

Kinsella on Liberty Podcast Episode 208

Conversation with Schulman about Logorights and Media-Carried Property

March 5, 2016

Transcribed by Rosemary Denshaw at rdenshaw@franklin.solutions

[Edited for clarity. – JNS]

Stephan Kinsella: Hey, this is Stephan Kinsella doing an episode of *Kinsella on Liberty*, podcast. This should be number 208. I've got my old friend, Neil Schulman, online. We've actually met in person, haven't we Neil?

J. Neil Schulman: Yeah. As I recall, it was at Libertopia a few years ago.

Kinsella: How are you doing?

Schulman: I'm doing well. How about you?

Kinsella: It's all right. Today is March 4th, 2016. You and I have known each other for maybe, what, 30+ years now?

Schulman: It's been a while. And I must say a lot friendlier now than we used to be.

Kinsella: Well, in the beginning it was friendly. Remember on the GENie Forums in the old days before the internet?

Schulman: My God, I didn't remember that we met on GENie. That goes back to the early 90s.

Kinsella: Yeah, that's where I sent you the review of your *Heinleiniana* book.

Schulman: Oh yes, yes. And it's one of the many interests we have in common.

Kinsella: Yeah, Heinlein. Of course, you knew him better than I did.

Schulman: Well, I was very lucky to be able to interview him for the *The New York Daily News* which led to our meeting and subsequent friendship.

Kinsella: Right. Right. Well, I think we're friendly when we're not threatening to convert each other to IP socialism. It depends on our definitions.

Schulman: Actually, it's amazing how much we agree on. And there's just one bone of contention which has occupied 90% of our energy.

Kinsella: Yeah and probably it's only because, as I have dug into this IP issue over the years, I get more and more into meticulous details because I keep seeing what I think are the errors that cause some mistakes to keep being perpetrated. So I get more and more into minutiae, but anyway.

Do you remember a few years ago, I think I dug up the old information and got the tapes from someone, from that IP debate you had done with Wendy McElroy back in like '83 I think, right?

Schulman:

Yes. And that was my first entry into this controversy.

Kinsella:

And I think Wendy's was '81 with some newsletters in California and then '83. So I really think the modern debate on this started around then, to be honest.

Schulman:

Well, actually for me, it went back even further in time because I was part of the close circle of Samuel Edward Konkin III and his magazines: *New Libertarian Notes*, *New Libertarian Weekly*, *New Libertarian* and various other publications. And of course I was also good friends with Robert LeFevre. Both Sam and Bob LeFevre were opposed to the idea of state copyright and state patents. And where I was coming in was a very early attempt to justify not statist concepts, being an anarchist, an agorist, I'm opposed to that, but to see if there was a natural law and natural right for these things, for a concept of ownership of content which existed only as what today I now call media-carried property, but back then I called logorights.

Kinsella:

Well, but...

Schulman:

The idea being that something didn't have to be made out of atoms and molecules in order to satisfy the requirements for a copyright claim. Now Sam allowed copyrights for individual writers in his publications. So he was not so opposed to it that he said, no, it has to be without copyright. And at that time, I don't even think there were creative commons licenses to enter the discussion.

Kinsella:

Well....

Schulman:

And Bob LeFevre, while he was opposed to copyright, he actually endorsed my concepts of logorights as worth considering, beginning right after my debate with Wendy McElroy. I would say that if I were to boil it down to my position today, is that I am not so much discussing the question of intellectual property, or ideas as property, two concepts which I reject out of hand, but that I am exploring that property itself is an intellectual artifact. And as I posted on your Facebook wall today, I think that it comes closest to being an intellectual artifact of contract law. Whether or not, as you posted, contract law is a subset of property law or whether property law is a subset of contract law, is a debate I don't think is really worth spending a lot of time on. But I do think that property itself is an intellectual concept which falls under both a discussion of legal rights and a discussion of natural law and natural rights as libertarians would understand

it.

Kinsella:

Yeah. Before we get into your theories, let's talk a little bit more about the background because I think we have another thing in common. Maybe you would agree or not on this, but my suspicion is you had – I know you had sort of a Randian approach to some issues in your libertarianism and you also were, and are, a writer and a successful career writer, right, a novelist. So you had an interest in trying to find a way to justify something that you had like a financial interest in, right?

And I did, too, in a way because I was a patent attorney and I still am. That's one reason I started searching as well. And the reason I was searching was because I found Ayn Rand – she influenced me early on. And one of the arguments she made that never did persuade me was her argument for IP. Something about it was just not like her other arguments. It was sort of arbitrary and utilitarian. It just didn't make sense like her other arguments did. But I was going to do patent law and copyright law for my career and I'm a libertarian. So I started thinking let me find a better solution for this. So I was searching as well. It's just you came up with logorights and I came up with skepticism.

Schulman:

It's ironic that you as a patent lawyer are probably one of the leading scholars today opposed to the very field you are operating in, which is patent law. But, in my case, I think you have the cause and effect reversed. My being a writer was not the reason why I felt it worth pursuing. It was my interest primarily as a libertarian natural law/natural rights believer which led me to this. And, in fact, I would say that I was probably more influenced by Robert LeFevre's approach to property rights *per se* than I was to Ayn Rand's.

Kinsella:

Okay, I accept that. But you would admit there is, there tends to be some correlation. I tend to find...

Schulman:

Well, let me let you off the hook by saying that in my original article, *Informational Property: Logorights*, I did quote from Ayn Rand because I found that parts of her argument were expressive, but in terms of the basic theory of property which I was pursuing,

I thought that Robert LeFevre made a more comprehensive case.

Kinsella:

No, but what I was going to say it seems to be no coincidence that there's a disproportionate number of libertarian novelists who happen to support copyright, just like almost all patent lawyers happen to support patent and copyright. Do you follow me? I don't think it's quite a coincidence.

Schulman:

But you see, it seems to me that that's starting off with, if I may use a term that Ludwig van Mises liked a lot, paralogism. In other words, it transferred the argument from a debate of the merits to a debate on the motivation of the people who are arguing it.

Kinsella:

Yeah, I don't mean to argue substance by psychologizing, but I do find psychologizing fun sometimes. I can't deny it. And I do think that at least, at very least, we should be aware of our biases and try to be sure that if you're advocating something that happens to be in your favor, that you have good reasons for it anyway. But, of course, the arguments stand on their own merits I think.

But, by the converse, I get attacked quite often for being an IP lawyer and for opposing it as if my arguments, if they were correct, is as if you wouldn't expect an IP lawyer to be one of the people that would recognize that. I mean it's possible to actually know something about the field that is unjustified and corrupt and to come to those conclusions, even though it's not in your personal, immediate interest.

Schulman:

Well, look, just switching to somewhere else just as a for instance, because what I'm noting is not what I call hypocrisy but merely irony, okay? I'm saying it's ironic. Wouldn't you find it at least ironic if you had a medical doctor, an obstetrician, say, who said that he was opposed to abortion who then, as part of his practice, performed abortions.

Kinsella:

Yes. In fact, I think that might be hypocritical. It could be. But, first of all, I don't think there is anything wrong with pointing out irony any more than psychologizing, it's kind of interesting—and it may be ironic. I don't think it happens to be ironic. Let's suppose that there is a healthy difference of agreement among the population as a whole or among academics or scholars about IP; 30% to 70%, whatever. I don't know. I mean it would be ironic if some percentage of patent lawyers didn't take that side, that if

everyone *automatically* agreed with it. As for the hypocrisy or the irony issue, it would be more ironic if I were out there *suing* people in the name of IP. So I agree that would be more difficult. But if you understand the way...

Schulman: Then let me establish this. I have never filed a lawsuit on behalf of any of my literary rights.

Kinsella: Right. No, I understand that because most copyright holders don't have those scruples. You have your anarchist and your voluntary scruples. So that tamps down the excesses that people might otherwise go to. So I understand that.

Schulman: Let me also make clear, let me also make clear, that in practice, when I have opposed pirating of my rights, I've only done so vocally in instances where I felt that it was damaging to a third party.

Kinsella: Right. Like more of a fraud type argument or something like that?

Schulman: Well, not even fraud. But let me give you an example. There was supposedly, I'm not sure, and I'm being told now that this never happened, but there was a representation that there was going to be a pirate screening of the *Alongside Night* movie at PorcFest to compete with the official screening that I went to a lot of trouble to sell at a movie theater...

Kinsella: Right. I heard about that.

Schulman: ...nearby Roger's Campground. Okay? And I was upset about it because the whole purpose of the screening was set up as a fundraiser for the Free State Project. And so, I felt that a pirate screening competing with a fundraiser for the Free State Project was damaging to the Free State Project and that upset me.

Kinsella: I understand that. Of course, that has nothing to do with the validity of copyright or even logorights, but I understand.

Schulman: Right. And, again, all of this is sort of like, as I say, paralogia. It's an interesting back to discussion, but really it doesn't speak to the actual question of whether under a general theory of property rights which I maintain is a moral and a legal construct. It's a subset of a theory of natural law leading to natural human rights. That I consider property rights to be primarily an ontological and moral issue. And then you get to it as a legal issue.

But let me start by conceding to you that, as I observe it right now, the mainstream position of the libertarian movement, as I perceive it, is anti what they perceive as artistic rights in things which are not physical objects.

Kinsella: Okay.

Schulman: So, in essence, I'm fighting an uphill battle, a battle in which you have the high ground, the strategic high ground.

Kinsella: Well, I understand that, but I think there's also, especially among anarchists, right, we are generally skeptical of existing statutory schemes. And so someone like you who supports some kind of, I don't want to call it intellectual property. You call it informational property or now material-carried property and we can get into the details in a second.

Schulman: Media-carried property.

Kinsella: Sorry, media-carried property. You shouldn't be in the position of having to defend the existing patent and copyright system.

Schulman: No and I find it frustrating that most of the vitriolic attacks on me assume that I am supporting what is being portrayed as a monopolistic grant of privilege from the State. In my very first debate with Wendy, I started off by saying if the concept I was putting forward could not be defended other than as a monopolistic grant of privilege from the State, then I would immediately abandon it.

Kinsella: Well, but the problem is, I would say, and see if you agree with this, the vast majority of pro-IP libertarians would oppose the abolition of patent and copyright, at least until we could replace with their ideal system. So they do not have this abolitionist view towards...

Schulman: And this is where I go into my usual spiel about how I don't think that any kind of property, if there is in fact a property, that there should be – there's a statist phrase, but it's a legal term of art, mostly a sunset.

If you're going to say that a copyright is statist, then why isn't a deed from the county clerk just as statist? And if you're going to say that we need to abolish now one, why not the other?

Kinsella: But you see, then I see that you're trying to have that both ways because you act, on the one hand, like you're not in favor of defending the existing patent and copyright system, but when someone calls for abolishing it, then you sort of say, well, if we abolish that, why not abolish real property titles?

Schulman: But that's the thing. Presumably you drive a car which is

registered with the Department of Motor Vehicles in which you're not allowed to operate without that license from the State. And presumably the land deed issued by your county is in the same situation, if you are in fact a homeowner. Or, if not, at one remove as a renter from somebody who does have property which has a deed issued by the county. I just don't see the difference.

Kinsella:

Okay. Well, so the problem I have with that argument, that analogy, is you and I as libertarians don't have much disagreement on the basic notion that there ought to be property titles recognized in scarce resources like land. We oppose the state from monopolizing...

Schulman:

Well, scarcity is only one of the things.

Kinsella:

Okay.

Schulman:

And I don't see scarcity as absolute as I discuss in my article, *Human Property*. Scarcity is not absolute. I'll refer people to that article rather than repeat myself.

Kinsella:

Yeah and I'm going to link to it in the podcast. I have all the links. I'm going to those. I'm just trying to pick something uncontroversial. We both agree there should be property rights in land, right?

Schulman:

Yes. I'm not a Henry Georgist.

Kinsella:

And the basic function of the existing property title records offices in the counties around the country is to just keep track of that. Now we oppose the State monopolizing the function, but it's basically a correct function, a libertarian function. You can't just leap from that and say that similarly the copyright system does something crudely but it does a similar function because, well, for several reasons. We don't agree that these kinds of things should be property. That's what we dispute. And the property title system itself is not terrible, the way the State runs it. It's just that the State has the right to come in and seize your property because of imminent domain.

Schulman:

Okay. Well, you see here we can get into another agreement immediately. I think that the way that the laws have been lobbied by large corporations to extend and protect their claims of copyright and patent are egregiously anti-property rights. For example – I will give you one example in patents and another in copyright. What Monsanto did in suing farmers whose crops were invaded by Monsanto's seeds from adjoining property...

Kinsella:

Patented seeds, right.

Schulman:

...and then sued the small farmers who had no ability to legally defend themselves against this mega-giant corporation, I think is one of the most horrific misuses of patent law that I can imagine.

Similarly, the way that corporations such as Disney have taken things that are traditional fairytales and copyrighted them and then aggressively attacked people who wanted to use this stuff which originated long before Disney got to it and sued the heck out of them to restrict their doing so, is equally egregious. Getting images and taking paintings which hang in the Louvre and then pursue claims against people who reproduce them, things that go back hundreds of years, is similarly egregious. So if you are looking for Schulman to agree with Kinsella, that the way that the State handles this is egregious, we have no disagreement.

Kinsella:

Well, let me disagree a little bit about on that. I wouldn't, I mean this is a quibble, but I wouldn't call it a misuse at all. And I wouldn't blame Monsanto and Getty. I mean maybe they're immoral, but they're using the legal rights the system gives them. In every one, all three of the cases you mentioned, you can explain why what they're doing is basically supported by the copyright and patent systems. What they're doing is totally legitimate.

Schulman:

And I'm not going to disagree with you, but that is the problem with all statist law. None of it supports a pure libertarian concept of property.

Kinsella:

Right.

Schulman:

And, in fact, one of the historical reasons why libertarians have opposed such law is that they started out with grants from kings and other royalties. So there is an historical parallel that the development of this body of law was corrupt going back to its root. But, to me, that is an artifact of statism itself. In other words, I would say that, in fact, the Robin Hood story of how you have the king's land being poached on, okay, is just as much of an argument not to have privately held land as the argument for grants of privilege from kings being one of the earliest uses of artistic creation. It's equivalent. In other words, the problem here is not that we don't have something which deserves to be treated as a property right. The problem is we have the State.

Kinsella:

I don't think that the argument that IP is unjust is the same as

arguing that current property rights and land are unjust because of some corruption back in the old days because we all agree there ought to be property rights in land and we have to have some system for determining who the best owner is. So that's not really controversial.

Schulman: Hold on. You can't say that we all agree.

Kinsella: All us libertarians, yeah.

Schulman: There are, in fact, communists who don't agree.

Kinsella: Well, you and I agree, okay? You and I agree on the land issues. That's one difference. The other thing is, if someone asks a libertarian, well, what would roads be like and would land title registry be like in a free market, we would say, well, it would be similar to what we have now. You'd have roads. It's just they'd have private owners and that would have different economic effects in how they're run and all that. We would have land title records.

Schulman: If you go to Cato and Reason, you're going to find scholars who found out that some of the earliest highways and turnpikes were, in fact, privately created. Then you get to the long history of the railroads where you have all sorts of statist interference.

Kinsella: But my point is you could use some of the existing common law based and other systems that we have as a rough model to what the libertarian system would look like, but it would be better. But you cannot say that. So in terms of IP, I could give 50 or 100 or 1000 examples and you might call them misuses of the system. I would just say this is just the implications of the current substantive law of patent and copyright that the State has created and you would probably agree with me on every one of those.

Schulman: I will immediately concede your historical point. What I represented in 1983, beginning with my debate with Wendy, is that I was putting forward a new natural rights theory that did not have an historical base.

Kinsella: Right. I understand. So let's get to something a little bit...you and I have gone back and forth over the years, mostly in writing. One reason that I just pinged you today was I was talking with another gentleman and he was questioning the IP issues and we were talking about it. And I was trying to explain something to him. And I made the point, which is my view, which I don't know if you completely agree with, but I was arguing that, look, one of the fundamental mistakes in the IP argument, or in your logorights argument I believe, is this idea that you can own an attribute or a characteristic or a feature of an object separate from the object itself, okay? And then I said...

Schulman: And that...

Kinsella: Hold on...

Schulman: And that comes directly out of Robert LeFevre's theory of property.

Kinsella: Okay, it may be. It's also somewhat of an implication of Locke. I think Locke was confused on his labor comments, etcetera, but, and then I said actually that Schulman has modified his logorights characterization. You call it material-carried property, right?

Schulman: No, media-carried property.

Kinsella: Sorry, I keep messing it, media-carried property. And I said, so basically, you view it the same as I. You just have a different conclusion. That's why I said, well, let's just talk about it. And let me just summarize quickly what I think the mistake is and you can tell me where you think I'm wrong or what I'm missing.

To my mind, if you own an object, and that's the media, that's the physical thing that is owned, that is always impatterned with some information or some attributes. And, in fact, the information cannot be a free floating abstraction. Information to exist and to be perceived and to persist has to be embodied in some media. Wouldn't you agree with that part?

Schulman: Yes, but let me tell you where I think you're going where I think that you're not seeing what I'm seeing.

Kinsella: Go ahead.

Schulman: In my view, something intangible can't be owned, okay? For something to be own-able, it has to be something observable in the world and it has to be distinct and definite. Now the question which I pose, which you said that you agreed with my formulation...

Kinsella: No, I don't agree that is efficient. That might be necessary.

Schulman: Let me get this out as concisely as I can.

Kinsella: Alright, go ahead.

Schulman: If you have an alphanumeric sequence which retains its material identity, in going from physical object to physical object, and is a commodity separate from the things on which it is carried which give value, trade value, to the objects on which it is carried, but it is transferrable one from physical entity to another, I maintain we have now identified an object, a thing, something observable and distinct in the real world, which is in fact a property separable from the objects on which it is carried.

Kinsella: I got it but what...

Schulman:

The example I gave in my debate with Wendy and have used ever since is you buy a book with the title *Atlas Shrugged*. You take it home and start reading. And what you read is, “It was the best of times. It was the worst of times”. *A Tale of Two Cities* by Charles Dickens. It’s not the same novel.

But if you’re a reductionist saying that what can be owned can only be a physical object, then you have something which -- for the sake of argument-- has the same number of pages, has ink impressions, has the same binding. And so, if you were going to reduce it and say that only a physical object can be owned, then the question arises: did you get what you paid for? If you say yes, okay, then you have now eliminated the possibility of a novel being an existent, a thing, an entity; not an existent so much as an entity. You’re saying that it cannot be a thing.

But if you’re saying that you’re entitled to the composition of words of *Atlas Shrugged* and not of *A Tale of Two Cities*, then you’re saying that the composition of words, the alpha-numeric sequence itself which is separable from the thing on which it is carried, the immediate carried property is the economic good which is being created. And therefore you have an economic good which is a thing separable from the media on which it is carried.

Kinsella:

I get your chain of reasoning. Let me see if I can summarize it. You tell me if I got it right. You start off with the presumption that if you can identify something as an existent, entity, as a thing, as you call it, something that is – what was your word? Specific and definite? You’re presupposing that that is sufficient for ownership. Like as long as something is specific and definite and you can give it some kind of ontological category or name and call it a thing, and especially if it is valued in commerce and therefore it’s a “commodity”, which I guess is only economic goods, not other kind of goods, then that’s sufficient for ownership. I just don’t see the argument from the.....

Schulman:

No, I would say necessary but not sufficient.

Kinsella:

Okay but...

Schulman:

There are other things. And in my original debate with Wendy and then in my subsequent 1983 treatise, *Informational Property: Logorights*, I go through a whole bunch of other things that are necessary, but they’re the same sets of questions that have to be satisfied for any other claim of ownership.

Kinsella: Well, the way you just stated it though, you only specified what was sufficient for ownership. I'm sorry, what was necessary for ownership, not what was sufficient. Just because...

Schulman: No, I'm saying that I've identified a category of things that can be owned if the same questions can be answered in the affirmative that you would have to answer for any claim of ownership of anything else.

Kinsella: See, I just don't think, to me that doesn't make sense for several reasons. Number one, I tried to give you an example in writing today, just as a pure contract situation. You could have a contract and the concept of fraud even if you want. You don't have to bring fraud into this, just contract. Contract theory and property rights alone explain why you're not getting what you asked for when you get the book that has the wrong pattern of information on it. In other words, if I give you money conditioned upon the book having a certain pattern in the book, and I don't get that, then the money that I paid you didn't transfer to you because it was conditioned upon a certain...

Schulman: Well, you see, it doesn't have to be fraud. Look, I'm a book publisher, okay? And I have in my possession an accidental artifact of a book which I received from Lightning Source. The cover is the cover of my novel, *The Rainbow Cadenza*, but the interior of the book is volume one of Robert LeFevre's autobiography. Now there was no deliberate fraud when this was manufactured...

Kinsella: Let's forget fraud, right. Let's just assume it's a contract.

Schulman: I'm not making a legal argument so much as I'm making an ontological argument. I'm saying that if, in fact, the composition, the alpha-numeric sequence in this particular case is different, then you have a different thing, a different commodity.

Kinsella: Right. But the different commodity is the physical book which is different than another physical book because of the way it's mpatterned. The question is can you own the attributes of the book in addition to the book itself. That's the question. Can you own...

Schulman: Well, this is the case even when there were no copyright laws to be enforced. In fact, you can argue...look, I will tell you right now that the argument you're making is one which is generally accepted by the film and television industry. The Writers' Guild treats writing as if it's an act of labor, but they're much less specific on whether the labor produces something which can be owned. And I'll tell you that this is something which the Writers' Guild calls separation of rights. In other words, if I as a screenwriter were to write for, let's say, *Gunsmoke*, it's a work for

hire because I'm basically creating new stories based on existing characters. But when I write an original episode of the *Twilight Zone*, an anthology series, they say I have separated rights unless it's a remake of an earlier *Twilight Zone*, such as the 1980s *Twilight Zone* that I worked on; remade some episodes from the original *Rod Serling Twilight Zone* from the 50s and 60s.

So, if I were the writer, who was creating a new script based on an original script by Richard Matheson or Charles Beaumont or Rod Serling, then there are no separated rights because it's a work for hire. But if I create an original script with original story, not based on that, then there's a separation or rights.

Kinsella: Yeah, but these are just legal terms based on current copyright. I don't really see how that's relevant.

Schulman: These are legal terms of art.

Kinsella: It's not really relevant to what we're discussing, philosophy of what natural property rights would be. I mean you wouldn't have all these arcane arrangements.

Schulman: I am arguing, first of all, that all property exists only as an intellectual artifact. And where I make this argument the most concisely is in my essay, *Human Property*.

Kinsella: But didn't you just say earlier that you don't believe in property in intangible things?

Schulman: Nothing found in nature is property. That it is basically a human intellect which creates the concept of property itself.

Kinsella: Well, that's true. But you could say human desire creates it too, but that doesn't mean desire gives rise to property rights absent other features.

Schulman: No, but what we're talking about is how human beings interact with each other. Unlike non-intellectual animals, we do it on the basis of intellectual construct.

Kinsella: Okay. Let me try to summarize a different way to look at it and get your take on this. It seems to me like your argument is basically this. You want to say, look, here's a book. There are two books that look identical on the outside. They have different patterns on the inside. You would be upset if you wanted one and you got the other. Therefore, it's a commodity or some kind of economic good. And because it's an economic good, that shows that the pattern, the logos as you call it, is an ontological thing that has existence.

Schulman: That's my argument.

Kinsella:

I don't disagree with that as a philosophical exercise. It's just that you want to leap from that to saying, aha, because I've identified that there's a thing that has ontological existence, therefore it can have an owner. That, to me, is the entire mistake you're making because you haven't shown that that's ...

Schulman:

...I approach this a number of different ways in my original *Informational Property Rights*, 1983, article. And one of the ways I approach is a reduction ad absurdum, using praxeology. In my reply to Konkin, his article, *CopyWrong*, I basically deconstruct several of his premises in which I show using Austrian economics, a praxeological approach, how, in fact, if you eliminate that concept, then you basically run into the contradiction of saying that that which you are arguing about doesn't exist.

I think that it is not a coincidence that literary contracts, regardless of whether we're talking about copyright or not, refer to something as the work. In other words, it's a noun.

Kinsella:

Because that's how the copyright statute defined it that way.

Schulman:

It's not arguing labor. It's arguing that there is a thing that is being traded called the work. It is referred to in the contracts granting rights, which I have signed, there is a term of art called the work.

Kinsella:

That's just how it's defined in the copyright statute.

Schulman:

I am saying that is a thing which is, in fact, being traded or licensed in the same way that there is a right of occupancy which is being traded in a rental agreement for a car or an apartment.

Kinsella:

Well, okay. So the copyright statute defined that term work and that's why contracts use it now.

Schulman:

The copyright statute is beside the point as far as I'm concerned.

Kinsella:

I don't think they would use the term work if not for the copyright statute.

Schulman:

We're talking plain language.

Kinsella:

But they wouldn't use that word if the copyright statute hadn't introduced it and defined it. That's a new innovation.

Schulman:

I'm not sure that that's true. In other words, what you're arguing is which is the cart and which is the horse and so am I. And I'm maintaining that there is a common sense observation in these contracts which would survive the demise of the State and its admittedly mucked up copyright laws.

Kinsella:

Well, let me ask you this. Would you agree with me that your argument to work, you need to show that something having ontological existence is sufficient for there to be property rights possible in it? Don't you think you need to establish that?

Schulman:

I think that given that you need to establish the same boundary issues that you would with other forms of property and contracts, that, yes, it qualifies as being entered into the running as a possible type of property.

Kinsella:

My point is you have to show it though. That is a presupposition of your argument, that establishing that something is an ontological existence, is an existent, is sufficient for it to be ownable. You have to prove that.

Schulman:

It is necessary to qualify it for the debate on whether or not it is a property.

Kinsella:

I mean, my view on this, I'm very Randian in my epistemology, my concept theory. I just think what you're doing, is you are doing reification on this. You're conflating the efficiency and the usefulness and the practicality of certain concepts with calling something existing and then leaping to the point where it can be owned.

Like, so for example, I think the concept of love is a valid concept. It has a referent in the world. You can say there is love. But just because we have identified an ontological type of thing that exists, love, doesn't mean it's a type of thing that can be owned. You have to do more than establish the validity of a concept to show that the referent of the concept is an ownable thing. I mean we have time. We have motion.

Schulman:

I agree with that, but that, in fact, when you're identifying something which exists...look, love is something which is an expression, okay? And it is something which may be observable in human behavior but it is not something which you can identify as existing outside of human behavior in the way that an alpha-numeric sequence is. I maintain that an alpha-numeric sequence is, in fact, a thing.

Kinsella:

Hold on a second. Earlier you said...

Schulman:

An array of photographic frames is an observable thing in the real world.

Kinsella: Not outside of human...you said earlier that property doesn't even exist, right?

Schulman: Just in the real world.

Kinsella: Hold on. You said property doesn't even exist outside of human intentions and human subjective evaluation. So how could alpha-numeric sequences in something called a movie exist without regard for human intention?

Schulman: Okay, because thingness is one of the necessary, but not sufficient, conditions for a claim of ownership. Ownership is about action and intellectual creation of identity and...look, I would say that the identity exists independent, the thing exists. This is why it's both an ontological and an epistemological question before you get to the moral and legal questions. What I think that my work has done is establish the ontological and epistemological basis for these media-carried objects to be identified as ownable in the same way that other things can be ownable according to the general common sense principles of contract.

Kinsella: No, I understand your general thrust, but you seem to be agreeing because you say it on occasion. You seem to be agreeing with me that "thingness," which is just another way of saying something exists. Or in my view it just means it's a valid concept. Thingness is a necessary but not sufficient condition. That's why I keep saying...I just want to make sure you agree with me...

Schulman: Yes, that's what I'm saying.

Kinsella: But you need to...

Schulman: Necessary but not sufficient. But the sufficiency is by applying the exact same question that you would for any other claim of property.

Kinsella: Yes, I understand. We don't have time to get into that, but in your argument, in your logorights article and, I think, in your...what's the other, *Human Rights*? What's it called? *Human Property*?

Schulman: Property.

Kinsella: Yeah, in that one I think you try to give reasons why you think it is sufficient. I don't agree with you on that, but I think that's really the crux of our disagreement. But before...

Schulman: Can we at least come to the point where you think it is debatable, within the realm of possibility?

Kinsella: Honestly, I don't, Neil. But it's only because I've thought about it so much and I can see no way that you can own the characteristic of an object without that being a universal that gives you property rights in other people's owned resources. In

other words, to my mind, information...

Schulman:

And here's where I'm saying that the defining distinction, which makes it possible, is that it is something outside of one human being. It is something that now exists in the world. At the point where it exists in the world, separate from the person who brought it into existence, now you have something real.

Kinsella:

Let me ask you this. Is your view here, is it Platonic or mystical at all? Because I know you're a little bit mystical, more than I am, on some spiritual issues. So does this view, because it seems to me...

Schulman:

Back in '83 when I was making these arguments, I was an atheist.

Kinsella:

I'm asking about now though. I understand. But do you think there is anything mystical or Platonic about what you're saying? You seem to envision these...

Schulman:

Only in the sense that Ayn Rand used the term spiritual.

Kinsella:

No, I don't mean that. I mean it's like you're envisioning the separate sort of ghostly existence of these Platonic objects that are out there, independently ontologically separate from the...

Schulman:

I don't accept Platonic metaphysics.

Kinsella:

Well would you agree that information has to be...hold on. Let me ask you this.

Schulman:

Let me say this. I have made the argument that there is no such thing as a virtual reality, that either something is real or it isn't. You go back to the movie, *The Matrix*, okay? And in fact there were these bodies....

Kinsella:

Yeah, yeah, yeah, of course. There's always an underlying media or underlying....

Schulman:

That was a reality.

Kinsella:

Yeah, there is a substrate. I understand. I agree with you on that. But my point is, wouldn't you agree that information, these alpha-numeric sequences you're talking about, they're always embedded in some substrate or some media. They have to be just the impatterning of a thing. Wouldn't you agree with that?

Schulman:

Yes, yes. And that's why I talk about media-carried property. And the question is whether or not there is something separable which can be transferred from physical object to physical object to physical object. And that is the distinction which makes it a thing in and of itself.

Kinsella:

Well, let's forget about whether it's separable. Let me ask you this. If all information has to be embodied or impatterned in a media, don't you agree the media has an owner? That physical

thing that is the media has some owner.

Schulman: Yes. And the ownership of that can be separated from the ownership of the thing which is carried.

Kinsella: It can be. I suppose it could be. But how does the fact that someone writes a novel give them the ability to control the media that other people own?

Schulman: Because there is a thing being carried for which property rights have not been transferred.

Kinsella: Hold on, hold on. Give me thirty seconds. Hold on. Neil, hold on. I've got to answer the door. Hold on thirty seconds. Neil, thirty seconds.

Schulman: If you book a ride with Uber, your claim to a ride is a usage which is separable from ownership of the vehicle.

Kinsella: Neil, sorry. I had to answer the door. Sorry. Go ahead.

Schulman: I'll repeat that because I don't know if you heard it. I'm saying that it's separable in the same way that if you book a ride with Uber, what you're buying is a use, but you're not buying the Uber vehicle itself.

Kinsella: Well, I agree some things are separable, mostly by contract or by co-ownership arrangements. But that doesn't mean that you can control what other people do with their property unless you have a good reason. I go with the Lockean and Rothbardian theory of property.

Schulman: Hold on. You're making an assumption. You're begging the question. You're saying you're restricting what other people can do with their property. I'm maintaining that what is being argued over is, in fact, what is not being transferred to somebody else and what they cannot do because it is not their property.

Kinsella: Well, but there is not always a transfer. So, for example, let's take the patent case. Okay, if you claim a property right in being the owner of this mousetrap design, alright? Now if I am toiling away in my garage with my own wood and steel, my own substrate, and I configure it into a certain shape, you can use the patent system to tell me I can't sell that. I can't even make that device. Now where was the transfer?

Schulman: You know, Stephan, I have to say that over the years I have become a lot less sanguine over arguing about patent rather than copyright.

Kinsella: Okay.

Schulman: I think the case for a patent is a harder case than arguing for what I've been calling media-carried property.

Kinsella: Well, let me do kind of a lightning round with you because there's some things I want to talk to you about because you know a lot of things about the history and Konkin and these things. Not to dwell too much on them. Let me just get your take on some things.

Number one, let's just stick with copyright, because you think that is some rough system that approximates something like, might, could exist in a free society. Do you think that the time limits on copyrights should be finite and arbitrary or perpetual?

Schulman: I think that for media-carried property, you ask the exact same question that you would for ownership of any other kind of property.

Kinsella: So the problem with the copyright system is that it expires at about 120 years. In your view, it should last forever.

Schulman: Yeah, but again you're talking about a statist defined system.

Kinsella: I understand but one defect of the system is that...

Schulman: They could also arbitrarily say that land ownership ends with death and can't be carried....

Kinsella: I know. I just want to get you on record and see what you think. I mean you do realize the original copyright act was about fourteen years.

Schulman: All I'm saying is that when approaching this question, I think you need to satisfy the same requirements that you would for ownership and transfer of any other kind of property.

Kinsella: Are you aware, by the way, that Jefferson, when the Bill of Rights was being considered, he wrote a letter to Madison and he proposed...because at that time the copyright clause was already in the Constitution, right, 1789. But for the Bill of Rights, Jefferson proposed amending the Bill of Rights, or adding a provision to the Bill of Rights saying that the State can grant these monopolies, by which he meant copyright and patent, but only for x years. So he wanted to put a time limit in there. You know, probably fourteen years.

Schulman: Jefferson, like Locke, was taking a utilitarian approach. I'm not. I wrote an entire novel, *The Rainbow Cadenza*, attacking the concept of utilitarianism being sufficient to come up with fairness. I'm an absolute believer in theories of natural law and natural rights. And I would say that would separate me from Jefferson and Locke.

Kinsella: So in your system, you couldn't even publish the Bible or Shakespeare's plays or Homer's works without getting some permission from some long lost descendent down the line? You

would have to permission for everything. There would be a complete permission culture for all ideas.

Schulman: Well, I mean, again, I expand the question to every other sort of property.

Kinsella: So that's a yes.

Schulman: In other words, do we need to get permission from the heirs of the Roman emperors before we can take a tour of the Coliseum?

Kinsella: Okay. So let me ask you this one about Konkin. You mentioned that he didn't oppose people using copyright, or in some cases, and LeFevre either. I mean, of course, I don't either. I've gotten copyrights on my works and used it before....

Schulman: Sam did not copyright his own works and Robert LeFevre did not copyright his own works.

Kinsella: Well, you realize that copyright is automatic. So that is actually not true. They do have copyrights in their work. As soon as you write something, you have a copyright.

Schulman: Well, according to the State. But, I mean, are we...these are two people who did not recognize the authority of the State to define these questions.

Kinsella: Well, but they had copyright in their works, whether they wanted it or not.

Schulman: According to the State but not according to their own preferences.

Kinsella: Well, yeah, but someone couldn't, someone can't go publish one of LeFevre's books right now without getting permission from someone, even though LeFevre himself might have opposed copyright, unless he put some kind of license...

Schulman: That would be the case if it were an unpublished work. Then that argument could be made. In fact, I will tell you where this arises in a practical sense. As far as I know, the only copy of the manuscript for Samuel Edward Konkin III's *Counter-Economics* is in the hands of Victor Komin. Victor Koman has published other of Sam's works which were first published when Sam was alive. And Sam explicitly published them without a copyright.

Kinsella: No, that's not true. You can't publish something without a copyright.

Schulman: The legal rights to this are held by the Konkin estate which devolves upon Sam's brother, Alan Konkin in which Alan has made me the literary executor. So Victor is in the position of

having the only manuscript, the only physical manuscript which he refuses to provide to the estate. But he cannot legally publish it himself...

Kinsella:

Correct.

Schulman:

...without permission from the estate.

Kinsella:

Right. Well, this is just the kind of bizarre logic that comes from any type of IP system, I believe. You can blame the State's copyright system but I think it's just the logic of copyright. You're going to get these absurd and obviously unjust and obscene results. It's just an inevitable part of separating the idea of ownership from scarce resources.

I wanted to ask you. You mentioned earlier that in your earlier arguments you tried to rely on praxeology to support your case. I think praxeology....

Schulman:

In my original 1983 article, *Informational Property: Logorights*, Sam makes what he represents as a praxeological case and so I responded with a praxeological case.

Kinsella:

Right. And then what I was going to say is I think that praxeology, especially Mises' version of the Austrian economics, is absolutely crucial, and indeed essential, to getting these issues straight. But I think it points in the other direction. I think that praxeology, basically, regards human action as the employment, right, the conscious, purposeful employment of scarce means to achieve something in the world, guided by knowledge. So praxeology views human action...

Schulman:

Let's start out with the first premise of Austrian economics which I almost parodied in the first line of my novel, *Alongside Night*. Mises argues human beings act to remove self-unease.

Kinsella:

Correct. That's their purpose. That's their motivation, right.

Schulman:

First line of the novel: "Elliot Vreeland felt uneasy the moment he entered his classroom".

Kinsella:

Right. And I think that's a brilliant aspect of praxeology but it only goes to the motives or the purpose. What human action is is the employment of scarce means, which you can call scarce resources, guided by knowledge. So there are two important components to successful human action. One is the availability...

Schulman:

Mises then goes on, through a whole series of deductive derivations on that premise.

Kinsella:

I know. I'm just focusing on the bare structure...I just want to get your take on this okay? My argument is very simple. And I

think Mises is right. When we act in the world, we're trying to achieve an outcome, right, to remove felt uneasiness or to achieve something at the end of the process, but we do it by employing scarce means that are causally effective in the world and we do it by using our knowledge to decide what to do. So you have to have knowledge and you have to have scarce means.

Property rights apply to...

Schulman:

But you see, again, and I think that I made this argument in one of my other articles responding to that video, *Copying is Not Theft*.

Kinsella:

By Nina Paley.

Schulman:

I responded to that...I think it's linked in an article called *The Libertarian Case for IP*.

Kinsella:

But I'm just trying, hold on.

Schulman:

I'm basically saying that scarcity is itself a limited concept. In other words, that it is a relative concept...

Kinsella:

But what do you...but hold on...

Schulman:

That there is no requirement for absolute scarcity. It merely needs to be scarcity within a particular context.

Kinsella:

But what do you mean when you say you're opposed to intangible property and that you think all information is in a media? A media is a scarce physical resource. Land is a scarce, physical resource.

Schulman:

I'm arguing that if there is an alpha-numeric sequence, for example, then that alpha-numeric sequence is a unique object.

Kinsella:

I know you think it's a unique object.

Schulman:

Therefore, if there's only one of something, it's by definition scarce.

Kinsella:

Okay, but let's go back. I want to just finish this very short praxeological argument and see what you think is wrong with it because you keep stopping me before I get to the end and it's very simple. We employ scarce means. That is you manipulate things in the world that can have a cause and effect. But to do that, you have to have some idea of what causality is, what physics laws are. And you have to have some idea of what's possible and what you're going to achieve. So knowledge is in your head. It guides your choice of means and your choice of ends. So every action is the employment of scarce means and the use of knowledge. Would you agree with that?

Schulman:

I would say that that is a chain of reasoning which precedes the

possibility of property, yes.

Kinsella: Yeah, I'm just saying that it's inconceivable to imagine human action that doesn't employ scarce means and isn't guided by knowledge. Correct?

Schulman: Well, ...uh...yes, but there's the possibility of human action acting on something which is ubiquitous.

Kinsella: Yeah right. That's the general condition of human action.

Schulman: In doing so, converting something from ubiquitous to scarce.

Kinsella: That's possible. I'm just saying the structure of action is that every single human action has to employ scarce means and has to be guided by knowledge. It's just inconceivable without it.

Schulman: In a sense...

Kinsella: But wait. Do you agree with that or not?

Schulman: Hold on. Let me try to answer your question. I think that human action is itself a scarcity and therefore the employment of human action on something else has at least the potential to satisfy the conditions of creating a scarce something.

Kinsella: That's fine but I'm not talking about the end results of your action. The end result of an action does not need to be the acquisition of a scarce resource or the ownership of some object. The end of an action can be anything. It can be totally subjective, right? It might be to get a little girl to smile after you do a card trick for her.

Schulman: Hold on. The reason that the human mind effects an action is not the same thing. And I would say that there is a disconnect. Once the results of that action produce an etching in the real world, which is separate from the actor and observable by other actors.

Kinsella: I know. Okay, but you're getting...I'm not trying...I'm just talking about if you view human action praxeologically as the employment of scarce means to achieve an end and the action that you take is guided by knowledge, that that shows that knowledge, or information....

Schulman: We're having a communication artifact problem at the moment. What you just said verbally. Can you say it again please?

Kinsella: Oh sorry. What I'm trying to say is my understanding of the way property norms arise and the way they relate to Mises' economic understanding of....

Schulman: Oh geez. I'm sorry Stephan. What you're talking I'm not hearing verbally....try saying it one more time.

Kinsella: Test, test, test. Can you hear me now? Hello? Test. Neil?

Schulman: Yeah, I'm not really getting anything. Do you want to stop the recording and call me back and start it again?

Kinsella: Sure. I'll do that right now. Sorry about that. Yeah, let's just finish it up quickly. What I'm doing is calling you on one iPhone and I'm recording it over the air on another. A very low tech solution because everything is always glitchy in technology. In fact, why don't we wrap it up. Yeah, let's just wrap it up. I told you what I wanted. I was just running an alternative praxeological theory by you. The basic argument is that you need property rights in the scarce means that are essential to human action but you cannot have property rights in the knowledge that guides human action because that's not a scarce human resource.

Schulman: I agree with you. I'm not making a knowledge argument.

Kinsella: Well, you do believe in informational property. So you think there are property rights in information.

Schulman: I believe that information *per se* cannot be owned but an information object can be. And that is a crucial distinction.

Kinsella: Okay. Okay. Well, I think...

Schulman: In the same way that you can't own matter, but you can own things made out of matter. You can't own information but you can own things made out of information.

Kinsella: So like, if you own a horseshoe, you don't own the matter in the horseshoe. You only own the way the matter is shaped?

Schulman: I'm sorry. Say that again please.

Kinsella: So like, if you own a horseshoe, you don't own the metal matter of the horseshoe. You only own the way the horseshoe is shaped?

Schulman: Well, again, you own the thing which is the horseshoe. You own the thing which is the horseshoe in the same way that, if you own a novel, you own the thing that is the novel.

Kinsella: Let me ask you this....

Schulman: The part on which it is in the same way that you can own the horseshoe without owning the horse.

Kinsella: Yeah, but...so let's suppose lightning strikes the horseshoe and melts it. And now you have a puddle of molten iron. Do you own that or have you lost the ownership of it because it's not a horseshoe anymore?

Schulman: Let me ask you this. If you own a house and the house burns down, do you own the ashes?

Kinsella: Yes, I would say that because I don't believe that the ownership of the house is dependent upon its shape.

Schulman: Well, here we have an interesting thing because unless the sole copy of a thing is destroyed, then you have something which is durable. And destroying a carrier of it does not necessarily destroy the thing which is carried.

Kinsella: But it does because you can't have information without some media that it's carried in.

Schulman: Yes and...

Kinsella: Yeah, there could be multiple copies of it. I know.

Schulman: And here is a case where there needs to be at least one surviving carrier.

Kinsella: Right, but this also implies there could be multiple copies of it. You see, you want to call it one object.

Schulman: There could be multiple copies. But the way that I would phrase that is what is the variable is the number of carriers. There is still only unique object which is being carried.

Kinsella: Yeah. So it's a universal or it's a Platonic. That's why I say it's a Platonic object; to me it seems like.

Schulman: No, I can understand why, from a philosophical standpoint, this concept could be regarded by Plato as Platonic. However, I am not a Platonist and I'm not making a Platonic argument. There it is. I believe that Aristotle had the concept of the atom but later science started talking about electrons and neutrons and protons and sub-particles called quarks. So just because the language seems to say something which was said by the ancients doesn't mean it's equivalent.

Kinsella: Sure. Sure. Anyway, I'm going to tie it up now. I'm a little upset with you because I asked you to keep this to thirty minutes and you insisted on going a whole hour, Neil.

Schulman: I'm sorry. How much did we actually use?

Kinsella: No, I'm just joking. I don't know because I have it broken up. Probably about an hour and five minutes.

Schulman: Well, I don't have a problem with that.

Kinsella: No, no, I'm joking.

Schulman: But then again, you and I have no problem being loquacious.

Kinsella: That's true. That's true. Well, I appreciate your time and your sincerity on this issue. I think for now we'll have to agree to disagree, but at least people can listen to this and see where you're coming from and evaluate the different ways of looking at this stuff.

Schulman: I appreciate it very much. Thank you.

Kinsella:

All right Neil. Hold on, hold on after I stop and we'll chat. Talk to you later. Thanks man.

Schulman:

Okay.