into existence against the will of this type of unsecured creditor. However, the possibility of collecting the proprietary information reliably allows general creditors to avert the risk of fraudulent antedating. The limited importance of the proprietary information gives rise to another question concerning the effect of publicity of property rights on general creditors. If, for example, a property right of security is created in the absence of publicity, should this right be effective against general creditors when the debtor falls insolvent? This question is discussed in Chapter 5 (see 5.3.3.2).

2.2.3 Publicity and Proprietary Information

The preceding part has shown that proprietary information is important in different senses for different types of third party. In this part, we discuss how proprietary information is collected. In reality, there are multiple ways in which proprietary information can be collected. Publicity is only one amongst these ways but has certain special aspects.

2.2.3.1 Multiple Ways of Collecting Proprietary Information

In the transfer and creation of property rights, disclosure by counterparties (such as the transferor of ownership and the grantor of limited property rights) and publicity seem to be the two most important ways of collecting proprietary information. In most situations, proprietary information is first provided by counterparties, who can be the seller in the case of sales, the owner in the case of creating a right of usufruct, or the debtor in the case of providing proprietary security. This is not difficult to understand. For example, the seller may guarantee that he or she has full ownership of the thing involved, promising that the purchaser is able to acquire ownership. Moreover, the seller might also provide evidentiary documents to prove

that he or she is the owner, such as the contract by virtue of which the thing was acquired or a certificate on which the seller is recorded as the owner.[156] If the thing is in possession by a lessee, the seller will usually demonstrate the legal relationship of lease to show that he or she, though not in possession of the thing, is the real owner.

In general, the proprietary information provided by counterparties may suffer from lack of objectivity. Counterparties usually have a direct stake in disclosing the legal relationships with respect to the object, which implies that they have a strong incentive to cheat.[157] As a result, counterparties may provide incorrect information or remain silent on some relevant matters. For example, in order to persuade the buyer to purchase the commodity in question, the seller might intentionally conceal that the commodity has been pledged to others. Therefore, the information asymmetry faced by third parties might be aggravated rather than alleviated by the disclosure of counterparties.

The disclosure of proprietary information by counterparties is generally regulated by contract law. In the pre-contractual phase, there is a duty of providing information, including proprietary information, prescribed by contract law for negotiators. Failure to fulfill this duty by one party will trigger certain consequences under the law of obligations, such as rescinding the contract by another party on the basis of deception.[158] Apart from this contract law solution, property law also prescribes a solution: publicity.

Publicity is based on the idea that the feature of absoluteness of property rights requires these rights to be made transparent to third parties. In other words, there should be a reliable channel through which third parties can obtain proprietary information.

> *"A legal system that wants to encourage a market in property interests must therefore adopt mechanisms and rules that make it safe for purchasers to assume that apparent owners are absolute owners, or at the very least lessen the risks of a successful challenge to a purchaser's title."*[159]

156 Clarke and Kohler 2005, p. 390.

157 Baird and Jackson 1983, p. 179; Pottage 1995, p. 399.

158 For example, A plans to transfer a parcel of land to B, and they have made a contract. After applying for registration of the transfer, B realizes that this parcel of land has been mortgaged to another person. A does not disclose this mortgage to B when they sign the contract of purchase. If B knows this mortgage, he would not agree to buy the land. In this case, B can rescind the contract on the basis of deception by A. In addition, contract law also imposes over the seller a general duty of transferring ownership to the buyer free from any encumbrance (art. 7:15 BW and § 435 BGB). In this hypothetical case, B can choose to require A to remove the mortgage or terminate the contract for monetary compensation on the basis of A's defective performance. See Staudinger/Beckmann 2014, p. 390. The duty of disclosing the existence of proprietary encumbrances to the buyer is implied by the seller's duty of transferring unburdened ownership to the buyer. See Huijgen 2017, p. 43.

159 Clarke and Kohler 2005, p. 388.

> "*Publicity therefore facilitates the search for which property rights are alive, making it possible to reach consent ex ante, purging titles, and reducing information asymmetries between the parties.*"[160]

As mentioned above (see 2.1.1.2), there is a difference in the legal effect of publicity between the translative system and the declaratory system (or the consensual system). In the former system, property rights cannot be created or alienated until the requirement of publicity is met. In contrast, the latter system means that the acquisition of property rights is based on parties' consent, and publicity is only a requirement for effect against third parties. Therefore, it can be said that the translative system *forces*, while the declaratory system *encourages*, transacting parties to show the property right to third parties.[161] About this difference, a further discussion is offered in Chapter 5 (see 5.1.4.1). In the next part, we focus on special aspects of publicity as a means of conveying proprietary information to third parties.

2.2.3.2 Publicity as a Special Source of Proprietary Information

First of all, publicity is statutory. In principle, publicity cannot be contracted out by individuals. The regime of publicity is stipulated by property law which mainly includes statutory rules.[162] The statutory feature of publicity involves two aspects: the possible forms of publicity and the legal effect of publicity. In principle, property law prescribes a specific form of publicity for every property right according to the nature of the object.[163] Roughly speaking, possession is a form of publicity for corporeal movables, registration is a form of publicity for immovable property and certain intangible things (such as patents and trademarks), and notification to the debtor might be treated as a form of publicity for claims. Individuals are neither allowed to create a new form of publicity nor to replace one form recognized by law with another form. Moreover, the legal effect produced by publicity is also defined by property law without leaving any space for party autonomy. To realize certain proprietary legal consequences, parties have to complete publicity in accordance with property law. For example, delivery of a parcel of land cannot trigger the shift of ownership of this land, when registration is prescribed by property law as the only form of publicity for immovable property and as a condition for the transfer of land ownership.

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160 Arruñada 2003, p. 411.

161 Here the term "force" is used to mean that transacting parties *must* fulfill the requirement of publicity if they want to create or transfer the property right under the translative system. The declaratory system only "encourages" transacting parties to publicize their property right, because the lack of publicity does not affect the acquisition *per se*. Under the declaratory system, publicity strengthens the legal position of the acquirer in relation to third parties.

162 Snijders and Rank-Berenschot 2017, p. 60.

163 Snijders and Rank-Berenschot 2017, p. 62-63.

Secondly, publicity is in principle singular. The feature of singularity means that, in principle, one object has only one form of publicity. For example, where registration is prescribed as a method of publicity for immovable property, possession should be excluded. Moreover, this feature also means that both the right of ownership and limited property rights on the same object should share the same method of publicity.[164] In other words, all proprietary information with respect to an object should be stored and communicated through the same method of publicity. The singularity can reduce the costs of publicity. This feature avoids the situation that the proprietary information concerning an object can only be fully gained by investigating two or more methods of publicity. However, law might refuse to implement the notion of singularity. In English law, for example, pledge of corporeal movables takes possession as the method of publicity, while the mortgage of corporeal movables granted by companies requires registration as a condition for effect against third parties.[165] Likewise, Article 9 UCC recognizes both possession and registration as an eligible means of publicity for the creation of security interests in corporeal movables.[166] Undoubtedly, the coexistence of multiple methods of publicity for one kind of property not only hampers the reliability of these methods, but also increases the costs of investigation by third parties.[167]

> "*Apart from inflating the cost of credit, treating possession as an alternative to registration has the following other disadvantages. It undermines the reliability of the register as a comprehensive source of information about the potential existence of security rights in the debtor's assets. The subsequent creditors cannot rely on the register to conclude whether the debtor had already created a security in the asset or not.*"[168]

For similar reasons, the costs of investigation will also rise when there are different methods of publicity for different kinds of property right created on the same object. For example, if the right of usufruct of land needs to be registered in one register, but the mortgage of land has another register, then third parties have to search these two registers to know whether there are any limited property rights on the land. Undoubtedly, this leads to a heavier burden of investigation that would be unnecessary if the two property rights share the same register.

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164 This is easy to understand. In E.M. Meijers' viewpoint, creating a limited right amounts to transferring a part of entitlements embodied within the primary right. This is the reason why the rules on the transfer of property are applicable to the creation of limited rights on the same property (art. 3:98 BW). See Snijders and Rank-Berenschot 2017, p. 395-396.

165 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.06.

166 White and Summers 2012, p. 1207, 1215.

167 Phillips 1979 (2), p. 227.

168 Secured Transactions Law Reform Project 2013, p. 5.

In fact, the statutory feature of publicity is also to save on the costs of publicity. This is easy to understand. If parties are entitled to freely choose a form of publicity for the property right they create, then the purpose of cost-efficiently providing proprietary information would be frustrated. Free choice implies that third parties must be aware of all the possible forms of publicity that might be selected. In this sense, publicity is also subject to a principle of *numerus clausus*.[169]

Thirdly, publicity is objective. As pointed out above, disclosure by counterparties may suffer from a lack of objectivity because counterparties always have an incentive to cheat (see 2.2.3.1). In contrast, publicity can provide proprietary information more reliably because publicity is nearly independent from the influence of interested parties. For example, possession conveys proprietary information through the visible physical proximity between the possessor and the thing possessed, and third parties obtain the information without having to rely on the possessor's disclosure (see 3.2.1.2). In general, whether a person has possession is a question that can be answered with certainty. At least, the answer is, to a large degree, independent from the possessor's internal intention. Registration is also objective. Once property rights are registered or relevant documents are recorded in a register, these rights or documents will become visible to third parties. The interested parties can no longer make any change in the absence of a legal reason. Moreover, they cannot manipulate the registration or the recordation at will.

As an important outcome of the feature of objectivity, publicity is often treated as the "appearance of rights (*Rechtsschein* in German or *schijn van recht* in Dutch)".[170] In general, property rights are an invisible legal relationship, while publicity is an observable fact.[171] The two should be distinguished. For example, the fact that a person is shown to be an owner by a method of publicity does not necessarily mean that this person has ownership. On the other hand, the two are also interconnected in several aspects. Among these aspects, one aspect is that publicity is a means of showing property rights to third parties, and another is the notion of publicity as an outward appearance of rights. This notion lays a foundation for the conclusion of invisible property rights from the observable fact of pub-

169 Reehuis 2004, p. 4. Conventionally, the principle of *numerus clausus* in property law refers to that property rights have "statutory types (*Typenzwang*)" and "fixed content (*Typenfixierung*)". However, it might also be understood in a broader way by including other aspects. For example, "*the way in which these rights can be created, transferred or destroyed*" is also determined by property law. See Van Sjef 2012, p. 65. Publicity can be seen as a part of the way of creating, transferring and destroying property rights, because publicity is necessarily involved. Furthermore, some scholars even interpret the principle of *numerus clausus* mainly from the perspective of publicity: the principle of *numerus clausus* is a "*regulation of the types and degree of notice required to establish different types of property rights*". See Hansmann and Kraakman 2002, p. 374.

170 Füller 2006, p. 247; Nieskens-Isphording and Van der Putt-Lauwers 2002, p. 3-6.

171 Quantz 2005, p. 25.

licity.[172] Concretely speaking, where the proprietary information conveyed by a means of publicity fails to reflect the real legal condition, property law might assume that the information is "correct" for third parties, and their reliance on the information might be protected. By doing so, property law makes publicity become a reliable method of proprietary information for third parties. However, this is only a rough description of the reliability of publicity. In reality, different means of publicity have different degrees of reliability, and whether the reliance of third parties can eventually be protected also depends on other factors.

2.2.4 Conclusion

Proprietary information is information concerning property rights. The third-party effect of property rights makes proprietary information important for third parties. In general, obtaining reliable proprietary information easily is a precondition for efficient utilization of things and the realization of individuals' liberty. Different types of third party have a demand for different proprietary information. Strange interferers only need to know that they cannot act in a certain manner with respect to others' property rights. Subsequent acquirers need to know the details of the property rights created on a specific thing. The proprietary information about unencumbered property owned by the debtor has only limited importance for general creditors. In general, proprietary information can be collected in different ways. Among these ways, publicity, a regime prescribed by property law, has special aspects. It is statutory, singular, objective and reliable. In order to have an efficient regime of publicity, the form and legal effect of publicity should be defined by property law. Moreover, publicity has the merit of objectivity, which allows it to serve as a basis for the protection of the reliance of third parties.

172 Füller 2006, p. 247.