

From the Forum...

Intellectual Property Rights: Are Intangibles True Property?

by Murray I. Franck

At an IOS Forum in New York City on May 2, 1992, Murray Franck, an attorney, professor, and trustee of the Institute, spoke on "Intellectual Property Rights." Mr. Franck began with a review of Ayn Rand's theory of rights and within that context discussed the nature and justification of intellectual property rights. He concluded with a brief review of the status of intellectual property rights today. The following brief excerpt discusses "intangible property" and our right to it.

Intellectual property includes not only patents and copyrights, but also *personality* property—property concerned with the facts of your life—and *conscience* property—property concerned with the content of your mind. I maintain that we cannot separate tangible property from intangible property, and therefore that intangible property—in all its forms—is subject to the protection of property rights.

In discussing intangible property, please bear in mind that tangible property is corporeal, physical—such as real estate, a pen, the clothing we are wearing—and that intangible property *supposedly* attaches to no physical entity; it includes, for example, a patent or copyright. The issue, then, is whether intangibles are true property and, if they are, do we have rights in them?...

Rights have no value except as rights to action in the physical world—that is, to attempt physical implementation of expression. And rights cannot be violated except in the physical world—that is, they can be violated only by physical action.

Let's explore this thesis with civil rights. One civil right is to freedom of expression. It is derived from the right to the contents of your mind, which is ostensibly an intangible. This intangible is property because you created your own thoughts. Let's test my thesis. Can we separate this ostensibly intangible property from a tangible piece of property? Freedom of the press is the manifestation of freedom of conscience and expression. It takes place in the real world with real printing presses. In practice, it requires private ownership of the physical media—that is, property rights in the media. To bring this home: If the government owned all of the media, we would have a regime of continuous censorship, because the government performs must select the users and then, by force, bar others from using the same physical media.

Your Right To Your Biography

Let's discuss personality property. Privacy rights protect the rights to knowledge of the facts of your own life—that is, to knowledge of your own biography—against public disclosure

without your permission. Publicity rights protect the rights to exploit your own name and likeness commercially—usually in association with a product, such as an actor endorsing a particular brand of soda. Laws against defamation protect rights to your own reputation.

Personality property meets all of the criteria of property and must be protected. First, you created it; you are the author of your own biography by means of your mental activity followed by your actions. You have the right to your own body, and to what it does.... Further, this thought in action creates your reputation, and it is your reputation that makes your biography—the facts of your life—interesting to people, and, conceivably, of economic value. Furthermore, your reputation is what makes your likeness and your caricature valuable for product endorsement. Most important, your reputation is what causes people to want to deal with you.

Further, the protection of personality property is crucial to one's survival. Each person, as we noted [earlier in the Forum], requires tranquility against constant intrusion that can inhibit access to the subconscious and therefore to certain automated thought processes, and therefore to effective creative and productive thought.... If you constantly have to worry that the most secret parts of your life are subject to revelation, you always will be on guard, and consequently you will lose access to certain forms of thought processes. In addition, the protection of personality property provides money for the means of survival: You can sell your story, and again license your name and likeness. And, if you are defamed, no one will deal with you—and survival can become impossible.

How are personality property rights violated? They are violated through physical means—primarily through the media.

Are rights attendant to personality property rights to *action* or rights to a *result*? They are merely rights to *action*: to create the facts of your life and attempt to make them valuable—i.e., marketable.

Personality property is consistent with the rights of others. No one has the right to use another's property without his permis-

sion. No one has the right to reveal—that is, to use—the facts of your life, your creation, your property, without permission. The public, in contrast to what a very irresponsible press has argued, does not have a “right to know”—at least, not a right to know everything. It has a right to the disclosure only of what one wishes to reveal, and only of that which is required for life: for example, whether a certain doctor has a communicable disease.

A claimant to personality property is not initiating force by refraining from disclosing the facts of his life, or by refraining from allowing the use of his name and likeness.

The Scope of Privacy

What is the scope of protection of personality rights? Let’s consider privacy. Rights to privacy... are protected to the point of what you voluntarily relinquish, as is the case with all other property. You can license the right to your biography, to your likeness, and to your name. You can enter the public eye to varying degrees. You can become part of the public landscape. You can act in a way that does not indicate secretiveness. You can become a public figure in the political arena—and your protection will be narrower.

I posit that any reasonable individual can judge what is private in this respect—this is, what is private in another reasonable individual’s life—by asking: Does the subject, the individual, wish it kept private and is this privacy necessary for his sense of tranquility? For example, I pass someone’s home and through an open window I overhear a conversation, the contents of which are clearly personal. If I reveal the content of that conversation, it is theft—in the same way that it is theft if I take an unattended flower pot from the sill of the same window. If I walk onto your real estate without permission, I am trespassing. I contend that if I take a photograph, from my property, of you on your real estate, I am trespassing by means of technology. If you are in the waiting room of a doctor’s office and you overhear a conversation between the nurse and a patient concerning a test result that is due, I contend that you cannot reveal that information, because by entering that doctor’s office you have entered into an implied contract to keep whatever you hear secret. And, as a lead into the next section, I argue that to publish private facts is tantamount to violating the subject’s copyright in his own biography.

Patents, Copyrights, and Trademarks

Do we have property rights in patents, copyrights, and trademarks? The subject matter of these branches of intellectual property is physical embodiments and physical expressions of ideas. Here are some definitions, which may overlap in practice.

A **patent** is the right to the exclusive use of utilitarian creations: that is, inventions of a chemical, biological, or physi-

cal nature. The standard for receiving a patent is: Is the invention novel, non-obvious to one skilled in the art, useful, and reduced to practice? “Reduced to practice” means that a model has been built or that you constructively reduced the invention to practice by filing a patent application, which requires drawings or formulae.

A **copyright** is the right to the exclusive control of artistic and literary creations embodied in any tangible form or medium of expression. This includes books, paintings, music, jewelry, and even software. The standard for receiving a copyright is lower than that for receiving a patent. The work must be original to the extent of being a non-trivial distinguishable variation from what existed previously. A copyright does not bar the marketing of an identical embodiment as long as that identical embodiment, that identical expression—or substantially similar expression—was

created independently. For example, and I know that this example is metaphysically impossible: if someone, somehow, somewhere wrote *Atlas Shrugged* without ever having had access to the works of Ayn Rand, particularly *Atlas Shrugged*, he could market it. He may not be able to market it under the same title, but he certainly could market it.

Trademarks protect the exclusive right to use your brand

name and packaging, and to bar use of an identical or confusingly similar trademark on the same or related goods, if you are the first to use the mark in commerce and if it, too, rises to a certain level of originality.

Protecting Man’s Mind

Is intellectual property actually *property*? And, are rights in it justified? Resoundingly, yes! Man requires property rights to survive physically and spiritually. As we have discussed, if the creator’s rights are not protected, his survival is jeopardized. If another can market his creation, the creator is deprived of the money he otherwise would have earned: that is, deprived of his means of production through trade, and therefore of his survival. In effect, the creator’s personality and the value of his creation to him have been destroyed. If the infringer can market the creator’s property without the creator’s permission, he has substituted his own life for the creator’s life in the marketplace by claiming the results of the creator’s energy, thought, time, and action.

Creation is the criterion of earning, and therefore of ownership. And again, to paraphrase Ayn Rand: Intellectual property rights recognize the paramount role of the mind in the creation of wealth. Intellectual property rights protect the basis of all rights: man’s right to the content and product of his mind.

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Neither man nor the product of his mind is a natural resource. All wealth is produced by somebody and owned by somebody, and all production involves both mental effort and the physical effort to translate the mental effort into material form. A physical object, in the absence of an idea of how to exploit it, has no value. Similarly, an idea not followed by physical concretization has no value. But again, ideas come first.

Technology is the translation of theoretical discoveries into practical form; thus, technology is the ultimate and implicit purpose of man's quest for knowledge. Intellectual property

rights protect this quest. They do not protect the metaphysically given; they protect only the manmade. They do not protect scientific discoveries. They protect only their volitionally created expressions and embodiments. Intellectual property rights do not mandate that people ignore scientific discoveries, and practice falsehoods. They do mandate that people practice truth in an original way.

Justice *demands* that we reward the creator by defending his right to the fruits of his creation. Justice *prohibits* rewarding the infringer by allowing him to diminish the rewards of the creator.... □

At the Institute...

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Stone magazine article (April 6) on libertarianism. The author mentioned Ayn Rand's influence on many libertarians, though he did not explain the difference between Objectivism and libertarianism. The article focused on the Cato Institute, whose president, Ed Crane, is an IOS Advisor. The article also quoted Jay Friedenbergl as the leader of a libertarian student group at the University of Virginia, where he is a graduate student. Mr. Friedenbergl attended the IOS Summer Seminars in 1992 and 1993.

cyberSeminar

A group of graduate students from around the country is working regularly with David Kelley, via electronic mail, to refine their understanding of the content and methodology of Objectivism. Each month, members of the cyberSeminar read and critique either a classic paper of analytic philosophy or a paper written by one of the participants. "Objectivism differs from the main schools of contemporary philosophy not only in content but in method," said Dr. Kelley. "It is important that Objectivist graduate students understand these differences at a detailed, technical level."

The cyberSeminar this year has focused on classic works in the philosophy of language by Bertrand Russell, Ludwig Wittgenstein, and other major philosophers of the 20th century. This topic was chosen because of the clear relevance of the Objectivist theory of concepts for issues pertaining to language.

The cyberSeminar is being provided this academic year on a pilot basis and may be expanded in the fall.

Dr. Kelley to Speak in Chicago

On May 22, Dr. Kelley will speak on "Ayn Rand's Contribution to Liberty" for the Free Market Society of Chicago. The talk is part of a course the Society is offering on *Capitalism: The Unknown Ideal*. Those interested in attending should contact Pat Peterson at the Free Market Society of Chicago, 1-800-446-4429. The following evening, the Heartland Institute of Chicago will sponsor a speech by Dr. Kelley as part of its "Visions of a

Free Society" series. The speech is open to the public and free of charge; it will be held at the Union League Club, 65 West Jackson Street, at 5:00 to 7:00 p.m. The Heartland Institute requests that attendees RSVP at 708-202-3060.

1995 Membership Campaign

Around the time you receive this newsletter, you should also receive the package for the Institute's 1995 Membership Campaign. This annual campaign is our primary source of funds, and its success determines what programs we can offer later in the year. If you have renewed recently, be assured that your membership in the Institute runs 12 months from the time of your contribution, whether or not that coincides with our campaign. For all who are renewing this year, we hope that you will consider renewing your membership at an increased level, if that makes sense given your financial situation and the value you place on our work in advancing the philosophy of Objectivism.

We are also delighted to accept "gift in kind" contributions as an alternative to cash contributions. In the past, such gifts have included printing services, photographic film and developing, early editions of Ayn Rand's works, office supplies, and other items. The Institute acknowledges such gifts by mail, but the IRS expects the donor to determine the gift's value and be able to substantiate it in a form acceptable to them. For more information, contact Donald Heath at the Institute.

Staff and Volunteers

Joanne Phillips, a sophomore at the State University of New York, New Paltz, has joined the Institute staff on a part-time basis. She will assist with the increased volume of administrative work that has accompanied growth in our membership and mail order service.

The Institute is pleased to welcome a new volunteer to the staff of the *IOS Journal*: Debra Cermele is now production editor. Since 1992, Ms. Cermele has been managing editor at The Hatherleigh Company in New York City, a leading publisher of continuing education journals for mental health professionals. □